No. 21-30037

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBLESS ENTERPRISES, L.L.C.;
APARTMENT ASSOCIATION OF LOUISIANA, INCORPORATED,

Plaintiffs – Appellants,

v.

ROCHELLE WALENSKY; SHERRI BERGER;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; MERRICK GARLAND, U.S. Attorney General; NORRIS COCHRAN, Acting Secretary, U.S. Department of Health and Human Services; CENTERS FOR DISEASE CONTROL AND PREVENTION,

Defendants – Appellees.

On Appeal from the United States District Court
for the Western District of Louisiana
Honorable Terry A. Doughty, District Judge

APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL

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Certificate of Interested Persons
No. 21-30037, *Chambless Enterprises, L.L.C. v. Walensky*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case:

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Alker & Rather, LLC, Law firm for Plaintiffs-Appellants

American Academy of Pediatrics, Amicus Curiae

American Medical Association, Amicus Curiae

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In accordance with Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the named Appellants have any parent corporation and that no publicly held corporation owns 10% or more of their stock.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

s/ Luke A. Wake
LUKE A. WAKE

Counsel for Plaintiffs – Appellants

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Pursuant to Federal Rule of Appellate Procedure 8(a)(2), Plaintiffs-Appellants move for an injunction pending appeal to prevent the Centers for Disease Control and Prevention (CDC) from enforcing its unlawful eviction moratorium against Chambless Enterprises, LLC, and members of the Apartment Association of Louisiana (AAL) (collectively "the Landlords").[1] Since briefing was completed in this appeal several important developments have occurred that make an injunction pending appeal both appropriate and necessary.

Most importantly, at the end of June it became clear that five justices on the U.S. Supreme Court recognize that the moratorium is unlawful. In *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320 (2021), the Court declined to lift a stay the District Court had imposed on its own order holding the moratorium unlawful. However, four justices dissented, meaning they agreed with the District Court that the CDC lacked statutory authority to impose the moratorium. Justice Kavanaugh concurred with the majority but wrote

[1] The Landlords gave reasonable notice of this filing to opposing counsel. The Government intends to file an opposition and does not consent to expedited briefing as proposed by the Landlords.

separately to say that he too thought the moratorium lacked statutory authority. *Id.* at 2320–21. He voted to leave the stay in place only because the CDC had stated the moratorium would expire at the end of July. *Id.* at 2321.

In response to the Supreme Court's ruling in *Alabama Ass'n of Realtors*, the White House publicly acknowledged that the CDC could not lawfully extend the eviction moratorium. According to White House American Rescue Plan Coordinator Gene Sperling, President Biden "asked the CDC to look at whether you could even do [a] targeted eviction moratorium . . . and they, as well, ***have been unable to find the legal authority . . . .***" Press Briefing by Press Secretary Jen Psaki and White House American Rescue Plan Coordinator and Senior Advisor to the President Gene Sperling, The White House (Aug. 2, 2021) (emphasis added).[2] *See also* Statement by White House Press Secretary Jen Psaki

[2] Sperling reiterated how exhaustively the President and his advisors had thought through the Supreme Court's decision and the federal opinions that have held the moratorium unlawful on the merits. "On this [] issue, the president has not only kicked the tires; he has double, triple, quadruple checked." *Available at* https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/02/press-briefing-by-press-secretary-jen-psaki-and-white-house-american-rescue-plan-coordinator-and-senior-advisor-to-the-president-gene-sperling-august-2-2021/.

on Biden-Harris Administration Eviction Prevention Efforts, The White House (July 29, 2021) ("White House Statement"), ("President Biden would have strongly supported a decision by the CDC to further extend this eviction moratorium" if that option was still "available.").[3]

That conclusion made eminent good sense, not only because of the Supreme Court's action in *Alabama Ass'n of Realtors*, but because every court that has reached the merits of the moratorium's lawfulness has ruled against the CDC. *See Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, No. 21-5256, 2021 WL 3121373 (6th Cir. July 23, 2021) (holding that the CDC lacked statutory authority for the eviction moratorium, and that CDC's interpretation raises serious constitutional concerns); *Skyworks, Ltd. v. CDC*, No. 5:20-cv-2407, 2021 WL 911720, at *10 (N.D. Ohio, Mar. 10, 2021) (same); *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 20-cv-3377 (DLF), 2021 WL 1779282, at *7 (D.D.C. May 5, 2021) (same); *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, No. 2:20-cv-02692-MSN-ATC, 2021 WL 1171887, at *8 (W.D. Tenn. Mar. 15, 2021) (same); *Terkel v. Ctrs. for Disease Control & Prevention*, No. 6:20-cv-564, No. 6:20-cv-564, __ F. Supp. 3d __, 2021 WL

[3] *Available at* https://bit.ly/3jm0K17.

742877, at *1–2, 10–11 (E.D. Tex. Feb. 25, 2021) (holding that the federal moratorium violates the Commerce Clause). *But see Brown v. Azar*, 497 F. Supp. 3d 1270 (N.D. Ga. 2020) (concluding that the CDC was likely to prevail on the merits and denying a motion for preliminary injunction); *Chambless Enterprises, LLC v. Redfield*, 508 F. Supp. 3d 101, 109 (W.D. La. 2020) (same). And although the Eleventh Circuit affirmed a district court denial of a motion to preliminarily enjoin the moratorium, it nonetheless noted that the CDC likely exceeded its statutory authority. *See Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs.*, 4 F.4th 1220, 1224–25 (11th Cir. 2021). Thus, other than the district courts in *Brown* and in the instant action, only the D.C. Circuit has indicated it believes the CDC possesses the authority to impose a nationwide eviction moratorium. *See Alabama Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 WL 2221646, at *1 (D.C. Cir. June 2, 2021) (addressing plaintiff's likelihood to prevail on the merits in considering a motion to vacate the District Court's stay). That, however, is the very case in which five justices on the Supreme Court have made clear that they view the CDC's action as ultra vires.

Recognizing that the CDC lacked the authority to renew the moratorium, the President called on Congress to do so by statute. *See supra*, White House Statement. Congress declined, leading to a storm of protests by, among others, certain members of Congress.[4] Despite recognizing that the moratorium was unlawful, the President changed course and directed the CDC to renew it, stating "***by the time it gets litigated it will probably give some additional time***" for the Government to distribute rental assistance funds. Remarks by President Biden on Fighting the COVID-19 Pandemic, The White House (Aug. 3, 2021) ("Biden Statement") (emphasis added).[5] Thus, on August 3, 2021, the CDC renewed its moratorium with some changes to the scope of its application. *See* Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to

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[4] *See* Jeff Stein, et al., *Biden Administration Moves to Block Evictions in Most of U.S.,* Washington Post (Aug. 3, 2021) ("Pelosi waged a multiday campaign to press the White House to Act unilaterally."), https://www.washingtonpost.com/us-policy/2021/08/03/white-house-evictions-democrats/.

[5] In the same press conference, the President acknowledged that "the bulk of the constitutional scholarship says that [this eviction moratorium] [is] not likely to pass constitutional muster." *Available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/.

Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244, 43,245 (Aug. 6, 2021). The current eviction moratorium Order is set to expire on October 3, 2021.

By renewing the moratorium yet again in the face of these developments, the CDC is upending the Constitution's separation of powers and exercising what the Sixth Circuit has described as "dictatorial power." *See Tiger Lily*, 2021 WL 3121373, at *4. Most courts—including five Supreme Court justices—have rightly sided with the challengers to this moratorium and against the CDC, recognizing that if the federal government is going to abrogate the rights of landlords nationwide and effectively bar them from seeking redress in local courts, that breathtaking exercise of power must come from Congress, not federal bureaucrats. Yet Congress has declined to act. That is not a "failure" or a "problem." It is our constitutional system working as intended—notwithstanding the apparent views of many members of Congress and the executive branch. For the reasons stated below, this Court should enjoin the government from enforcing the CDC's August 3, 2021, Order.

STATEMENT OF CASE

Chambless Enterprises, LLC owns and rents residential properties in Ouachita Parrish, Louisiana. AAL represents Louisiana's landlord community. Since last fall the CDC has prohibited these Landlords from evicting certain non-paying tenants. *See* Opening Br. at 2–4. The Landlords filed suit in the Western District of Louisiana on November 12, 2020, and sought a preliminary injunction to prevent the CDC from enforcing the moratorium. *Id*. The District Court denied that motion on December 22, 2020, and the Landlords appealed. ROA.011. This case is tentatively set for oral argument in the first week of October.

The CDC's August 3rd eviction moratorium is the latest in a series of orders first imposed in September 2020 and renewed several times since then.[6] The current Order, like the others, relies for its authority on the Public Health Service Act of 1944, 42 U.S.C. § 264(a), and 42 C.F.R. § 70.2. The August 3rd Order differs slightly in scope from the previous

[6] The original CDC moratorium order expired on December 31, 2020. Thereafter, a short-term eviction moratorium went into effect by an Act of Congress through January 31, 2021. Consolidated Appropriations Act, Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020). "On January 29, 2021, just before that statutory extension lapsed, the CDC Director issued a new directive extending the order through March 31, 2021." *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 521 (6th Cir. 2021).

CDC Orders in that the moratorium now applies only "in U.S. count[ies] experiencing substantial or high levels of community transmission levels of SARS-CoV-2 as defined by CDC."[7] *See* 86 Fed. Reg. at 43,245. Ouachita Parrish, where Chambless owns property, and several other Louisiana parishes, where members of the AAL own property, fall into this category.[8] Chambless currently has tenants who have invoked the moratorium, as do many members of AAL. *See* Supplemental Declaration of Joshua Chambless, ¶¶ 5–6, Exhibit B; Supplemental Declaration of Tammy Esponge, ¶ 6, Exhibit C.

Previously, when the CDC issued its third extension in June, it stated that "absent an unexpected change in the trajectory of the pandemic, CDC [did] not plan to extend the Order [beyond July 31,

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[7] The Order defines "substantial transmission levels" as "(1) 50.99–99.99 new cases in the county in the past 7 days divided by the population in the county multiplied by 100,000; and (2) 8.00–9.99% positive nucleic acid amplification tests in the past 7 days divided by the total number of tests performed in the county during the past 7 days." 86 Fed. Reg. at 43,245, n.12. It defines "high transmission levels" as: "(1) >100 new cases in the county in the past 7 days divided by the population in the county multiplied by 100,000; and (2) >10.00 positive nucleic acid amplification tests in the county during the past 7 days divided by the total number of tests performed in the county during the past 7 days." *Id*. at n.13.

[8] *See* COVID-19 Integrated County View, CDC, https://covid.cdc.gov/covid-data-tracker/#county-view.

2021].” Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,013 (June 28, 2021). The CDC has now renewed its eviction moratorium order, citing a “recent surge in cases” attributable to the Delta variant. 86 Fed. Reg. at 43,244. But, the CDC was already reporting a rise in COVID-19 cases attributable to the new Delta variant in June.[9] That trend continued through July and into August, when the Government chose to extend the moratorium once again.[10] *See* Bruce Sprunt, *The Biden Administration Issues a New*

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[9] *See* Michael E. Miller, et al., *Delta Variant Could Become the Dominant Strain in the U.S. This Summer, CDC Head Says*, Washington Post, (June 18, 2021), *available at* https://www.washingtonpost.com/nation/2021/06/18/coronavirus-covid-live-updates-us/; *Arkansas has Biggest One-Day Virus Case Spike in 4 Months*, Associated Press (June 30, 2021), *available at* https://apnews.com/article/ar-state-wire-arkansas-coronavirus-pandemic-health-4692603de02d4683ad2291588bd27e95. *See also* Melody Schreiber, *The U.S. Could Face Another COVID Surge this Fall*, The New Republic (June 21, 2021), https://newrepublic.com/article/162766/us-face-another-covid-surge-fall.

[10] “The [Delta] variant was first detected in India in October 2020, according to the World Health Organization (WHO). On May 20, the University of Texas Southwestern Medical Center announced it had identified the first two cases of Delta in North Texas. … [And the Delta variant] ha[s] [now] been detected in all 50 states as well as Washington, D.C.” Ed Browne, *When Were the First U.S. COVID Delta Variant Cases, and How Did it Mutate?*, Newsweek (Aug. 10, 2021), *available at* https://www.newsweek.com/first-us-covid-delta-variant-cases-how-did-it-mutate-1617871.

Eviction Moratorium After a Ban Lapsed, NPR (Aug. 3, 2021) (discussing the circumstances leading to the fourth extension).[11]

ARGUMENT

I. This Motion Is Properly Submitted to the Court of Appeal

Motions for injunction pending appeal ordinarily must be filed initially in the District Court. FRAP Rule 8(a)(1). But a motion may be filed directly in the Court of Appeal where it would be "impracticable" to move first in the District Court. Rule 8(a)(2)(A)(i). In this case, it would be impracticable to move initially in the District Court for two reasons. First, the District Court is highly unlikely to reverse its previous decision. Second, and as a result, moving first in the District Court would needlessly compound briefing and delay a definitive ruling on the Landlord's request to enjoin the CDC's unlawful action.

The CDC's August 3rd Order relies on the same statutory and regulatory authority as the previous Orders. *See Alabama Ass'n of Realtors v. U.S. Dep't of Health & Hum. Svcs.*, No. 20-cv-3377 (DLF),

[11] A bill was introduced in the House of Representatives to extend the eviction moratorium by an Act of Congress; however, it failed to pass before the House adjourned on July 30, 2021. 167 Cong. Rec. H4302-03 (July 30, 2021).

2021 WL 3577367, at *2 (Aug. 13, 2021) (observing that the current order is "virtually identical" to the CDC's prior orders). As such, the District Court is unlikely to alter its conclusion that the Landlords are unlikely to prevail on the merits. *Cf. Alabama Ass'n of Realtors*, 2021 WL 3577367, at *2 (concluding that the law of the case bound the district court to follow its previous order staying implementation of a judgment against the CDC, notwithstanding strong signals that the Supreme Court would come to a different conclusion on the merits). Indeed, the District Court not only denied the Landlords' motion for a preliminary injunction, it also stayed, over the Landlords' objections, any further proceedings in this case pending the outcome of this appeal. *See* Memorandum Order, Document 60 (June 2, 2021), Exhibit A. It is thus clear that the District Court will await the outcome of this appeal until taking further action.

Accordingly, moving for an injunction pending appeal in the District Court would be impracticable. *See*, *e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013) (concluding that it would be impracticable to move for an injunction pending appeal in the district court where the law sought to be enjoined would take effect immediately). This Court should therefore address the

Landlords' motion without requiring them first to move in the District Court.

II. Plaintiffs Are Entitled to an Injunction Pending Appeal

In reviewing a motion for injunction pending appeal, the Court must consider four factors: (1) the likelihood that the moving party will ultimately prevail on the merits of the appeal; (2) the extent to which the moving party would be irreparably harmed without an injunction; (3) the potential harm to other parties; and (4) the public interest. *Texas v. United States*, 787 F.3d 733, 746–47 (5th Cir. 2015). But "when Government is the opposing party" the third and fourth factors "merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

A stronger showing on certain factors may lessen the required showing on others. *See Ruiz v. Estelle*, 650 F.2d 555, 565–66 (5th Cir. 1981) (employing a sliding scale analysis). Accordingly, an injunction pending appeal may issue even if the opposing party makes a "strong showing" on the harm factor where there is a high likelihood that the moving party will prevail on the merits. *See Abbott*, 734 F.3d at 419. That is because the likelihood of success on the merits and a showing of

irreparable harm are "the most critical" factors in the inquiry. *Nken*, 556 U.S. at 434.

A. The CDC's Eviction Moratorium Is Unlawful

In light of the Supreme Court's ruling in *Alabama Association of Realtors* and the decisions holding the CDC eviction moratorium unlawful, the Landlords have more than a likelihood of success on the merits. Success on their claim that the eviction moratorium exceeds the CDC's statutory authority is certain. But for Justice Kavanaugh's decision to concur in the Court's opinion, rather than dissent, the moratorium would now be stayed nationwide. *Alabama Ass'n of Realtors*, 141 S. Ct. 2320 (Kavanaugh, J., concurring). And Justice Kavanaugh did so despite agreeing "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." *Id.* It was only "[b]ecause the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds" that Justice Kavanaugh "vote[d] ***at this time*** to deny the application to vacate the District Court's stay of its order." *Id.* at 2321

(emphasis added). Like the Sixth and Eleventh Circuits and several district courts, Justice Kavanaugh recognized that "clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31." *Id.*

It is, of course, necessary for plaintiffs seeking to vacate a stay pending appeal to show a likelihood of success on the merits of their claim. It thus follows inexorably that the dissenting justices believed, as did Justice Kavanaugh, that the CDC lacks authority to issue an eviction moratorium and the plaintiffs in the case were thus likely to succeed on the merits.

The Supreme Court's denial of a stay should be given at least the effect of Supreme Court dicta, which the Fifth Circuit treats as binding. *See Hollis v. Lynch*, 827 F.3d 436, 448 (5th Cir. 2016) (stating that the Fifth Circuit is generally bound by Supreme Court dicta, especially when it is "recent and detailed"). *See also Autobahn Imports, L.P. v. Jaguar Land Rover N. Am., L.L.C.*, 896 F.3d 340, 346 (5th Cir. 2018) (stating that where dicta from a Texas Supreme Court decision represented a "deliberat[e] and careful consideration" of the issue, it "should be followed unless found to be erroneous"); *Winslow v. FERC*, 587 F.3d 1133, 1135

(D.C. Cir. 2009) (stating that "'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative'"); *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (affirming that lower courts should generally treat Supreme Court dictum as authoritative: "[T]his court cannot ignore the unmistakable import of [the Supreme Court's] analysis"); *Bangor Hydro–Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) ("It may be dicta, but Supreme Court dicta tends to have somewhat greater force—particularly when expressed so unequivocally."); Hon. Trevor McFadden & Vetan Kappor, Symposium: The Precedential Effects of the Shadow Docket Stays, SCOTUSblog (Oct. 28, 2020) ("[W]hen a majority of the Supreme Court signals its views on the merits of an issue, even in a brief shadow docket order, lower courts should either defer to the court's ruling or justify a departure from that view.").

Although Justice Kavanaugh and the four dissenting justices did not perform a detailed analysis of the moratorium's legality, the conclusion that five justices view the moratorium as ultra vires is unavoidable. Whether the CDC possessed the statutory authority to issue a moratorium was the issue in the case and the District Court concluded

that the CDC lacked that authority. *See Alabama Ass'n of Realtors*, 2021 WL 1779282 at *6. The plaintiffs' application to the Supreme Court to reverse the District Court's stay of its judgment pending appeal thus necessarily turned on that very question. Justice Kavanaugh made clear that his answer was "no" and that he agreed with the detailed analysis of the District Court in the case. That the four dissenting justices agreed on that point is likewise clear. In this circumstance, where a district court performs a detailed analysis of a legal issue and it is clear that five justices agree, it should not be necessary to wait until the justices state what is otherwise obvious before treating their conclusion as authoritative. The Supreme Court's ruling in *Alabama Ass'n of Realtors* should thus be treated at least as controlling Supreme Court dicta unless there are compelling reasons to conclude otherwise.

Here, there are no reasons to think otherwise and every reason to treat the conclusion of Justice Kavanaugh and the dissenting justices as binding or, at the very least, extremely persuasive, authority. As the Landlords have argued in this case and the Sixth Circuit has now confirmed in *Tiger Lily*, Section 264(a) of the Public Health Services Act cannot be read to give the CDC the sweeping authority to control all

evictions nationwide. This would, as the Sixth Circuit stated, give the CDC "near-dictatorial authority for the duration of the pandemic[.]" 2021 WL 3121373 *4. The Sixth Circuit's decision represents the weight of authority among courts. *See Skyworks, Ltd.*, 2021 WL 911720, at *10; *Alabama Ass'n of Realtors*, 2021 WL 1779282, at *7; *Tiger Lily*, 2021 WL 1171887, at *8. *See also Brown*, 4 F.4th at 1224–25 (signaling doubt as to the CDC's claimed statutory authority). And even the President recognizes that the CDC lacks authority to impose the ban. *See supra* Biden Statement (acknowledging that the "bulk of constitutional scholarship" was against the Government). Only the D.C. Circuit views the moratorium to be within the CDC's lawful authority, but that view will not prevail if the issue returns to the Supreme Court.

The Landlords would be free to exercise their rights to their own property but for Justice Kavanaugh's conclusion that the CDC would not further extend the moratorium and the President's belief that the Government could get away with imposing another moratorium. Whether the moratorium is good policy is debatable—and, indeed, is something that, under our system, must be debated in Congress to be a lawful exercise of power. Whether it is valid lawmaking is not debatable.

It is not. The CDC's eviction moratorium is a raw exertion of power by one branch of government in defiance of the other two. If it is allowed to stand, the courts will signal to Congress and the executive branch that the judiciary will step aside while they openly flout the rule of law.

B. The Landlords Are Suffering Irreparable Harm, Now More than Ever

As the Landlords have argued in their briefing, the tenants who have invoked the moratorium are necessarily insolvent. Opening Br. at 61–63. While the CDC's various orders state that tenants are still liable for back rent, this is a hollow statement from an agency that is immune from liability under the Administrative Procedure Act and will not be collecting back rent or damages on behalf of landlords. Accordingly, the Landlords have suffered irreparable harm, both in the form of rent that is lost forever and, now, in the form of further damages from a moratorium revived due to political pressure that ensued after Congress chose not to enact its own moratorium. *See Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011) (recognizing irreparable injury if the assets needed to pay damages are likely to dissipate); *Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 290 (1940) (finding a preliminary injunction was appropriate because there were "allegations" of insolvency); *Performance*

Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1382 (6th Cir. 1995) (affirming that there is irreparable harm where a "[party] is likely to be insolvent at the time of judgment"). *See also Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 630 (5th Cir. 1985) (Garwood, J., dissenting) (stating that there is irreparable harm if "defendant[s] [are] unable to respond in damages") (citing Restatement (Second) of Contracts §§ 359(1), 360 (1981)).[12]

But as the Landlords have argued throughout this case, the CDC's renewed moratorium is imposing a constitutional injury as well. Opening Br. at 56–59; Reply Br. at 23–26. That has always been true, but it is now

[12] Chambless' non-paying tenants currently owe more than $26,000 in back rent, even though the company has sought and obtained rental assistance. *See* Chambless Supplemental Declaration at ¶¶ 6, 13–15. Because these tenants are incapable of paying rent, they are insolvent by definition. Chambless is thus not only losing rent, under existing lease agreements, it is also losing opportunities to bring in higher rents based on changed market conditions and or improvements that it would have made if permitted to reclaim possession of its properties. *Id.* at ¶ 15; Esponge Supplemental Declaration at ¶ 7, Exhibit C. Moreover, the new moratorium makes it more difficult for companies that rely on rental income to access credit, or in some cases to sell their rental properties. Chambless Supplemental Declaration at ¶ 10–12; Esponge Supplemental Declaration at ¶ 8. Such lost opportunities constitute irreparable harm. *See Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. 1981) (finding that enforcement of a likely unlawful ordinance was causing irreparable harm in preventing businesses from making sales and growing their business).

unavoidably so. The CDC's moratorium is unlawful. And yet it continues, only because Justice Kavanaugh took the CDC's representation at face value and because the executive branch knows it can get away with imposing a moratorium for some amount of time before the courts can act. *See supra* Biden Statement ("[A]t a minimum, by the time it gets litigated, it will probably give some additional time . . ."). This Court should not allow that time to stretch on any longer.

A constitutional injury "unquestionably constitutes irreparable injury." *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). The government has argued throughout this case that the rule in *Elrod* applies only to First Amendment harms. But, as the Landlords have shown, that is not true. Reply Br. at 26. *See, e.g.*, *Am. Trucking Ass'n Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (finding a Dormant Commerce Clause violation caused irreparable harm); *Doe v. Mundy*, 514 F.2d 1179 (7th Cir. 1975) (finding irreparable harm where a fundamental privacy right was at issue); *Victory v. Berks County*, 355 F. Supp. 3d 239 (E.D. Pa. 2019) (finding irreparable harm where the right to equal protection was at issue); *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018) (finding irreparable harm for a likely procedural due process

violation). Constitutional injury can come in many forms. In this instance, the harm is to the separation of powers, which serves to protect not only our constitutional system but the Landlords' liberty as well. *See Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (stressing that separation of powers "serves not only to make Government accountable but also to secure individual liberty"). *See also Bond v. United States*, 564 U.S. 211, 222 (2011) (recognizing "an injured person's standing to object to a violation of a constitutional principle that allocates power within government").

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Here, it is clear that the CDC's eviction moratorium exceeds the power granted by Congress. Its continuation thus amounts not only to a statutory violation, but to a violation of the separation of powers as well. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373–77 (1986) (affirming that ultra vires regulation violates separation of powers).

As the Sixth Circuit recognized in *Tiger Lily*, the Government's position in these cases amounts to an assertion of "near dictatorial

powers" to make virtually any rule allegedly necessary to fight the pandemic. 2021 WL 3121373 at *4. The Sixth Circuit is not the only authority to have recognized this threat. *See, e.g.*, *Brown*, 4 F.4th 1220, 1224 (noting that "the government was unwilling to articulate any limits to the CDC's regulatory power at oral argument."). The Founders warned that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison). Although the Framers viewed the legislature as the most dangerous branch,[13] and sought to limit its powers, they nonetheless recognized that the "formidable power 'of prescribe[ing] the rules by which the duties and rights of every citizen are to be regulated[,]" must belong to Congress, because that is the branch most directly accountable to the American people. *Tiger Lily*, 2021 WL 3121373, at *5 (Thapar, J., concurring) (quoting The Federalist No. 78, at 468 (Alexander Hamilton)). However, that political accountability and the entire "constitutional equilibrium" is lost when

[13] *See* The Federalist No. 48 (James Madison) ("[I]t is against the enterprising ambition of [the legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions.").

"bureaucrats embedded in the executive branch" make the laws governing our lives. *Id.* at *5, 7.

The executive branch, through the CDC, is now making law. It is not in any sense legitimate or constitutional, but it carries the same threat that laws typically do—in this case massive fines and imprisonment. *See Skyworks, Ltd.*, 2021 WL 911720, at *3 ("A violation subjects individuals to a fine up to $250,000, one year in jail, or both."). This is a blatant and brazen violation of the separation of powers. Indeed, it was to prevent such actions that the separation of powers exists. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020) (stressing that separation of powers was intended to guard against the "gradual concentration" of power in the same hands). There is no reason in law or logic that a violation of, say, the First Amendment or the due process clause would constitute irreparable harm, but a violation of the very structure of our constitution should be dismissed as a mere formality. Indeed, without the latter, the former would be impossible to enforce. *See Morrison v. Olson*, 487 U.S. 654, 697–99 (1988) (stressing that separation of powers serves to protect liberty, including those rights enshrined in the Constitution) (Scalia, J., dissenting).

No amount of damages can compensate the Landlords—indeed, any landlord—for the constitutional harm caused by the CDC's unlawful moratorium. And, as the President himself recognized, only the courts can put a stop to this.

C. Disregard for the Rule of Law and the Separation of Powers Is Never in the Public Interest

Because the CDC lacks the statutory authority to impose an eviction moratorium, the public interest is not a question of whether the moratorium serves the goal of public health. That is a debatable question. But, since the executive branch has skirted the one place in which such questions are debated—Congress—the Government cannot claim the mantle of the "public interest." After all, the "Constitution is the ultimate expression of the public interest." *Gordon v. Holder*, 721 F.3d 638, 658 (D.C. Cir. 2013). *See also G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). And the Constitution cannot be "put away and forgotten" in an emergency. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). The executive branch is now making law in open defiance of Congress and the judiciary. The CDC's actions are unlawful and unconstitutional and cannot be said to represent the public interest.

CONCLUSION

For the forgoing reasons, this Court should grant an immediate injunction pending appeal.

DATED: August 18, 2021.

Respectfully submitted,

LUKE A. WAKE
STEVEN M. SIMPSON
ETHAN W. BLEVINS
JAMES C. RATHER

s/ Luke A. Wake
LUKE A. WAKE

Counsel for Plaintiffs –Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Luke A. Wake
LUKE A. WAKE

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DATED: August 18, 2021.

s/ Luke A. Wake
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Counsel for Plaintiffs – Appellants

Exhibit A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CHAMBLESS ENTERPRISES, LLC, ET AL.	**CIVIL ACTION NO: 3:20-cv-01455**
VERSUS	**JUDGE TERRY A. DOUGHTY**
ROBERT REDFIELD, ET AL.	**MAG. JUDGE KAYLA MCCLUSKY**

MEMORANDUM ORDER

Pending before the Court is an Appeal of Magistrate Judge Decision filed by Plaintiffs [Doc. No. 53]. Plaintiffs appeals Magistrate Judge McClusky's April 19, 2021 Memorandum Order [Doc. No. 52] granting Defendants' Motion to Stay these proceedings pending the Fifth Circuit's review of the denial of the preliminary injunction [Doc. No. 44].

A magistrate judge's non-dispositive pretrial order is reviewable under the clearly erroneous and contrary to law standard. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). Following a review of the record, the Court finds that the Magistrate Judge's Memorandum Order is neither clearly erroneous nor contrary to the law.[1] Accordingly,

IT IS ORDERED that Plaintiffs' appeal [Doc. No. 53] is **DENIED**, and Magistrate Judge McClusky's Order [Doc. No. 52] is **AFFIRMED**.

MONROE, LOUISIANA, this 2nd day of June, 2021.

TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

[1] Even if the Court were to apply the *de novo* review standard, the Court would reach the same decision.

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBLESS ENTERPRISES, LLC, and APARTMENT ASSOCIATION OF LOUSIANA, INC., Plaintiffs-Appellants, v. ROCHELLE WALENSKY; SHERRI BERGER; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT M. WILKINSON, ACTING U.S. ATTORNEY GENERAL; NORRIS COCHRAN, ACTING SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; CENTER FOR DISEASE CONTROL AND PREVENTION, Defendants-Appellees.	Case No. 21-30037 **Supplemental Declaration of Joshua Chambless in Support of Plaintiffs-Appellants Motion for Injunction Pending Appeal**

I, Joshua Chambless, make this supplemental declaration based upon my personal knowledge, information, and belief:

1. I am a resident of the State of Louisiana and am over the age of 18.

2. I previously signed a declaration in support of a motion for preliminary injunction in this case on November 11, 2020.

3. As stated there, I am the sole owner of Chambless Enterprises, LLC.

4. Chambless Enterprises owns and manages 725 units in Louisiana.

5. At all times since filing our complaint, Chambless has had non-paying tenants who have invoked the protection of the CDC eviction moratorium. And based on experience, I believe that other non-paying tenants will do the same if I should move to evict them so long as the moratorium remains in place.

6. At this time—counting tenants who are more than one month behind in rent—Chambless Enterprises is owed more than $26,000.

7. Based on my experience and expertise in the field of property management, I do not expect that my company will ever be able to collect back-rent from tenants who have fallen three or more months behind in payments.

8. At the time this lawsuit was initially filed I could attest that this posed an immediate problem because Chambless Enterprises relies on rent collected from its tenants to ensure basic upkeep, to cover repairs, to replace appliances, and to make other necessary improvements so that its tenants enjoy a safe, attractive and comfortable living space. The company also relies on rent collected to cover expenses in maintaining common areas, which includes gardening and landscaping expenses.

9. What is more, Chambless Enterprises relies on rent collected from its tenants to cover its mortgage, its continuing tax obligations, and general overhead expenses.

10. Additionally, Chambless Enterprises relies on rental income to cover monthly payments on a sizable business loan. Recently, I sought to renegotiate this loan to remove some of the properties I had listed as collateral, given that the company had built significant equity and made progress paying toward the principal.

11. In my experience, the bank would ordinarily work with me on this. That would have freed up properties currently held as collateral on that loan, which would give the company greater financial flexibility to enable us to grow the business or the liquidity we need to cover major expenses as they may arise.

12. Unfortunately, my bank informed me that they could not renegotiate my loans at this time because of the continuing eviction moratorium. My understanding was that the bank was concerned about my company's revenue streams given that Chambless Enterprises has no recourse to evict non-paying tenants.

13. I can attest that Chambless Enterprises has sought rental assistance for to cover back-rent from its non-paying tenants. But that has not made us whole. For one, the program did not fully cover what was owed for at least one tenant. What is more, even after obtaining rental assistance for other tenants, they have quickly fallen behind again.

14. Further, even if the rental assistance program could fully compensate for what was owed under the existing lease agreement, it could not compensate me for the lost rents I could be charging if I was able to reclaim possession of my units.

15. If not for the eviction moratorium I would have reclaimed and renovated units at this point-to replace carpets with hardwood floors and to make other improvements. If I were able to make such improvements, I could then be renting out these units to new tenants and could charge significantly higher rents.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Monroe, Louisiana on August 16, 2021.

Joshua Chambless

Exhibit C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBLESS ENTERPRISES, LLC, and APARTMENT ASSOCIATION OF LOUSIANA, INC., Plaintiffs-Appellants, v. ROCHELLE WALENSKY; SHERRI BERGER; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT M. WILKINSON, ACTING U.S. ATTORNEY GENERAL; NORRIS COCHRAN, ACTING SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; CENTER FOR DISEASE CONTROL AND PREVENTION, Defendants-Appellees.	Case No. 21-30037 **Supplemental Declaration of Tammy Esponge in Support of Plaintiffs-Appellants Motion for Injunction Pending Appeal**

I, Tammy Esponge, make this supplemental declaration based upon my personal knowledge, information, and belief:

1. I am a resident of the State of Louisiana and am over the age of 18.

2. I previously signed a declaration in support a motion for preliminary injunction in this case on November 11, 2020.

3. As stated there, I am the Association Executive for the Apartment Association of Louisiana ("AAL"). In this role, I advocate on behalf of Louisiana's landlord community, including AAL's approximately 118,000 rental units across Louisiana.

4. AAL coordinates with various local apartment associations across Louisiana. When a member joins their local apartment association they are automatically enrolled as a member of AAL at the state level.

5. In addition to my role with the AAL, I am the Association Executive for several local apartment associations. In my capacity as Association Executive for AAL and on behalf of these local apartment associations, I have heard from many landlords and management companies facing challenges under CDC's continuing eviction moratorium. Those challenges have only grown greater as the CDC has repeatedly extended the moratorium to prevent landlords from reclaiming possession of their properties.

6. I have heard from many Louisiana landlords, and many companies in our membership, that have received Renters Declarations from non-paying tenants and who are unable to evict with the CDC moratorium in place.

7. At this point, I can attest that AAL members are frustrated not only because they are unable to collect rent from their current tenants, but also because

in many cases they could rent out those same units for higher rents—based on changed market conditions—if they were able to reclaim possession.

8. I also understand from discussions with our members and our Board that they have faced challenges in refinancing properties, or even in selling properties, as a result of the continuing federal eviction moratorium.

9. Even setting aside missed business opportunities, AAL members are unlikely to recoup what is owed even from their non-paying tenants..

10. As stated before, AAL members typically rely on rental income from their properties to pay for their mortgages, taxes, and other overhead expenses, such as repairs, replacement of appliances, and other necessary improvements. AAL members also typically rely on rental income to cover other property management costs, including landscaping, contracts, and maintenance of various amenities.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Metairie, LA on August 13, 2021.

Tammy Esponge

Tammy Esponge