

SUPREME COURT OF KENTUCKY

CASE No. _____

ORIGINAL ACTION IN SUPREME COURT
ARISING FROM FAYETTE DISTRICT COURT
FORCIBLE DETAINER/EVICTIONS PROCEEDINGS

NOS. 21-C-1479, 21-C-1471, 21-C-1474, 21-C-1480, 21-C-1482, 21-C-1483, 21-C-1490

40 ACRES AND THE MULE, LLC;
MORTON PROPERTIES, LLC;
BRIGGS PROPERTIES, LLC;
LAWRENCE W. MORTON;
H2 CONSTRUCTION, LLC; and
LAWRENCE M. AND HOPE T. MORTON

PETITIONERS/LANDLORDS

v.

PETITION FOR WRIT OF PROHIBITION AND OTHER RELIEF
AGAINST THE ENFORCEMENT OF
SUPREME COURT AMENDED ORDER 2021-007

HONORABLE LINDSAY HUGHES THURSTON, JUDGE,
FAYETTE DISTRICT COURT

RESPONDENTS

AND

BLANCO DELGADO;
CARRIE EDWARDS;
DREW MILLIKEN;
MICHAEL POWERS;
MONDAY RYDELL;
OWEN GARLEN, JR.; and
ROBERTO TOREZ

REAL PARTIES IN INTEREST/TENANTS

*** **

Come the Petitioners, 40 Acres and the Mule, LLC, Morton Properties, LLC, Briggs Properties, LLC, Lawrence W. Morton, H2 Construction, LLC, Lawrence M. and Hope T. Morton (the landlords and collectively referred to as “the Petitioners”), by counsel, pursuant to Section 110 of the Kentucky Constitution and all other applicable law, and for their Petition for a

writ of prohibition against the enforcement of Supreme Court Amended Order 2021-007, and their supporting Memorandum, state as follows:

INTRODUCTION

This is an action for a writ of prohibition against the enforcement of Supreme Court Amended Order 2021-07.

The Respondent(s) against whom this relief is sought are: Honorable Lindsay Hughes Thurston, Fayette District Judge, and all other District Court judges in the Commonwealth of Kentucky applying the Supreme Court Amended Order 2021-007.

The style and case numbers of the underlying actions pending before one of the Respondents, Judge Thurston, are *40 Acres and the Mule, LLC v. Blanca Delgado, et al.*, Fayette District Court, Forcible Detainer Division, 21-C-001479, *Morton Properties, LLC v Carrie Edwards, et al.*, Fayette District Court, Forcible Detainer Division, 21-C-001482, *Morton Properties, LLC v. Drew Milliken, et al.*, Fayette District Court, Forcible Detainer Division, 21-C-001483, *Briggs Properties, LLC v. Michael Powers, et al.*, Fayette District Court, Forcible Detainer Division, 21-C-001471, *Lawrence W. Morton v. Monday Rydell, et al.*, Fayette District Court, Forcible Detainer Division, 21-C-001490, *H2 Construction, LLC v. Owen Garlen, Jr., et al.*, Fayette District Court, Forcible Detainer Division, 21-C-001480, and *Lawrence M. and Hope T. Morton, v. Roberto Torez, et al.*, Fayette District Court, Forcible Detainer Division, 21-C-001474.

The facts upon which the Petitioners claim entitlement to relief and a memorandum of authorities in support of the Petition are set out below.

The relief sought is relief from Supreme Court Amended Order 2021-07, specifically including relief from the Disease Control and Prevention (CDC) order entitled "Temporary Halt

in Residential Evictions to Prevent the Further Spread of COVID-19 (CDC No. 2021-02243, 86 FR 8020 (Jan. 31, 2021)), and any subsequent CDC orders extending or modifying the temporary halt in residential evictions, all of which are incorporated into the Amended Order.

BACKGROUND

On March 6, 2020, Governor Andy Beshear declared a state of emergency in Kentucky in response to the COVID-19 global pandemic. Thereafter, this Court issued a series of orders (and amended orders) to address the impact of the pandemic on the Kentucky Court of Justice system, including on actions for residential and commercial evictions. The Order giving rise to this Petition is Amended Order 2021-07, and provides, in relevant part:

1. Evictions. All actions for residential and commercial eviction may proceed, subject to the following:
 - a. **All evictions from residential premises for nonpayment of rent shall comply with the provisions of The Centers for Disease Control and Prevention (CDC) order entitled “Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 (CDC No. 2021-02243, 86 FR 8020 (Jan. 31, 2021)) and any subsequent CDC orders extending or modifying the temporary halt in residential evictions.**
 - b. In consideration of the creation of the Healthy at Home Eviction Relief Fund, and to ensure landlords and tenants have access to available rental assistance, the following procedures shall apply to evictions from residential premises in which only nonpayment of rent is alleged:
 - i. At the initial hearing noticed by the summons, the parties must be verbally informed that funding agencies may be able to assist tenants with payment for some or all of the rent that is owed and assist landlords with recouping missed or late rent payments. Parties should also be informed that a judgment is not necessary to receive assistance.
 - ii. Following the initial hearing, all eviction proceedings shall be held in abeyance for fourteen days and rescheduled for the next available court date unless the landlord dismisses the complaint, with or without prejudice; a tenant who was properly served under KRS 383.210 or KRS 383.540 fails to appear; or the parties reach an agreement and file an AOC-218, Forcible Detainer Settlement Agreement, before the fourteen days expire.

- iii. A request for a jury trial must be made within fourteen days of the initial hearing.
- iv. Proceedings must be held in accordance with Administrative Order 2021-06.
- c. Nothing in this Order shall be interpreted to suspend or otherwise excuse an individual's duty to pay rent or to comply with any other obligation under tenancy.

(Supreme Court of Kentucky Amended Order 2021-07, a copy of the order is attached hereto as **Exhibit 1**) (emphasis added).

The CDC Order referenced by and incorporated into Amended Order 2021-07, "Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19" ("Temporary Halt" or "moratorium"), states, in its current form and in relevant part:

[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** from any residential property in any state or U.S. territory in which there are documented cases of COVID-19 that provides a level of public health protections below the requirements listed in this Order.

<https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-03292021.pdf>

(last visited May 5, 2021) (emphasis added).

"Covered person" is defined in the Order as

any tenant, lessee, or resident of a residential property who provides to their landlord, the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action, a declaration under penalty of perjury indicating that:

(1) The individual has used best efforts to obtain all available government assistance for rent or housing;

(2) The individual either (i) earned no more than \$99,000 (or \$198,000 if filing jointly) in Calendar Year 2020, or expects to earn no more than \$99,000 in annual income for Calendar Year 2021 (or no more than \$198,000 if filing a joint tax return), (ii) was not required to report any income in 2020 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment (stimulus check);

(3) The individual is 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) The individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses; and

(5) Eviction would likely render the individual homeless – or force the individual to move into and live into close quarters in a new congregate or shared living setting – because the individual has no other available housing options.

(*Id.*). The current Order states that it shall remain in effect through June 30, 2021. (*Id.*).¹

The Petitioners are the owners of various residential rental property, all of which is located in Lexington, Fayette County, Kentucky.

On March 24, 2021, the Petitioners filed actions in the Fayette District Court for forcible detainer based on each tenants' failure to pay rent. But for Amended Order 2021-07, these petitions would have resulted in evictions and entry of Forcible Detainer Judgments at the trial/hearing of the matters set for April 29, 2021.

On April 26, 2021, the Petitioners filed Motions in each case to be permitted to proceed under applicable Kentucky forcible detainer state law instead of being delayed and prohibited from evicting non-paying tenants by the application of the Halt Order based on findings and rulings by several United States District Courts that the Halt Order is unconstitutional and/or invalid. (A sample copy of the Motion is attached hereto as **Exhibit 2**).

¹ The Order states that it shall have “no effect on the contractual obligations of renters to pay rent and shall not preclude charging or collecting fees, penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis, under terms of any applicable contract.” This language, of course, does not provide any substitute to the remedy of forcible detainer for a landlord who is prohibited from evicting a “covered person” for non-payment of rent.

The Motions came before the Fayette District Court on its April 29, 2021, evictions docket for hearing at the designated “trial” date. During the hearing on the named Forcible Detainer cases, arguments were presented by counsel for Petitioners consistent with the written motion. The Court gave a verbal ruling from the Bench, noted the substance of here order on the docket entry for each matter and by a detailed written order entered on May 3, 2021, each applicable case, the Court overruled the Motions in each case (see a copy attached as **Exhibit 3**), holding that the Supreme Court’s Amended Order 2021-07 (and prior orders) makes clear “that evictions matters are subject to modified ‘court proceedings’ as a result of Covid-19 emergency”, specifically including the CDC’s Halt Order. (Order, p. 1-2). The Court noted that the Halt Order “creates and calls for delays in non-payment of rent evictions **and prohibits evictions based solely on non-payment of rent.**” *Id.*, p. 2 (emphasis added). The Court acknowledged that federal cases submitted by the Petitioner (*Tiger Lily, LLC, et al. v. United States Department of Housing and Urban Development, et al.*, 2021 WL 1171887 (W.D. Tenn. 2021), *Skyworks, Ltd., et al. v. Centers for Disease Control*, 5:20-cv-2407 (N.D. Ohio March 10, 2021), and *Terkel v. Centers for Disease Control, et al.*, 2021 WL 742877 (E.D. Tex. 2021), *appeal filed March 3, 2021*,² holding that the CDC Halt Order is unconstitutional and/or invalid. Nevertheless, District Court Judge Lindsay Hughes Thurston held:

This Court finds and concludes that it is not bound by either *Skyworks* or *Tiger Lily* but is bound by the Kentucky Supreme Court Amended Order and therefore the CDC Halt Order. This Court further finds and concludes that it must proceed with this eviction matter/Forcible Detainer Action in compliance with the Amended Order and Section B.(1.) on Evictions and therefore the CDC Halt Order upon which it is premised. Meaning, rather than a trial being conducted today, at the initial hearing noticed by the summons, the parties must be verbally informed of specific matters set forth in subsection b.(i.) of the Amended Order and thereafter the Court shall hold in abeyance the eviction proceedings for fourteen days and reschedule the matter for the next available date. **Based upon**

² All federal cases cited herein are attached as collective **Exhibit 4**.

the CDC Halt Order, this Court is not permitted to enter a Forcible Detainer Judgment based solely upon non-payment of rent.

(*Id.*, p. 2-3) (emphasis added).

The Petitioners bring this original action for the issuance of a writ prohibiting Judge Thurston (and this Court and other similarly situated District Courts in the Commonwealth) from enforcing or applying the (invalid) CDC Halt Order by virtue of its incorporation into Amended Order 2021-07.

ARGUMENT

A. This Court has Jurisdiction to Hear This Petition

As an initial matter, the Petitioners state that this Court has jurisdiction to hear this original action for a writ pursuant to Section 110 of the Kentucky Constitution, which provides, in relevant part:

The Supreme Court shall have appellate jurisdiction only, except it shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, **or as may be required to exercise control of the Court of Justice.**

Ky. Const. § 110(2)(a) (emphasis added).

This Court has recognized that Section 110 extends to this Court “the raw power to entertain any case which fits generally within the rubric of its constitutional grant of authority.” *Abernathy v. Nicholson*, 899 S.W.2d 85, 88 (Ky. 1995). “As section 110(2)(a) of the Constitution contains a provision which grants the Supreme Court supervisory control of the Court of Justice, virtually any matter within that context would be subject to its jurisdiction.” *Id.*

The Petitioners acknowledge that Rule 76.36(1) states that an original proceeding in an appellate court “may be prosecuted only against a judge or agency whose decisions may be reviewed as a matter of right by that appellate court.” *Id.* The Petitioners respectfully submit that

this Court necessarily has the power to review its own orders and amended orders, and any doubt as to this Court's jurisdiction over this matter is erased by the broad grant of power bestowed by Section 110 of the Kentucky Constitution. Because the Fayette Circuit Court and the Court of Appeals (like the Fayette District Court) have no choice but to follow Amended Order 2021-07, an original action in this Court is the only means through which the Amended Order may be effectively challenged.³

B. The CDC's Halt Order has been invalidated by federal courts sitting within the Sixth Circuit of the United States Court of Appeals, in which Kentucky is located, and by other federal courts.

The COVID-19 pandemic has presented once-in-a-lifetime challenges to virtually every aspect of American life, and all branches of federal and state government have grappled with its ramifications. However, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) (enjoining restrictions on religious services). Although the Petitioners acknowledge that a handful of federal District Courts upheld the Halt Order earlier in the pandemic⁴, Courts sitting within the Sixth Circuit have more recently reached contrary conclusions.

³ This is because a writ issued by the Court with appellate jurisdiction over the Fayette District Court (the Fayette District Court) cannot be appealed as a matter of right to this Court pursuant to CR 76.36(7)(a), which permits such an appeal only from a judgment or final order in a proceeding originating in the Court of Appeals.

⁴ These earlier cases, *Chambless Enters., LLC v. Redfield*, 2020 WL 7588849 (W.D. La. Dec. 2020), and *Brown v. Azar*, 2020 WL 6364310 (N.D. Ga. 2020), were carefully considered by the *Skyworks* Court, which noted that neither decision had considered the meaning of the limiting phrase "animals or articles" in 42 U.S.C. § 264(a) and how that limitation related to the power granted by Congress to the CDC. *Skyworks*, *supra* at p. 23-24. The *Skyworks* Court further observed that the *Chambless* case, in particular, "appears to ground its reasoning in a healthy dose of deference to the judgment of federal experts in the face of medical and scientific uncertainty." *Id.*, at p. 24. However, the "obvious truism" that effective pandemic response requires the judgment of science "does not empower agencies or their officials to exceed the mandate Congress gives them." *Id.*, at p. 25.

First, in *Skyworks, supra*, the District Court for the Northern District of Ohio held that the Halt Order exceeds Congress's congressional grant of authority to the CDC. The Public Health Act of 1944 allows the Secretary of Health and Human Services to authorize the CDC

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 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.A. § 264(a). The Court conceded that the use of the phrase "in his judgment" in the first sentence of the above-quoted provision is broad, but noted that the phrase does not stand alone; it is qualified by the second sentence, which provides examples of the types of actions the CDC may take. *Id.* at p. 20-21. By tying those actions to "animals or articles," the CDC's power is linked (and limited) to specific, tangible things. Even the final sentence, permitting the Secretary to authorize the CDC to take "other measures, as in his judgment may be necessary", follows a list of examples that consist of very specific matters, e.g., fumigation, disinfection, sanitation, and/or the destruction of animals or articles (but, even then, only those found to be contaminated or infected). The Court reasoned that, without this limiting interpretation of the phrase "other measures," the statute would be read as authorizing the CDC to take virtually unlimited actions, amounting to a general police power and (citing *Terkel*, discussed below) implicating serious constitutional concerns. *Id.*, p. 23. Applying the plain language of the statute, the Court found that the Halt Order exceeds the CDC's statutory authority.

Second, and similarly, in *Tiger Lily, supra*, the Western District of Tennessee found the CDC's Halt Order to exceed its statutory jurisdiction. Section 264(a) "clearly limits the agency's authority under the context of 'Quarantine' set forth in the enabling language of the Public

Health Act to those measures enumerated and others like them.” *Id.* at *6. “These measures do not include moratoria on evictions.” *Id.* The Court reasoned:

If the Director were not limited in his or her authority, why list any specific examples of measures within that authority? Why not simply provide the Director “is authorized to make and enforce such regulations as in [her] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases.”? In other words, Defendants’ theory renders the limitations of the statute—*e.g.* inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals, or articles to be so infected or contaminated—superfluous or surplusage which must be resisted. *See Yates v. United States*, 574 U.S. 528, 543, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015).

Id. at *7. Indeed, Congress could not have constitutionally delegated power to the CDC without imposing those statutory limitations. “To hold otherwise would be to construe the statute so broadly as to grant this administrative agency unfettered power to prohibit or mandate anything, which would ignore the separation of powers and violate the non-delegation doctrine.” *Id.* at *8.⁵

Courts outside of the Sixth Circuit have reached similar conclusions. In *Terkel v. Centers for Disease Control*, 2021 WL 742877, *appeal filed March 3, 2021*, the District Court for the Eastern District of Texas confronted the constitutional flaws to which *Skyworks* and *Tiger Lily* alluded and held that the Halt Order violated the Commerce Clause of the United States Constitution.

Applying the same reasoning underlying *Tiger Lily* and *Skyworks*, the United States District Judge for the District of Columbia very recently vacated the Halt Order on a nationwide basis:

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

⁵ The United States filed a motion with the Sixth Circuit for an emergency stay of the District Court’s order invalidating the Halt Order pending appeal. On March 29, 2021, a three-judge panel of the Sixth Circuit upon *de novo* review denied that application based on the conclusion that the government was unlikely to succeed on the merits of its appeal. *Tiger Lily, LLC v. United States Department of Housing and Urban Development*, 992 F.3d 518 (6th Cir. 2021).

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

Alabama Association of Realtors v. United States Department of Health and Human Services, et al., 1:20-cv-03377, p. 19-20 (D.D.C. May 5, 2021) (emphasis added).

C. This Court cannot and should not enforce an unconstitutional or invalid federal order or regulation.

While Judge Thurston correctly pointed out that she is bound by this Court's Amended Order rather than the above-discussed federal case law, the Petitioners respectfully submit that the holdings of federal courts as to the validity of the Halt Order are entitled to considerable deference by this Court.⁶ "[T]he judge of a state court may not enforce a [federal] statute whose terms are clearly unconstitutional." *Miller v. Municipal Court of City of Los Angeles*, 142 P.2d 297, 303 (Cal. 1943). This Court's Amended Order effectively enforces and implements a federal order or regulation that has been declared invalid and/or unconstitutional by numerous federal Courts, including those sitting within the Sixth Circuit. For that reason alone, the Amended Order should be rescinded and eviction matters should be permitted to proceed under Kentucky law – not pursuant to restrictions imposed by the CDC, a federal agency, in an invalid "order" of that federal agency.

D. The Amended Order constitutes a violation of the separation of powers doctrine.

⁶ For example, Courts throughout the country recognize that "the federal courts are uniquely situated to render opinions regarding the meaning and application of federal statutes." *Griffin v. Bruner*, 793 N.E.2d 974, 977 (Ill. App. 2003). See also *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 556 (N.C. 2012) ("although they are 'not binding on North Carolina's courts, the holdings and underlying rationale of decisions rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute'"); *Glukowsky v. Equine One, Inc.*, 848 A.2d 747, 755 (N.J. 2004) ("the principle of comity instructs state courts to give due regard to a federal court's interpretation of a federal statute")

For the reasons set out above, the Amended Order cannot be justified as the enforcement of a federal order; the underlying Halt Order is invalid and/or unconstitutional, and so is not properly enforced by order of this or any other state court. While this Court's authority to enact procedural rules is beyond question, the Petitioners respectfully submit, however, that such authority does not extend to the power to so severely – and substantively - curtail the remedy of eviction, even in the midst of a global pandemic. As remarked by Justice Keller in his concurring Opinion in *Hoskins v. Maricle*, 150 S.W.3d 1, 27-28 (Ky. 2004), as modified on denial of rehearing (Dec. 16, 2004):

It is well settled law in the state of Kentucky that one branch of Kentucky's tripartite government may not encroach upon the inherent powers granted to any other branch." Unlike the U.S. Constitution, "[o]ur Constitution, Sections 27 and 28, is clear and explicit on this delineation." "[T]he framers of Kentucky's constitution ... were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government." Thus, "it has been our view, in interpreting Sections 27 and 28, that the separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be 'strictly construed.'" "[T]he judiciary should be particularly vigilant to restrain its own exercise of power, because of its unique position as the final and unchecked arbiter of constitutional disputes [,]" and the powers of the Legislature should not "stand or fall according as they appealed to the approval of the judiciary; else one branch of government, and that the most representative of the people, would be destroyed, or at least completely subverted to the judges."

This Court has authority under Section 116 of the Kentucky Constitution to adopt procedural rules. Just as it would be a violation of separation of powers for the Legislature to promulgate rules of practice and procedure for the Court of Justice, a similar constitutional violation of separation of powers occurs when this Court exercises power properly belonging to another branch. Since the enactment of substantive law is the exclusive prerogative of the Legislature under our Constitution, substantive rules of law, therefore, "cannot originate from the judicial power to regulate practice and procedure in the courts." Accordingly, this Court does not have the power to adopt substantive law under the guise of enacting a procedural rule.

"Procedural law" consists of "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." A rule is procedural if it "really regulates procedure,—the

judicial process for enforcing rights and duties recognized by substantive law”
“Substantive law” is “[t]he part of the law that creates, defines, and regulates the
rights, duties, and powers of parties.”

(Concurrence) (citations omitted). See also *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*,
163 S.W.3d 408, 423 (Ky. 2005), overruled on other grounds by *Calloway County Sheriff's
Department v. Woodall*, 607 S.W.3d 557 (Ky. 2020) (“Just as it would be a violation of
separation of powers for this Court to exercise power properly belonging to another
branch, e.g., adopting substantive law under the guise of enacting a procedural rule since
the enactment of substantive law is the exclusive prerogative of the Legislature under our
Constitution, a similar constitutional violation of separation of powers occurs when our
Legislature promulgates rules of practice and procedure for the Court of Justice”) (emphasis
added).

The invalid Halt Order amounts to a substantive – and sweeping – change to Kentucky
law governing the remedy of forcible detainer. Because the Halt Order is incorporated into
Amended Order 2021-07, this Court’s Order affirmatively prohibits a landowner from evicting
“any covered person”, as defined in the Halt Order. However, forcible detainer is a statutory
remedy, see *Shinkle v. Turner*, 496 S.W.3d 418, 421 (Ky. 2016), not a matter of procedure.
Indeed, the Civil Rules allowing for discovery do not even apply to forcible detainer actions.
Baker v. Ryan, 967 S.W.2d 591, 593 (Ky. App. 1997). The Halt Order cannot be fairly read as a
procedural rule. It defines which tenants are and are not subject to eviction, and affirmatively
prohibits landlords from obtaining a forcible detainer against those who are not. If the power to
evict is to be limited during the pandemic, the Petitioner respectfully submits any such limitation
must be imposed by Kentucky’s General Assembly as an exercise of its legislative power to
enact substantive law, not as an Order by this Court.


WHEREFORE, Petitioners respectfully request relief as follows:

1. That the Court issue the appropriate Writ to prohibit application of the Halt Order within the Fayette District Courts and further within the Courts of the Commonwealth of Kentucky as requested;
2. That the Court dissolve, terminate, rescind or otherwise void all prior Administrative Orders of the Court that call for or require the application of the Halt Order;
3. That the Court make clear that Kentucky law should be applied in evictions proceedings;
4. For prompt oral argument if needed to address the matters presented;
5. For prompt ruling by the Court; and
6. For any other relief to which Petitioners (and the citizens of the Commonwealth) may be entitled.

Respectfully submitted,

MILLER, GRIFFIN & MARKS, P.S.C.
271 West Short Street, Suite 600
Lexington, Kentucky 40507
Telephone No. (859) 255-6676
Fax: (859) 259-1562

By:



/s/ Carroll M. Redford, III
CARROLL M. REDFORD, III
e-mail: cmr@kentuckylaw.com
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served via Courtnet2 and/or email and/or by U. S. mail, postage prepaid, on May 6, 2021, upon:

Vincent Riggs, Clerk
Fayette District Court

150 N. Limestone
Lexington, KY 40507
Honorable Lindsay Hughes Thurston, Judge
Fayette District Court
Robert F. Stephens District Courthouse
150 N. Limestone
5th Floor, Room 531
Lexington, KY 40507

Honorable John D. Minton, Jr., Chief Justice
Kentucky Supreme Court
700 Capital Avenue
Room 231
Frankfort, KY 40601

Blanca Delgado
564 Anniston Drive
Lexington, KY 40505
Tenant

Carrie Edwards
609 Freeman Drive
Lexington, KY 40505
Tenant


Drew Milliken
2537 Checkerberry Drive
Lexington, KY 40509
Tenant

Michael Powers
2901 Trial Wood Lane
Lexington, KY 40511
Tenant

Monday Rydell
2015 New Orleans Drive
Lexington, KY 40505
Tenant

Owen Garlen Jr.
3333 Tahoe Road
Lexington, KY 40515
Tenant

Roberto Tomez
900 McClain Drive
Lexington, Ky 40505
Tenant


____/s/ Carroll M. Redford, III____
ATTORNEY FOR PETITIONERS

F:\Share\TR\CASES\Lexington Rental Homes\0000 Motion to Proceed & SUPREME COURT\Petition final 5.6.21.docx

Supreme Court of Kentucky

2021-07

AMENDED ORDER

**IN RE: KENTUCKY COURT OF JUSTICE RESPONSE TO COVID-19
EMERGENCY: COURT PROCEEDINGS**

In addition to those rights provided by the U.S. Constitution, Section 14 of the Kentucky Constitution guarantees the citizens of this Commonwealth that “[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”

In light of the declared federal and state emergencies and considering the need to balance access to the courts and the constitutional rights guaranteed to the people of this Commonwealth with the health and safety of court employees, elected officials, and the public during the COVID-19 emergency, the Supreme Court, under Section 116 of the Constitution and Supreme Court Rule 1.010, hereby orders that effective April 1, 2021, Administrative Order 2021-02 is replaced in its entirety and the following measures shall be implemented until further Order of this Court:

A. JURIES

1. Petit Jurors and Jury Trials. Jury trials may resume after May 1, 2021. Jury trials shall only resume if the trial judge determines in his or her discretion, after having considered local public health conditions and the health and safety requirements established by the Supreme Court, that it is advisable.
 - a. Jury trials and voir dire must be conducted at a court facility in the county, unless otherwise authorized by the Supreme Court in accordance with KRS 26A.100.
 - b. Petit juror orientation shall be conducted by one of the following formats, as directed by the chief circuit judge:
 - i. Requiring petit jurors to read juror reporting information posted on each county’s juror information page on the Kentucky Court of Justice website or requiring jurors to watch the statewide videos entitled “Jury service: A jury of your peers starts with you” (Video #2) and “Jury service: A fair trial starts with

you” (Video #3) on the Jury Service page located on the Kentucky Court of Justice website; or

- ii. Requiring petit jurors to participate in a remote video or audio orientation using telephonic or video technology such as Zoom, Skype, etc., which shall be conducted in the same manner as an in-person juror orientation; or
 - iii. Requiring petit jurors to attend orientation as part of the voir dire proceedings. Jury panels shall be subdivided into smaller groups so that there is six (6) feet distance between all jurors in the courtroom at all times. The Jury Management Program may be utilized for grouping.
 - c. Voir dire shall be conducted in smaller groups with staggered reporting times and over the course of multiple days, if necessary.
 - d. In all cases scheduled for a jury trial, a final pretrial conference shall be conducted no more than three days prior to the date of trial. If jurors still need to report for a jury trial, they shall be notified after the final pretrial conference.
 - e. Bench conferences shall be conducted outside the presence of the jury where a complete record can be made while still maintaining appropriate social distancing.
 - f. The use of technology to publish exhibits to the parties, counsel, and jurors should be strongly encouraged, with preservation of the exhibits shown.
 - g. Attorneys shall be granted a reasonable continuance if they or their clients are ill or in a high-risk category or are caring for someone who is ill or in a high-risk category.
 - h. Access to view jury trials must be provided to members of the public and media. However, in-person viewing shall be subject to the social distancing, capacity limitations, and other restrictions set out in this Order or any other subsequent Order issued by this Court. If there is no room for members of the public or media to be inside the courtroom, the court shall provide access to view the trial by live audio or video or by digital recording.
2. Grand Jury Proceedings. Grand jury proceedings may resume after April 1, 2021. A grand jury may be conducted remotely via

available telephonic or video technology, subject to applicable Rules of Criminal Procedure. The indictment may be returned to the circuit judge using available technology. If a grand juror is unable to participate remotely, the chief circuit judge shall excuse that grand juror either temporarily or permanently and swear another grand juror from the current jury panel in place of the one excused.

- a. Access to view the return of indictments pursuant to RCr 5.20 must be provided to members of the public and media. Access may be provided by live audio or video or by digital recording.
- b. Any case where the 60-day period in RCr 5.22(3) or an extension thereof was tolled by operation of Administrative Order 2020-72 or 2021-02 shall be presented to the grand jury on or before May 30, 2021. The Commonwealth's Attorney is encouraged to give priority to cases where the defendant is in custody and proceedings have been tolled by the Supreme Court's response to the COVID-19 emergency.
- c. Existing grand jury panels may be extended at the discretion of the court, subject to the 20-day limitation set out in AP Part II, Sec. 19(3).
- d. If an existing grand jury panel is unable to be extended, juror education shall be conducted by one of the following formats, as directed by the chief circuit judge:
 - i. Requiring grand jurors to read juror reporting information posted on each county's juror information page on the Kentucky Court of Justice website or requiring grand jurors to watch the statewide videos entitled "Jury service: A jury of your peers starts with you" (Video #2) and "Jury service: A fair trial starts with you" (Video #3) on the Jury Service page located on the Kentucky Court of Justice website; or
 - ii. Requiring grand jurors to participate in a remote video or audio orientation using telephonic or video technology such as Zoom, Skype, etc., which shall be conducted in the same manner as an in-person grand jury orientation; or
 - iii. Requiring grand jurors to report in person for orientation on the date they report for grand jury service. Grand jury panels shall be subdivided into smaller groups with staggered reporting times. The

Jury Management Program may be utilized for grouping.

- e. The Chief Circuit Judge shall ensure that each designated grand juror orientation area is demarked with six-foot spacing to maintain appropriate social distancing.
3. Postponements and Excusals. Juror qualification forms shall be reviewed prior to the first day of service and any jurors who meet the following criteria shall have their service postponed or be excused prior to reporting.
- a. Jurors who are ill or in a high-risk category or are caring for someone who is ill or in a high-risk category shall have their jury service postponed to a later date. The court should document the reason as COVID-19 for the postponement of service.
 - b. Jurors who are unable to wear a facial covering because doing so would pose a serious threat to their health or safety shall have their jury service postponed to a later date. The court should document the reason as COVID-19 for the postponement of service.
 - c. Jurors who were laid off, became unemployed, or otherwise suffered an economic loss due to the COVID-19 pandemic, and who show they would suffer further economic loss as a result of jury service, shall be excused for undue hardship.
4. Health and safety precautions. The following health and safety precautions for grand jury proceedings and jury trials must be followed:
- a. Grand jury proceedings must be conducted in a large ventilated space so that there is six (6) feet distance between all jurors in the courtroom at all times. If the designated grand jury area is not large enough, then grand jury proceedings shall be conducted in the courtroom.
 - b. For grand jury proceedings, the judge presiding over the grand jury and the Commonwealth Attorney shall ensure that each designated area is demarked to maintain appropriate social distancing among witnesses, the Commonwealth Attorney, and grand jurors.
 - c. For jury trials, the judge presiding over the trial shall ensure that the courtroom is demarked to maintain appropriate social distancing among and proper use of facial coverings

by parties, attorneys, witnesses, jurors, and members of the public or media.

- d. Any space utilized by grand jurors or petit jurors must be configured to maintain appropriate social distancing.
- e. Grand jury proceedings and voir dire must be scheduled so as to reduce the number of individuals entering, exiting, or gathering at a certain time.
- f. At the conclusion of the proceedings, the presiding judge shall ensure the microphones, tables, and other exposed surfaces are thoroughly cleaned and disinfected as provided by the COVID-19 Health and Safety Requirements for the Expansion of Operations for the Kentucky Court of Justice, Administrative Order 2021-06.

B. CIVIL MATTERS

- 1. **Evictions.** All actions for residential and commercial eviction may proceed, subject to the following:
 - a. All evictions from residential premises for nonpayment of rent shall comply with the provisions of The Centers for Disease Control and Prevention (CDC) order entitled "Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19" (CDC No. 2021-02243, 86 FR 8020 (Jan. 31, 2021)) and any subsequent CDC orders extending or modifying the temporary halt in residential evictions.
 - b. In consideration of the creation of the Healthy at Home Eviction Relief Fund, and to ensure landlords and tenants have access to available rental assistance, the following procedures shall apply to evictions from residential premises in which only nonpayment of rent is alleged:
 - i. At the initial hearing noticed by the summons, the parties must be verbally informed that funding agencies may be able to assist tenants with payment for some or all of the rent that is owed and assist landlords with recouping missed or late rent payments. Parties should also be informed that a judgment is not necessary to receive assistance.
 - ii. Following the initial hearing, all eviction proceedings shall be held in abeyance for fourteen days and rescheduled for the next available court date unless

the landlord dismisses the complaint, with or without prejudice; a tenant who was properly served under KRS 383.210 or KRS 383.540 fails to appear; or the parties reach an agreement and file an AOC-218, Forcible Detainer Settlement Agreement, before the fourteen days expire.

- iii. A request for a jury trial must be made within fourteen days of the initial hearing.
 - iv. Proceedings must be held in accordance with Administrative Order 2021-06.
 - c. Nothing in this Order shall be interpreted to suspend or otherwise excuse an individual's duty to pay rent or to comply with any other obligation under tenancy.
2. **Judicial Sales.** Master Commissioners are authorized to conduct judicial sales remotely. In-person judicial sales shall be postponed or rescheduled until after May 1, 2021, unless they can be conducted outdoors safely and in accordance with CDC guidelines.

D. CRIMINAL MATTERS

- 1. **Show Cause Dockets.** All show cause dockets for payment of fines and court costs shall be rescheduled no sooner than July 1, 2021.
- 2. **Bench Warrants.** Judges should continue to issue summonses or notices to appear in lieu of bench warrants, unless the judge has good cause to believe a defendant will not appear voluntarily upon a summons or notice to appear.

E. NIGHT TRAFFIC COURT

Due to health considerations and current staffing limitations, night traffic courts in Jefferson County are suspended until further notice.

F. LOCAL PROTOCOLS

- 1. Each chief district and chief circuit judge must develop a local protocol regarding any additional restrictions or changes in local procedure, consistent with this Order. Proposed local protocols shall be submitted electronically by the chief district or chief circuit judge to localrules@kycourts.net for posting to the Kentucky Court of Justice website. To the extent any local protocols are inconsistent or otherwise conflict with this Order, this Order prevails. Any local protocol that substantially deviates from this Order or other Administrative Orders of this Court may

be subject to review and final approval by the Chief Justice under SCR 1.040(3).

2. Concerns regarding local application or implementation of this order may be submitted to COVIDcourtconcerns@kycourts.net.

This Order shall be effective April 1, 2021, and until further Order of this Court.

Entered this 25th day of February 2021.


CHIEF JUSTICE

All sitting; all concur.

COMMONWEALTH OF KENTUCKY
FAYETTE DISTRICT COURT
FORCIBLE DETAINER DIVISION
CASE NO. 21-C-001479

40 ACRES AND THE MULE, LLC

PLAINTIFF

v.

LANDLORD'S MOTION TO PROCEED UNDER NORMAL KY FORCIBLE
DETAINER LAWS BECAUSE THE CDC 'MORATORIUM' ON RESIDENTIAL
EVICTIONS ORDER EXCEEDED THE CDC'S STATUTORY AUTHORITY UNDER 42
USC 264(a) AS DETERMINED AND ORDERED BY TWO US DISTRICT COURTS
WITHIN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT

BLANCA DELGADO, ET AL

DEFENDANTS

Come the Landlords and Plaintiffs, 40 Acres and The Mule, LLC ("Plaintiffs") by counsel, and in the event the Court intends to proceed with any delay in hearing the matter on the merits or if the Court intends to continue to apply the Centers for Disease Control and Prevention "order" for nationwide moratorium on residential evictions ("Halt Order") rather than applying Kentucky law, hereby move the Court to proceed under normal Kentucky Forcible Detainer laws because the United States District Court (for the Northern District of Ohio and also for the Western District of Tennessee) both of which are within the Sixth Circuit, and the Sixth Circuit Court of Appeals (in the Tennessee case) have held the CDC is not authorized to ban evictions.

Plaintiffs respectfully request to be heard on this date, its trial date, on the merits as to non-payment of rent, and without delay.

In *Skyworks, LTD, et al. v. Centers for Disease Control*, 5:20-cv-2407, March 10, 2021(USDC, Northern District of Ohio), the Court held that the CDC does not have the authority to make and enforce a nationwide moratorium on evictions. In *Tiger Lily, LLC, et al. v. United*

State Department of Housing and Urban Development, et al., 992 F.3d 518 (2021), Case No. 21-5256, USDC Western District of Tennessee, March 15, 2021), the Court held that the CDC was not authorized by law to ban evictions – specifically, the CDC exceeded its authority under 42 USC 264(a). HUD pursued a motion to stay enforcement of the order pending its appeal and the United States Court of Appeals for the Sixth Circuit denied the request for stay by Order entered March 29, 2021. The Sixth Circuit further found as part of the *Tiger Lilly* ruling that the government is unlikely to succeed on the merits in its appeal. Order, page 7 (by order of the Court, including Judges Norris, Thapar and Bush, Circuit Judges).¹

There is no doubt that the federal courts have jurisdiction to decide the issue of whether a federal *agency* has exceeded its authority or whether it even has any authority to do what it is purportedly doing or ordering. Moreover, this Court must give *Tiger Lilly* and *Skyworks* full faith and credit. While the judicial proceedings of the federal courts are not within the terms of U.S.C.A.Const. art. 4, § 1, requiring a state to give full faith and credit to the judicial proceedings of a sister state, such proceedings must be accorded the same full faith and credit by state courts as would be required of judicial proceedings of another state. *Supreme Lodge, K.P. v. Meyer*, 265 U.S. 30, 44 S. Ct. 432, 68 L. Ed. 885 (1924).

In sum, district federal courts within the Sixth Circuit and further the Court of Appeals of the Sixth Circuit have held that the CDC has exceeded its authority through its Halt Order for over a year to the harm and detriment of every landlord. Landlords in Kentucky demand Kentucky Courts follow and apply Kentucky law on forcible detainers today.

¹ Other federal courts have reached the same conclusion based on similar and also different grounds, that The CDC's Halt Order is not enforceable or valid or it is unconstitutional. See *Terkel v. Centers for Disease Control, et al.*, 6:20-cv-00564, February 25, 2021 (USDC Eastern District of Texas).

Respectfully submitted,

MILLER, GRIFFIN & MARKS, P.S.C.
271 West Short Street, Suite 600
Lexington, Kentucky 40507-1292
Telephone: (859) 255-6676
Fax #: (859) 259-1562

By: Carroll M. Redford, III
CARROLL M. REDFORD, III
e-mail: cmr@kentuckylaw.com
ATTORNEYS FOR PLAINTIFF

NOTICE OF HEARING

The parties shall take notice that the foregoing shall come on for hearing before the Fayette District Court, Forcible Detainer Division, 150 N. Limestone Street, Lexington, Kentucky 40507 on Thursday, April 29, 2021 at the hour of 9:30 a.m., or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served by US Mail to:

Blanca Delgado
564 Anniston Drive
Lexington, KY 40505

on the 26th day of April, 2021.

Carroll M. Redford, III
ATTORNEY FOR PLAINTIFF

Laura Jones

From: noreply@kycourts.net
Sent: Monday, April 26, 2021 2:55 PM
To: Trip Redford; Laura Jones; Todd Moore; Terri DeZarn
Subject: NEF, (for eFiler) FAYETTE 21-C-01479, 40 ACRES AND THE MULE LLC VS. DELGADO, BLANCA ET AL Envelope # 3412940

Notice of Electronic Filing

Date and Time of Filing: April 26, 2021 at 2:53PM Eastern

eFiler: REDFORD, CARROLL M., III (ATTORNEY FOR PLAINTIFF)

Court: FAYETTE (DISTRICT)

Case Caption: 40 ACRES AND THE MULE LLC VS. DELGADO, BLANCA ET AL

Case Number: 21-C-01479

Envelope Number: 3412940

Notice has been electronically mailed to:

Redford, Carroll Morris - cmr@kentuckylaw.com

The following document(s) were included in this eFiling:
MOTION - OTHER: LL MOTION TO PROCEED

Additional details: <https://kcoj.kycourts.net/efiling/Dashboard/Receipt?caseid=3412940>

You may view the document(s) at <https://kcoj.kycourts.net/eFilingRetrieval/Home/Package?id=25FD976E-9953-4788-9029-60942A612DAE>

You may file subsequent case matters at <https://kcoj.kycourts.net/efiling/Filing/?parentId=3412940>

This was automatically generated by the [Kentucky Court of Justice eFiling system](#). Do not reply to this email.

Kentucky Court of Justice Confidentiality Notice

This message and/or attachment is intended only for the addressee and may contain information that is privileged, confidential and/or proprietary work product. If you are not the intended recipient, or an authorized employee, agent or representative of the intended recipient, do not read, copy, retain or disseminate this message or any attachment. Do not forward this message and attachment without the express written consent of the sender. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachment. Transmission or misdelivery shall not constitute waiver of any applicable legal privilege.

04/29/2021 09:30 AM DI

FAYETTE

Run Date: 4/27/2021 8:16:48AM DocketListSmall.Rp

Court 5 COURTROOM 5
Judge HON. LINDSAY H. THURSTON
23 DI 21-C-01479

Prep Info 68935 04/21/2021 09:19 AM 1949806

Court Docket Proceedings Page 23 of 35

40 ACRES AND THE MULE LLC VS. DELGADO, BLANCA ET AL 1774764

☐ REDFORD, CARROLL M., III ATTORNEY FOR PLAINTIFF REDFCM
☒ DELGADO, BLANCA ET AL DEFENDANT / RESPONDENT @60004723640
☒ 40 ACRES AND THE MULE LLC PLAINTIFF / PETITIONER

854.6939493

5/27/21

93

COURT TRIAL

MOTION - OTHER

DENIED FOR REASONS
STATED ON THE RECORD.

☒ TO APPLY.

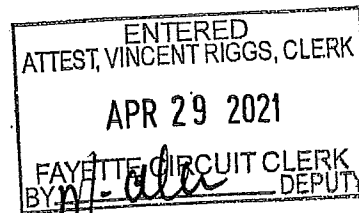
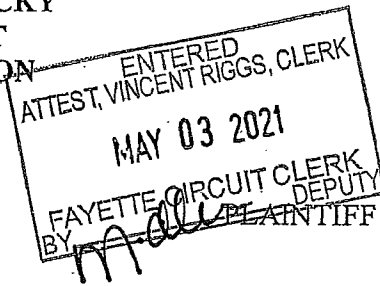


EXHIBIT 3

[Signature]

COMMONWEALTH OF KENTUCKY
FAYETTE DISTRICT COURT
FORCIBLE DETAINER DIVISION
CASE NO. 21-C-001479



40 ACRES AND THE MULE, LLC

v.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING MOTION
TO PROCEED UNDER KENTUCKY FORCIBLE DETAINER LAWS

BLANCA DELGADO, ET AL

DEFENDANTS

This matter having come before the Court on April 29, 2021, on the Forcible Detainer Complaint filed by Plaintiff against Defendants based upon non-payment of rent; and based upon the proper service of the summons and "Eviction Notice; Notice of Eviction Hearing Trial by the Court;" the Defendant and tenant Blanco Delgado having appeared for the Eviction Hearing Trial; and the Plaintiff having moved the Court to "Proceed under normal KY Forcible Detainer laws because the CDC "Moratorium" on Residential Evictions Order Exceeded the CDC's Statutory Authority under 42 USC 264(a) as Determined and Ordered by two United States District Courts within and the United States Court of Appeals for the Sixth Circuit;" and the Court having reviewed the record and being otherwise sufficiently advised;

IT IS HEREBY ORDERED and ADJUDGED that the motion be, and the same hereby is, OVERRULED.

Plaintiff requested to be heard on this date, the trial date, on the merits and without delay, as to the tenant's non-payment of rent, and for judgment to be entered. However, the Kentucky Supreme Court's Amended Order 2021-07, entered February 25, 2021, and "effective April 1, 2021, and until further Order of this Court" (and several prior, similar orders), makes clear that

evictions matters are subject to modified "court proceedings" as a result of Covid-19 emergency.

Specifically, the Amended Order in Section B.(1.) (a.) provides that:

All evictions from residential premises for nonpayment of rent shall comply with the provisions of the Centers for Disease Control and Prevention (CDC) order entitled "Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19" (CDC No. 2021-02243, 86 FR 8020 (Jan. 31, 2021)) and any subsequent CDC orders extending or modifying the temporary halt in residential evictions.

The CDC order creates and calls for delays in non-payment of rent evictions and prohibits evictions based solely on non-payment of rent.

Plaintiff argues that three federal district courts, two of which are within the Sixth Circuit of the United States Court of Appeals, have ruled that the CDC Halt Order, which is the fundamental premise of the modified court proceedings directed by the Kentucky Supreme Court, is invalid. Therefore, Plaintiff argues this portion of the Amended Order must be ignored or inoperable because the CDC Halt Order has been invalidated by the federal courts.

Specifically, Plaintiff relies upon *Skyworks, LTD, et al. v. Centers for Disease Control*, 5:20-cv-2407, March 10, 2021 (USDC, Northern District of Ohio) (CDC does not have the authority to make and enforce a nationwide moratorium on evictions), *Tiger Lily, LLC, et al. v. United State Department of Housing and Urban Development, et al.*, 992 F.3d 518 (2021), Case No. 21-5256, USDC Western District of Tennessee, March 15, 2021) (CDC was not authorized by law to ban evictions – specifically, the CDC exceeded its authority under 42 USC 264(a)), and *Terkel v. Centers for Disease Control, et al.*, 6:20-cv-00564, February 25, 2021 (USDC Eastern District of Texas) (CDC order is not enforceable or valid or it is unconstitutional). Plaintiff further notes that HUD pursued a motion to stay enforcement of the order in *Tiger Lily* pending its appeal and the United States Court of Appeals for the Sixth Circuit by panel denied the request for stay by their Order entered March 29, 2021. The Sixth Circuit further found as part of the *Tiger Lily*

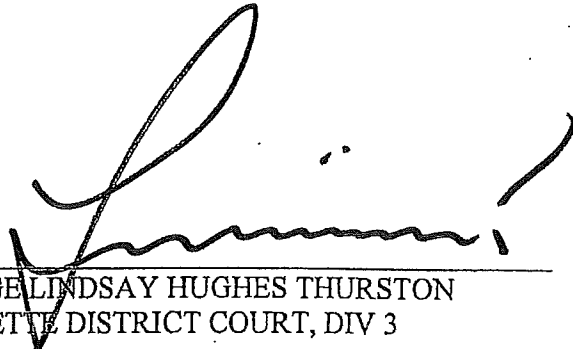
order that the government is unlikely to succeed on the merits in its appeal. Order, page 7. But, the Sixth Circuit, in *Tiger Lily*, has not reached a decision on the merits and the case remains pending.

This Court has thoroughly reviewed the Amended Order, and the CDC Halt Order along with the federal court authority cited by Plaintiff, specifically, *Skyworks* and *Tiger Lily*.

This Court finds and concludes that it is not bound by either *Skyworks* or *Tiger Lily* but is bound by the Kentucky Supreme Court Amended Order and therefore the CDC Halt Order. This Court further finds and concludes that it must proceed with this eviction matter/Forcible Detainer Action in compliance with the Amended Order and Section B.(1.) on Evictions and therefore the CDC Halt Order upon which it is premised. Meaning, rather than a trial being conducted today, at the initial hearing noticed by the summons, the parties must be verbally informed of specific matters set forth in subsection b.(i.) of the Amended Order and thereafter the Court shall hold in abeyance the eviction proceedings for fourteen days and reschedule the matter for the next available date. Based upon the CDC Halt Order, this Court is not permitted to enter a Forcible Detainer Judgment based solely upon non-payment of rent.

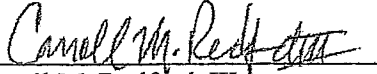
This matter was handled consistent with the Amended Order and no trial was conducted, the matter is held in abeyance and rescheduled to May 27, 2021, for further action consistent with the Amended Order and the CDC Halt Order.

Date: MAY 3, 2021



JUDGE LINDSAY HUGHES THURSTON
FAYETTE DISTRICT COURT, DIV 3

Tendered by and consistent with the Court's ruling
from the Bench on April 29, 2021:



Carroll M. Redford, III
Miller, Griffin & Marks, PSC
271 West Short Street, Ste 600
Lexington, KY 40507
859-255-6676

CLERK'S CERTIFICATE OF SERVICE

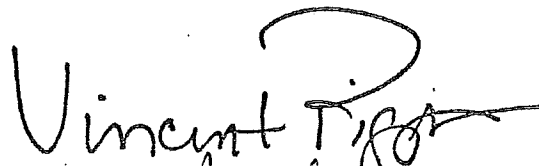
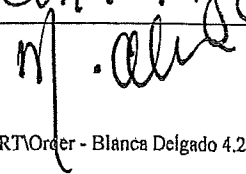
This is to certify that a true and correct copy of the foregoing was served by US Mail
and/or Courtnet2 to:

Blanca Delgado
564 Anniston Drive
Lexington, KY 40505

cmr@kentuckylaw.com
Carroll M. Redford, III
Miller, Griffin & Marks, PSC
271 West Short Street, Ste 600
Lexington, KY 40507
859-255-6676

on the day of , 2021.

MAY 03 2021


Clerk 

F:\Share\TR\CASES\Lexington Rental Homes\0000 Motion to Proceed & SUPREME COURT\Order - Blanca Delgado 4.29.21.docx

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

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.

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.

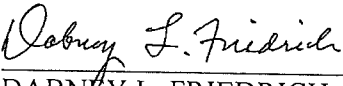
It is the role of the political branches, and not the courts, to assess the merits of policy measures designed to combat the spread of disease, even during a global pandemic. The question for the Court is a narrow one: Does the Public Health Service Act grant the CDC the legal authority to impose a nationwide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

May 5, 2021


DABNEY L. FRIEDRICH
United States District Judge

992 F.3d 518

United States Court of Appeals, Sixth Circuit.

TIGER LILY, LLC, et al., Plaintiff-Appellees,

v.

UNITED STATES DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT,
et al., Defendants-Appellants.

No. 21-5256

Decided and Filed: March 29, 2021

Synopsis

Background: Landlords and managers of residential rental properties filed suit against Department of Housing and Urban Development (HUD), challenging Centers for Disease Control and Prevention's (CDC) order imposing nationwide moratorium on residential evictions, pursuant to Public Health Service Act (PHSA), in response to COVID-19 pandemic. The United States District Court for the Western District of Tennessee, Mark Saalfield Norris, J., 2021 WL 1171887, granted plaintiffs judgment on administrative record. Government appealed and filed emergency motion to stay order pending appeal.

[Holding:] The Court of Appeals held that CDC exceeded its statutory authority under PHSA.

Motion denied.

Procedural Posture(s): On Appeal; Motion for Judgment on Administrative Record; Motion to Stay Enforcement of Judgment.

West Headnotes (13)

[1] **Federal Courts** ⇌ Supersedeas or Stay of Proceedings

Court of Appeals considers four factors when deciding whether to stay a judgment pending appeal: (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.

[2] **Federal Courts** ⇌ Supersedeas or Stay of Proceedings

When party has no likelihood of success on merits, Court of Appeals may not grant stay of a judgment pending appeal.

[3] **Federal Courts** ⇌ Statutes, regulations, and ordinances, questions concerning in general
Court of Appeals addresses a question of statutory interpretation de novo.

[4] **Statutes** ⇌ Plain Language; Plain, Ordinary, or Common Meaning

When analyzing a statute, Court of Appeals looks first to its language, giving the words used their ordinary meaning.

[5] **Statutes** ⇌ Plain Language; Plain, Ordinary, or Common Meaning

After giving the words of a statute their ordinary meaning, Court of Appeals applies established principles of interpretation.

[6] **Statutes** ⇌ Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

If, after first giving the words of a statute their ordinary meaning and then applying established principles of interpretation, the statute's meaning is clear, Court of Appeals' task is done.

[7] **Administrative Law and Procedure** ⇌ Deference to Agency in General

When reviewing an agency's construction of a statute it administers, Court of Appeals generally

applies the two-step *Chevron* framework that requires it (1) to determine whether the statute is unambiguous, and (2) if so, to defer to the agency's construction if it is permissible.

- [8] **Statutes** ⇌ Giving effect to statute or language; construction as written

Where a statute is unambiguous, then that is the end of the matter, and the Court of Appeals applies it as written.

- [9] **Health** ⇌ Contagious and Infectious Diseases
Health ⇌ Buildings, structures, and building components

Landlord and Tenant ⇌ Right to Maintain Action and Conditions Precedent

Centers for Disease Control and Prevention's (CDC) order imposing nationwide moratorium on residential evictions did not constitute "other measures" for disease control, within meaning of Public Health Service Act (PHSA), authorizing CDC to provide for 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 necessary, and thus moratorium exceeded CDC's statutory authority; government intrusion on property to sanitize and dispose of infected matter was different in nature from moratorium, and PHSA lacked unmistakably clear language indicating Congress's intent to invade state-operated arena of landlord-tenant relations. 42 U.S.C.A. § 264(a).

- [10] **Statutes** ⇌ General and specific terms and provisions; ejusdem generis

The "ejusdem generis canon" says that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.

- [11] **States** ⇌ Other particular powers

Regulation of the landlord-tenant relationship is generally the province of the states.

- [12] **States** ⇌ Powers of United States and Infringement on State Powers

It is an ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute.

- [13] **United States** ⇌ Legislative Authority, Powers, and Functions

Congress has the power to ratify acts which it might have authorized and give the force of law to official action unauthorized when taken.

*520 On Emergency Motion for Stay Pending Appeal and Immediate Administrative Stay. United States District Court for the Western District of Tennessee at Memphis; No. 2:20-cv-02692—Mark S. Norris Sr., District Judge.

Attorneys and Law Firms

ON MOTION AND REPLY: Alisa B. Klein, Brian J. Springer, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. ON RESPONSE: S. Joshua Kahane, Aubrey B. Greer, GLANKLER BROWN, PLLC, Memphis, Tennessee, for Appellees.

Before: NORRIS, THAPAR, and BUSH, Circuit Judges.

ORDER

Last September, the Centers for Disease Control and Prevention ordered a nationwide moratorium on residential evictions. As justification for its involvement in landlord-tenant relations, the CDC cited a provision of the Public Health Service Act authorizing it to sanitize property exposed to contagion. Plaintiffs in this case—all of whom own or manage residential rental properties—challenged the CDC's

order and its subsequent extension. The district court entered judgment in favor of Plaintiffs. The government now moves to stay the district court's order pending appeal. We deny its motion.

I

In March 2020, Congress responded to the wide-ranging economic effects of the COVID-19 pandemic by passing the CARES Act. *See* Pub. L. No. 116-136, 134 Stat. 281 (2020). Among other economic relief provisions, the Act included a 120-day moratorium on eviction filings based on nonpayment of rent for tenants residing in certain federally financed rental properties. *Id.* § 4024(b). That moratorium expired on July 25, 2020.

After the congressionally authorized moratorium expired, the CDC Director unilaterally issued an order declaring a new moratorium, halting evictions of certain “covered persons” through December 31, 2020. 85 Fed. Reg. 55292-01. The CDC purported to find statutory authority for the Halt Order in Section 361 of the Public Health Service Act, codified at *521 42 U.S.C. § 264. *Id.* That section provides the Secretary of Health and Human Services with the power to “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases.” 42 U.S.C. § 264(a).¹ To carry out and enforce those regulations, the statute authorizes the Secretary to provide for “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 statute also grants the Secretary authority to make and enforce regulations for quarantining infected persons. *Id.* § 264(b–d). The Secretary has delegated its powers under § 264 to the CDC by regulation. *See* 42 C.F.R. § 70.2.

Shortly after the CDC issued the Halt Order, Congress passed the Consolidated Appropriations Act, which extended the Halt Order from December 31 to January 31. 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. 86 Fed. Reg. 8020-01. She again relied only on the generic rulemaking power arising

from the Public Health Service Act. *Id.* (citing 42 U.S.C. § 264(a)).

In September 2020, Plaintiffs filed suit against the government seeking, as relevant here, a declaratory judgment that the Halt Order violated the Administrative Procedures Act and a preliminary injunction barring its enforcement. The district court denied the preliminary injunction because it found that Plaintiffs’ loss of income did not rise to the level of an irreparable injury. The government then moved for judgment on the pleadings. Plaintiffs countered with a Rule 56 motion for judgment on the administrative record. The district court granted judgment in Plaintiffs’ favor, finding that the Halt Order exceeded the CDC’s statutory authority under 42 U.S.C. § 264(a).

The day after the district court entered judgment, the government filed its appeal and moved the district court for an emergency stay and immediate administrative stay. Plaintiffs notified the district court that they intended to take two weeks to respond, and the district court did not order otherwise. The government then filed the stay motion now before us.²

II

[1] [2] We consider four factors when deciding whether to stay a judgment pending *522 appeal: “(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, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (quotation and brackets omitted). When a party has no likelihood of success on the merits, we may not grant a stay. *SawariMedia, LLC v. Whitmer*, 963 F.3d 595, 596 (6th Cir. 2020) (quoting *Daunt v. Benson*, 956 F.3d 396, 421–22 (6th Cir. 2020)).

[3] [4] [5] [6] [7] [8] Whether the government is likely to succeed on the merits boils down to a simple question: did Congress grant the CDC the power it claims? We address that question of statutory interpretation *de novo*. *See Smith v. Thomas*, 911 F.3d 378, 381 (6th Cir. 2018).³ When analyzing the statute, “we look first to its language, giving the words used their ordinary meaning.” *Artis*

v. District of Columbia, — U.S. —, 138 S. Ct. 594, 603, 199 L.Ed.2d 473 (2018) (citation and internal quotation marks omitted). We then apply “established principles of interpretation.” *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 134 S. Ct. 2228, 2236, 189 L.Ed.2d 141 (2014). If, after those steps, the statute's meaning is clear, our task is done. See *BedRoc Ltd. v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004).

[9] Because Congress's express authorization of the Halt Order expired on January 31, the CDC points to 42 U.S.C. § 264 as the sole statutory basis for the order's extension. But the terms of that statute cannot support the broad power that the CDC seeks to exert.

To slow disease transmission, the HHS Secretary, and the CDC by extension, can impose specific restrictions on both property interests, see 42 U.S.C. § 264(a), and liberty interests, see *id.* § 264(d). As to the former, the Secretary “may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.” *Id.* § 264(a). The government asserts that a nationwide eviction moratorium is among the “other measures” for disease control that Congress envisioned when drafting the statute.

[10] We disagree. This kind of catchall provision at the end of a list of specific items warrants application of the *ejusdem generis* canon, which says that “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114–15, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (citation omitted). The residual phrase in § 264(a) is “controlled and defined *523 by reference to the enumerated categories ... before it,”

id. at 115, 121 S.Ct. 1302, such that the “other measures” envisioned in the statute are measures like “inspection, fumigation, disinfection, sanitation, pest extermination” and so on, 42 U.S.C. § 264(a). Plainly, government intrusion on property to sanitize and dispose of infected matter is different in nature from a moratorium on evictions. See *Terkel v. CDC*, No. 6:20-cv-00564, — F.Supp.3d —, —, 2021 WL 742877, at *6 (E.D. Tex. Feb. 25, 2021) (holding that the Halt Order exceeded the scope of the CDC's authority and

observing that “eviction is fundamentally the vindication of the property owner's possessory interest”). The Halt Order thus falls outside the scope of the statute.

[11] [12] Furthermore, even if we were inclined to construe the phrase “other measures” as expansively as the government suggests, we cannot read the Public Health Service Act to grant the CDC the power to insert itself into the landlord-tenant relationship without some clear, unequivocal textual evidence of Congress's intent to do so. Regulation of the landlord-tenant relationship is historically the province of the states. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (“This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular.”). It is an “ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (quotation marks and citation omitted); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (declining to defer to agency interpretation of a statute where the interpretation pushed the limits of Congress's Commerce Clause authority “by permitting federal encroachment upon a traditional state power”). There is no “unmistakably clear” language in the Public Health Service Act indicating Congress's intent to invade the traditionally State-operated arena of landlord-tenant relations.

As the district court noted, the broad construction of § 264 the government proposes raises not only concerns about federalism, but also concerns about the delegation of legislative power to the executive branch. The government would have us construe the phrase “and other measures, as in his judgment may be necessary,” 42 U.S.C. § 264, as a “broad grant of authority” to impose any number of regulatory actions, provided the Secretary believes those actions will help prevent the spread of disease, regardless of whether they are in any way tethered to the “specific intrusions on private property described in the second sentence” of § 264. “In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power” of that kind. *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 645, 100 S.Ct. 2844, 65

L.Ed.2d 1010 (1980) (plurality opinion). We will not make such an unreasonable assumption.

The government raises two textual counterarguments, neither of which has merit. Its first requires some unpacking. The government argues primarily that (i) a later subsection of § 264 acknowledges the Secretary's authority to enforce quarantines, (ii) quarantines are not among the enumerated provisions of § 264(a), (iii) quarantines are different in kind from the enumerated provisions, and therefore, (iv) *524 "other measures" must be read more expansively than the *ejusdem generis* canon allows. The argument has cosmetic appeal, but it does not withstand scrutiny. Those later subsections concern the government's limited power to restrict liberty interests—by means of enforced quarantine—in order to prevent the spread of disease. Section 264(a) is concerned exclusively with restrictions on property interests and is, therefore, structurally separate from the statute's quarantine provision. Prohibiting landlords from evicting nonpaying tenants unquestionably restricts a property interest, but an eviction moratorium is radically unlike the property interest restrictions listed in § 264(a) (sanitizing, fumigating, etc.).

[13] Second, the government contends that when Congress legislatively extended the Halt Order to January 31 through the Consolidated Appropriations Act, it effectively acknowledged that § 264(a) authorized the Halt Order in the first place. That argument also fails. It is true that when Congress legislatively extended the Halt Order, it referenced the fact that the CDC claimed 42 U.S.C. § 264(a) as its authority for issuing the order in the first place. H.R. 133, 116th Cong., div. N, tit. V, § 502. However, mere

congressional acquiescence in the CDC's assertion that the Halt Order was supported by 42 U.S.C. § 264(a) does not make it so, especially given that the plain text of that provision indicates otherwise. We acknowledge that Congress has "the power to ratify ... acts which it might have authorized and give the force of law to official action unauthorized when taken." *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301-02, 57 S.Ct. 478, 81 L.Ed. 659 (1937) (internal citation omitted). But nothing in § 502 expressly approved the agency's interpretation. All § 502 did was congressionally extend the agency's action until January 31, 2021. H.R. 133, 116th Cong., div. N, tit. V, § 502. After that date, Congress withdrew its support, and the CDC could rely only on the plain text of 42 U.S.C. § 264, which, as noted, does not authorize the CDC Director to ban evictions.

Given that the government is unlikely to succeed on the merits, we need not consider the remaining stay factors.

See *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615–16 (6th Cir. 2020); *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153–54 (6th Cir. 1991) ("[E]ven if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the [Plaintiffs] if a stay is granted, [it] is still required to show, at a minimum, serious questions going to the merits").

The emergency motion for a stay pending appeal is denied.

All Citations

992 F.3d 518

Footnotes

- 1 The statute actually grants this authority to the Surgeon General. But that office was abolished in 1966, and all statutory powers vested in the Surgeon General were transferred to the HHS Secretary. 31 Fed. Reg. 8855; 20 U.S.C. § 3508. The Secretary retained those powers even after the Office of the Surgeon General was reinstated in 1987.
- 2 Plaintiffs initially refused our order for a substantive response to the government's stay motion, objecting that the motion was procedurally improper. While not a jurisdictional limitation, "[a] party must ordinarily move first in the district court for ... a stay of the judgment or order of a district court pending appeal." Fed. R. App. P. 8(a)(1)(A). But if "moving first in the district court would be impracticable" or if "a motion having been made, the district court...failed to afford the relief requested," we may grant initial relief. Fed. R. App. P. 8(a)(2)(A)(i)-(ii). Here, the government did move first in the district court, but Plaintiffs notified the court that they intend to use the full time (14 days) to respond. See W.D. Tenn. LR 7.2(a)(2). Given the Halt Order's looming March 31

expiration, we construe the district court's decision not to order a more expedited response as a denial of the government's requested relief. The normal appellate rules thus present no bar to the government's motion.

3 When reviewing an agency's construction of a statute it administers, we generally apply the two-step *Chevron* framework that requires us (1) to determine whether the statute is unambiguous, and (2) if so, to defer to the agency's construction if it is permissible. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018). Where the statute is unambiguous, then “that is the end of the matter”: the court applies it as written. *Id.* (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013)). In the briefing before us, neither party has argued that *Chevron* applies. Whether or not it applies, we find that the statute is unambiguous; therefore, we need not proceed beyond step one in any event.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

2021 WL 1171887

Only the Westlaw citation is currently available.
United States District Court, W.D.
Tennessee, Western Division.

TIGER LILY, LLC; Hunter Oaks Apartments
Utah, LLC; North 22nd Flat, LLC; Cherry
Hill Gardens, LLC; Churchill Townhomes,
LLC; Brittany Railey; and Applewood
Property Management, LLC, Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT and Benjamin S.
Carson, M.D., in his official capacity as United States
Secretary of Housing and Urban Development;
United States Department of Justice and William
P. Barr, in his official capacity as United States
Attorney General; United States Center for Disease
Control and Prevention and Nina B. Witkovsky,
in her official capacity as Acting Chief of Staff of
the Center for Disease Control and Prevention;
United States Department of Health & Human
Services and Alex Azar, in his official capacity as
United States Secretary of Health and Human
Services; Vice Admiral Jerome M. Adams, M.D.,
in his official capacity as United States Surgeon
General; and D. Michael Dunavant, in his official
capacity as United States Attorney General for
the Western District of Tennessee, Defendants.

No: 2:20-cv-02692-MSN-atc

Signed 03/15/2021

Attorneys and Law Firms

Aubrey Brode Greer, S. Joshua Kahane, Glankler Brown,
PLLC, Memphis, TN, for Plaintiffs.

Leslie Cooper Vigen, DOJ, Washington, DC, Audrey M.
Calkins, Stuart J. Canale, U.S. Attorney's Office Western
District of Tennessee, Memphis, TN, for Defendant United
States Department of Housing and Urban Development.

Leslie Cooper Vigen, DOJ, Washington, DC, Audrey
M. Calkins, U.S. Attorney's Office Western District of
Tennessee, Memphis, TN, for Defendants Benjamin S.

Carson, M.D., United States Department of Justice, William
P. Barr, United States Center for Disease Control and
Prevention, Nina B. Witkovsky, United States Department of
Health & Human Services, Alex Azar, Vice Admiral Jerome
M. Adams, M.D., D. Michael Dunavant.

ORDER GRANTING PLAINTIFFS' MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD AND ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

MARK S. NORRIS, UNITED STATES DISTRICT JUDGE

*1 This cause comes before the Court on Plaintiffs' Motion
for Judgment on the Administrative Record (ECF No. 84) and
Defendants' Motion for Judgment on the Pleadings. (ECF No.
82). The parties filed their respective responses on January 15,
2021.¹ (ECF Nos. 87, 88.) The parties then filed their replies
on January 29, 2021. (ECF Nos. 91, 92.) For the reasons
below, the Court **GRANTS** Plaintiffs' Motion and **DENIES**
Defendants' Motion.

FACTUAL BACKGROUND

On March 11, 2020, the World Health Organization declared
COVID-19 a global pandemic. The next day, Tennessee
Governor Bill Lee issued Executive Order No. 14 declaring a
State of Emergency in response to the COVID-19 outbreak.
Then-President Trump declared a national emergency for
COVID-19 on March 13, 2020.

On March 27, 2020, then-President Trump signed into law
the Coronavirus Aid, Relief, and Economic Security Act
(the "CARES Act"). Coronavirus Aid, Relief, and Economic
Security Act, Pub. L. 116-136, 134 Stat. 281 (2020). Sections
4022 and 4023 of the CARES Act protected those with
federally backed mortgages from foreclosures until at least
August 31, 2020 and allowed for a mortgage forbearance
for up to 180 days. Section 4024(b) provided for a 120-
day eviction moratorium for rental units in properties that
participated in federal assistance programs or had a federally
backed mortgage or multifamily loan. Congress did not renew
the CARES Act protections for homeowners or renters upon
their expiration.

On August 8, 2020, then-President Trump issued an executive
order directing the Secretary of Health and Human Services

and the Director of the Centers for Disease Control and Prevention (the "CDC") to "consider whether any measures temporarily halting residential evictions for any tenants for failure to pay rent [were] reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession." Less than a month later, on September 4, 2020, the CDC issued the "Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19" (the "Halt Order"). 85 Fed. Reg. 55,292 (Sept. 4, 2020).

The Halt Order imposes a moratorium on evictions of certain tenants under residential leases, "subject to further extension, modification, or rescission." *Id.* at 55,296. To qualify for protection under the Halt Order, a tenant must submit a declaration under penalty of perjury affirming that the tenant:

- (1) has used best efforts to obtain government assistance to make rental payments;
- (2) expects to earn less than \$99,000 in annual income in 2020, was not required to pay income taxes in 2019, or qualified for a stimulus check under the CARES Act;
- (3) is unable to pay full rent due to substantial loss of household income, loss of compensable hours of work or wages, lay-offs, or extraordinary out-of-pocket medical expenses;
- *2 (4) is using best efforts to make partial payments;
- (5) would likely experience homelessness or need to move into a shared residence if evicted;
- (6) understands that rent obligations still apply; and
- (7) understands that the moratorium was to end on December 31, 2020.

Id. at 55,297.

The Halt Order provides extensive background on COVID-19 and its historic threat to public health. The Halt Order notes that "[t]he virus that causes COVID-19 spreads very easily between people who are in close contact with one another (within about 6 feet), mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks." *Id.* at 55,293. In light of this, the Halt Order makes specific findings about the use and effectiveness of eviction moratoria in the context of a pandemic, providing that such moratoria "facilitate self-isolation by people who become ill or who

are at risk for severe illness from COVID-19 due to an underlying medical condition." *Id.* at 55,294. Further, eviction moratoria "allow State and local authorities to more easily implement stay-at-home and social distancing directives to mitigate the community spread of COVID-19," while also facilitating "housing stability [that] helps protect public health because homelessness increases the likelihood of individuals moving into close quarters in congregate settings, such as homeless shelters, which then puts individuals at higher risk to COVID-19." *Id.*

While the Halt Order prohibits evictions at the national level, it contains several exceptions. It provides that it "does not apply in any State, local, territorial, or tribal area with a moratorium on residential evictions that provides the same or greater level of public-health protection" as the Halt Order's requirements. *Id.* It does not relieve any individual of the obligation to pay rent, and nothing in the Halt Order prevents landlords from charging or collecting fees, penalties, or interest as a result of a failure to pay rent. *Id.* The Halt Order also does not preclude evictions based on a tenant, lessee, or resident: (1) engaging in criminal activity while on the premises; (2) threatening the health or safety of other residents; (3) damaging property; (4) violating any applicable building code or other similar regulations as to health and safety; or (5) violating any other contractual obligation other than the timely payment of rent. *Id.*

The Halt Order imposes criminal penalties for those that violate its provisions: Individuals could be subject to a fine of up to \$250,000, one year in jail, or both, while organizations could be subject to a fine of up to \$500,000. *Id.* at 55,296.

The Halt Order was originally set to expire on December 31, 2020. However, prior to its expiration, Congress passed the Consolidated Appropriations Act, 2021 (the "CAA"), which extended the Halt Order an additional month until January 31, 2021. H.R. 133, 116th Cong., div. N, tit. V, § 502. Additionally, the CAA allocated \$25 billion to states to aid individuals behind on rent. H.R. 133, 116th Cong., div. N, tit. V, § 501.

*3 On January 20, 2021, Joseph R. Biden Jr. was sworn in as President of the United States. Upon taking office, President Biden asked the CDC to consider extending the Halt Order until March 31, 2021. *Fact Sheet: President-elect Biden's Day One Executive Actions Deliver Relief for Families Across America Amid Converging Crises*, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/>

statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-amid-converging-crises/. On January 29, 2021, the Director of the CDC signed an order extending and superseding the original Halt Order. (ECF No. 93-1 at PageID 2590–603.) As it stands, the Halt Order, as extended and superseded by the CDC's January 29th order, is in place until March 31, 2021, unless further extended, modified, or rescinded. (ECF No. 93-1 at PageID 2603.)

PROCEDURAL BACKGROUND

Plaintiffs in this matter are a group of business organizations and individuals who own and/or manage residential real property in the form of multi-family apartment complexes, duplexes, townhomes, and single-family residences located within the Western District of Tennessee. (ECF No. 21 at PageID 195, 199–200.) On September 16, 2020, Plaintiffs filed their Complaint for Declaratory Judgment and Injunctive Relief, (ECF No. 1), seeking a declaratory judgment that the Halt Order violates the Constitution and for injunctive relief to prevent Defendants from enforcing the Halt Order. On September 27, 2020, Plaintiffs filed a Motion and Application for Emergency Hearing and Preliminary Injunction. (ECF No. 12.) On October 8, 2020, Plaintiffs filed an Amended Complaint, which presents an additional claim but seeks the same relief set forth in their original Complaint. (See ECF No. 21.)

On November 6, 2020, this Court issued an Order denying Plaintiffs' Motion for Preliminary Injunction. (ECF No. 69.) In the Order, this Court found that it had jurisdiction to hear the matter but held that Plaintiffs were not entitled to a preliminary injunction because they were unable to demonstrate that they would face irreparable harm because Plaintiffs' harm was reducible to monetary damages. (*Id.* at PageID 967–71, 975–81.)

Defendants filed their Answer to First Amended Complaint (ECF No. 80), as well as the Administrative Record (ECF No. 79), on December 11, 2020. Defendants supplemented the administrative record on December 16, 2020. (ECF No. 81.)

On December 18, 2020, Defendants filed a Motion for Judgment on the Pleadings. (ECF No. 82.) In their motion, Defendants argue:

1. the Order does not violate the Administrative Procedure Act ("APA");
2. Plaintiffs have made no allegation that could overcome the presumption that agency action is valid;
3. the Order is demonstrably not arbitrary or capricious; and
4. Plaintiffs' due process claims fail because the Halt Order: (1) passes the extremely deferential rational basis test applied to substantive due process challenges to economic regulations; and (2) is the type of broadly applicable governmental action to which procedural due process rights do not attach. (*Id.* at PageID 2169.)

Plaintiffs also filed a Motion for Judgment on the Administrative Record on December 18, 2020. (ECF No. 84.) In their motion, Plaintiffs argue that the Halt Order exceeded the CDC's authority under the enabling statute, is arbitrary and capricious in violation of the APA, violates the procedural due process requirements of the APA, and is unconstitutional. (ECF No. 84 at PageID 2248.)

On January 15, 2021, Plaintiffs responded in opposition to Defendants' Motion for Judgment on the Pleadings. (ECF No. 88.) In their response, Plaintiffs echo the arguments included in their Motion for Judgment on the Administrative Record. (*Id.*) On the same day, Defendants filed their response in opposition to Plaintiffs' Motion for Judgment on the Administrative Record and argued that in light of congressional action, Count 1 of Plaintiffs' Amended Complaint was now constitutionally moot,² or, in the alternative, the matter should be dismissed because Congress had ratified the Halt Order. (ECF No. 87-1 at PageID 2513–18.)

*4 On January 29, 2021, the parties filed replies to one another. (ECF Nos. 91, 92.) Both replies contained the same arguments made in the past with Plaintiffs alleging the Halt Order was both unlawful and unconstitutional and Defendants contending otherwise. On February 1, 2021, Defendants filed Notice with the Court that the Halt Order has now been extended March 31, 2021. (ECF No. 93.) On February 23, 2021, Defendants filed the supplemental administrative record which contained the information on which the CDC Director based her decision to extend the Halt Order. (ECF No. 94.) On February 25, 2021, Plaintiffs filed Notice that the United States District Court for the Eastern District of Texas had deemed the Halt Order unconstitutional under the

Commerce Clause. (ECF No. 95.) In response, Defendants asserted that the holding of this case was irrelevant to the one before the Court because Plaintiffs did not contend that the Halt Order was unconstitutional under the Commerce Clause, and because that case did not extend beyond the parties involved in the case. (ECF No. 96 at PageID 2839.) On March 1, 2021, Plaintiffs replied that the Halt Order cannot be unconstitutional in the Eastern District of Texas but lawful in the Western District of Tennessee. (ECF No. 98 at PageID 2843.) Lastly, Plaintiffs filed Notice of the decision of the United States District Court for the Northern District of Ohio on March 12, 2021. (ECF No. 100.) Defendants responded that same day. (ECF No. 101.) At a status conference today, March 15, 2021, the parties confirmed that the American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021), (the "Rescue Act") does not extend the Halt Order.

STANDARD OF REVIEW

As an initial matter, the Court notes what appears to be a discrepancy between the parties. Plaintiffs have titled their Motion "Plaintiffs' Motion for Judgment on the Administrative Record," (ECF No. 84) and ask that the Court review the Halt Order under the APA. (ECF No. 84-1 at PageID 2257-59.) Defendants, on the other hand, title their Motion "Defendants' Motion for Judgment on the Pleadings," which asks the Court to review the Halt Order under the standard set forth under Federal Rule of Civil Procedure 12(c). (ECF No. 82-1 at PageID 2191-92.) In reality, there is not much daylight between the two sides for the Court's review: Under either a Rule 56 motion or a

Rule 12(c) motion, the standard of review is the same when it comes to agency action. See *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("[T]here is no real distinction in this context between the question presented on a 12(b)(6) motion and a motion for summary judgment."). When reviewing agency action, the district court "sits as an appellate tribunal," see *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009), and the question before it "is a question of law, and only a question of law." *Shalala*, 988 F.2d at 1226.

The Court reviews the propriety of agency action under the Administrative Procedure Act ("APA"). See *Freeman v. United States Dep't of Labor*, 653 F. App'x 405, 409 (6th Cir. 2016).

[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

5 U.S.C. § 706(2); see also *Bangura v. Hansen*, 434 F.3d 487, 502 (6th Cir. 2006) ("The APA directs courts to review agency actions under a deferential standard. A court may not set aside or hold unlawful an agency action unless that action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." (internal citations omitted)). An agency's interpretation of a statute "is entitled to deference, but the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute ... that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981) (internal citations omitted).

DISCUSSION

This is no ordinary case. The task at hand, statutory construction of the Public Health Act and scrutiny of the Halt Order under the Administrative Procedure Act, is not unusual per se, but the circumstances precipitating it are rather extraordinary. Prompted by the worst pandemic in more than a century, the Executive and Legislative branches of two different Administrations and two different Congresses have played ping pong, if not "hot potato," with an eviction moratorium spanning two different years, impacting the lives

and property of thousands of souls in ways never before experienced in the history of the United States.

*5 The “on-again, off-again” activity between the Legislative and Executive Branches of Government has made adjudication of the Halt Order something of a “greased pig.” No sooner may courts get a grasp than it slips away. From the CARES Act to Executive Order to the Consolidated Appropriations Act, 2021 to and back Executive Order, the Halt Order (or its equivalent) has been embraced at various times as executive action, legislative action, or both. But it has never been made law.

One hundred and three years ago this month, in 1918, the last great flu epidemic began. And, just last week, Congress enacted its latest version of pandemic relief, the Rescue Act, American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021). The Rescue Act provides over \$20 billion to underwrite rental assistance, but it does not extend the moratorium on evictions. Whereas Defendants previously asserted Congress had ratified the Halt Order under the Consolidated Appropriations Act, 2021 (ECF No. 87-1 at PageID 2516–18), any such ratification was of limited duration, and now the opposite appears true. Either Congress no longer embraces the Halt Order, or Congress feels it has served its purpose. The Halt Order will apparently come to its end, as we hope this pandemic is also finally coming to its end; however, if recent history is any guide, additional executive action might occur or is at least capable of repetition.

As the Sixth Circuit has recently said, “[w]hile the law may take periodic naps during the pandemic, we will not let it sleep through one.” *Maryville Baptist Church, Inc., et al. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020).³ Therefore, the Court must adjudicate the request for declaratory relief.

I. 42 U.S.C. § 264 does not authorize the Halt Order.

The question has been presented, and it is thus necessary to decide, whether the Court must declare *ultra vires*, and set aside, the Halt Order—the original CDC action at issue. “The Administrative Procedure Act ... prohibits agencies from taking action ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.’ ” *Tenn. Hosp. Ass’n v. Azar*, 908 F.3d 1029, 1037 (6th Cir. 2018) (citing

5 U.S.C. § 706(2)(C)). It is for the Court to determine and declare whether the Halt Order is:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege or immunity; [or]
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right

5 U.S.C. § 706(2)(A)–(C). Though much has recently been made by other litigants in other courts concerning similarly alleged constitutional violations or the absence of same, this Court seeks to avoid constitutional entanglement altogether by construing the statute narrowly at the outset as it was written for the limited purpose for which it was designed. “A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); *United States v. Green*, 654 F.3d 637, 646 (6th Cir. 2011).

*6 The statute provides:

The Surgeon General, 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 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) (emphasis added).

The regulation promulgated thereunder provides:

Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, 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.

42 C.F.R. § 70.2 (emphasis added).

Defendants contend the statute permits the CDC Director to do whatever is necessary to prevent the spread of communicable disease. (ECF No. 82-1 at PageID 2194–97.) That is not the case. The plain meaning of the statute limits the agency's authority. If it did not do so, it would likely amount to an unconstitutional delegation of authority by Congress in violation of the non-delegation doctrine under Article I Section 1. This Court avoids this constitutional conundrum by construing the statute as written under norms of traditional statutory construction for this reason.

The statute clearly limits the agency's authority under the context of "Quarantine" set forth in the enabling language of the Public Health Act to those measures enumerated and others like them. See 42 U.S.C. § 264(a). These measures do not include moratoria on evictions.

"[The] Court does not revise legislation ... just because the text as written creates an apparent anomaly[.]" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). Here we have an apparent anomaly; not because of the text of the statute as written, but because the CDC has historically confined its actions to those traditionally associated with quarantine as defined by law.⁴

"[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing, but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370, 45 S.Ct.

274, 69 L.Ed. 660 (1925) (citation and internal quotations omitted).

*7 The Court does not minimize the gravity of the pandemic nor the exigency of this hard case. It is noteworthy, however, that Congress has neither acted to amend the Public Health Act, the CARES Act, nor provided for an ongoing moratorium on evictions as recently as the adoption of the Rescue Act last week. It is not the Court's role to revise the Public Health Act nor any subsequent legislation through its own ingenuity when Congress could do so through legislation instead. Judicial restraint is the order of the day. Alexander Hamilton quoted Montesquieu in *Federalist* No. 78 for good reason: "There is no liberty if the power of judging be not separated from the legislative and executive powers." *The Federalist* No. 78, at 379–80 (Alexander Hamilton) (Dover ed., 2014). This Court respects and maintains that separation,

Fortunately, traditional rules of statutory interpretation make this possible because to read the language otherwise ignores important canons of statutory construction — *noscitur a sociis*, *eiusdem generis*, Constitutional avoidance, and absurd results — among others. In the recent case of *Donovan v. FirstCredit, Inc.*, 983 F.3d 246 (6th Cir. 2020), construing the Fair Debt Collection Practices Act, the Sixth Circuit once again makes clear, "[t]he traditional canons of statutory interpretation are useful in determining whether the statutory text is susceptible to more than one reasonable interpretation." *Donovan*, 983 F.3d at 256 (emphasis added)

(citing *United States v. Miller*, 734 F.3d 530, 541 (6th Cir. 2013)). "[T]he question whether a statute is ambiguous arises after, not before, a court applies traditional canons of interpretation[.]" *OfficeMax, Inc. v. United States*, 428 F.3d 583, 592 (6th Cir. 2005); *Donovan*, 983 F.3d at 256.

Plaintiffs contend the CDC Director is limited to the types of measures to be undertaken. (ECF No. 84-1 at PageID 2265–69.) Defendants contend she is not. (ECF No. 82-1 at PageID 2194–201.) Therein lies the rub. Plaintiffs' interpretation is the more reasonable. If the Director were not limited in his or her authority, why list any specific examples of measures within that authority? Why not simply provide the Director "is authorized to make and enforce such regulations as in [her] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." In other words, Defendants' theory renders the limitations of the statute—e.g. inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals, or articles to be so

infected or contaminated—superfluous or surplusage which must be resisted. See *Yates v. United States*, 574 U.S. 528, 543, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015).

In *Yates v. United States*, the Supreme Court was confronted with construction of the term “tangible object,” specifically, whether a small fish was a tangible object within the meaning of the Sarbanes-Oxley Act prohibiting tampering with “any record, document, or tangible object” in an attempt to obstruct a federal investigation. *Yates*, 574 U.S. at 531–32, 135 S.Ct. 1074. Did it refer to “something similar to records or documents” or, alternatively, “colonial farmhouses, crocodiles, or fish” instead? Justice Ginsburg wrote:

We resist a reading of § 1519 that would render superfluous an entire provision passed in proximity as part of the same Act.

The words immediately surrounding “tangible object” in § 1519—“falsifies, or makes a false entry in any record [or] document”—also cabin the contextual meaning of that term. As explained in *Gustafson v. Alloyd Co.*, 513 U.S. 561, 115 S.Ct. 1061 [131 L.Ed.2d 1] (1995), we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.” In *Gustafson*, we interpreted the word “communication” in § 2(10) of the Securities Act of 1933 to refer to a public communication, rather than any communication, because the word appeared in a list with other words, notably “notice, circular, [and] advertisement,” making it “apparent that the list refer[red] to documents of wide dissemination.” And we did so even though the list began with the word “any.”

*8 The *noscitur a sociis* canon operates in a similar manner here. “Tangible object” is the last in a list of terms that begins “any record [or] document.” The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information....

A canon related to *noscitur a sociis*, *ejusdem generis*, counsels: “[W]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those

objects enumerated by the preceding specific words.” In *Begay v. United States*, 553 U.S. 137, 142–143 [128 S.Ct. 1581, 170 L.Ed.2d 490] (2008), for example, we relied on this principle to determine what crimes were covered by the statutory phrase “any crime ... that ... is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]” The enumeration of specific crimes, we explained, indicates that the “otherwise involves” provision covers “only *similar* crimes, rather than *every* crime that ‘presents a serious potential risk of physical injury to another.’ ” Had Congress intended the latter “all encompassing” meaning, we observed, “it is hard to see why it would have needed to include the examples at all.” Just so here. Had Congress intended “tangible object” in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to “record” or “document.” The Government’s unbounded reading of “tangible object” would render those words misleading surplusage.

Id. at 543–46, 135 S.Ct. 1074 (internal citations omitted).

The statute before this Court sets forth a narrow list of measures which may be undertaken to make and enforce regulations necessary to prevent the spread of disease. The statute authorizes the Director to undertake certain specifically enumerated acts “and other measures, as in [her] judgment may be necessary.” 42 U.S.C. § 264(a). But those “other measures” are limited by the specific examples listed. They provide the intelligible principle without which Congress’ delegation of authority in this instance would be too broad to withstand Constitutional scrutiny.⁵ To ignore them creates surplusage which is also to be avoided.

It would not be reasonable had Congress delegated such broad authority nor could it constitutionally have done so. The CDC was given broad authority to make and enforce regulations, and the statute specifically identifies the measures to be taken. To hold otherwise would be to construe the statute so broadly as to grant this administrative agency unfettered power to prohibit or mandate anything, which would ignore the separation of powers and violate the non-delegation doctrine. The agency could not only prohibit landlords from evicting tenants (whether occupying federally supported property or not) but any “congregate activity”—*e.g.*, in-person voting, interstate and intra-state travel or mass immigration—even

though it has not done so. Under Defendants' theory, the agency could also mandate the nationwide wearing of masks even though it has not done so.

*9 Once again from Federalist No. 78:

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principle; ... that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

The Federalist No. 78, at 380 (Alexander Hamilton) (Dover ed., 2014).

The Sixth Circuit recognizes and upholds this fundamental principle. "Just as the executive and judicial branches may not encroach on the power of Congress, Congress may not abdicate its responsibility to either of these two branches." *Green*, 654 F.3d at 649. The Supreme Court has emphasized that "the integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371–72, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (internal quotation marks and citation omitted). The Supreme Court has recognized that "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Id.* at 372, 109 S.Ct. 647. "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'"

" *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United*

States, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)) (alteration in original); *Green*, 654 F.3d at 649.

The Court construes 42 U.S.C. § 264 narrowly in order to uphold the Separation of Powers and avoid violation of the non-delegation doctrine. Congress is vested with the sole authority to legislate. See U.S. Const., art. I, §§ 1, 8; see also

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529, 55 S.Ct. 837, 79 L.Ed. 1570 (1935). Under the non-delegation doctrine, "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 529, 55 S.Ct. 837. However, the non-delegation doctrine does not keep "Congress from obtaining the assistance of its coordinate Branches." *Mistretta*, 488 U.S. at 372, 109 S.Ct. 647; *Green*, 654 F.3d at 649.

In *J.W. Hampton*, Chief Justice Taft invoked the maxim "delegata potestas non potest delegari"—no delegated powers shall be further delegated:

The well-known maxim "*Delegata potestas non potest delegari*," applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law. The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to

the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

*10 *J.W. Hampton*, 276 U.S. at 405–06, 48 S.Ct. 348.

Construing the statute in accord with this maxim guards against the devolution of delegation otherwise lawful into a disintegration of the Separation of Powers altogether. Congress may delegate but not abdicate. Upholding the Halt Order under these circumstances, particularly where criminal sanctions are ultimately ordered by the CDC, goes too far. It would amount to an impermissible delegation by Congress authorizing the CDC to make law. As Chief Justice Taft wrote, “[t]he true distinction ... is [] between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.” *J.W. Hampton, Jr.*, 276 U.S. at 407, 48 S.Ct. 348 (quoting *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm’r*, 1 Ohio St. 77, 88–89 (Ohio 1852)).

II. Congress did not permanently ratify the Halt Order.

Defendants argue that, because Congress extended the Halt Order in the Consolidated Appropriations Act, 2021, it ratified the Halt Order. (ECF No. 87-1 at PageID 2516–18.) The Court disagrees. Congress may have done so at one point in time, but not for all time; not to the present.

Congress has “the power to ratify the acts which it might have authorized.” *United States v. Heinszen & Co.*, 206 U.S. 370, 384, 27 S.Ct. 742, 51 L.Ed. 1098 (1907). This power of authorization extends to executive orders. *Muller Optical Co. v. EEOC*, 574 F. Supp. 946, 953 (W.D. Tenn. 1983) (“When the President, by executive order, has taken action that he may not have been authorized to take, Congress, in some situations, has the power to ratify the President’s actions and thus legitimize any irregularity.”) In particular, Congress may ratify an executive action where “both Houses of Congress either pass legislation appropriating funds to implement the executive order or make reference to the executive order in subsequently passed legislation.” *Id.*

While the Court makes no determination as to whether Congress could have passed the Halt Order, Defendants’ arguments are moot given the temporal limit that Congress included on the extension at that time. The Consolidated Appropriations Act, 2021 extended the eviction moratorium only through the end of January. H.R. 133, 116th Cong., div. N, tit. V, § 502. Despite the winding history of the Halt Order, it now rests within the Executive Branch, and it would no longer be effective but for executive action. As a result, it makes little sense to find that the Halt Order was permanently ratified by a Congressional extension of limited duration. In addition, a one-month extension of the Halt Order does not remedy the Constitutional infirmities of an open-ended delegation. For these reasons, Defendants’ arguments concerning ratification are unavailing.

CONCLUSION

The Halt Order exceeds the statutory authority of the Public Health Act, 42 U.S.C. § 264. The Halt Order is *ultra vires* and unenforceable in the Western District of Tennessee.

*11 **IT IS SO ORDERED**, this 15th day of March 2021.

All Citations

--- F.Supp.3d ----, 2021 WL 1171887

Footnotes

- 1 In conjunction with their Response, Defendants requested for leave to file excess pages. (ECF No. 87.)
Plaintiffs do not oppose Defendants' request. (*Id.* at PageID 2499.) The Court finds the motion well-taken
and hereby **GRANTS** the motion.
- 2 Defendants have since withdrawn this argument. (ECF No. 93 at PageID 2587.)
- 3 Similarly, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, — U.S. —, 141 S.Ct. 63, 208 L.Ed.2d 206
(2020), the Supreme Court said, "But even in a pandemic, the Constitution cannot be put away and forgotten."
The *per curiam* opinion went on to explain that relief was warranted because "[i]t is clear that this matter
is not moot" and because the applicants remained under "constant threat" that the local government could
again reimpose the challenged action. *Id.* at 68–69; *see also id.* at 72 (Gorsuch, J., concurring) ("The
parties before us have already shown their entitlement to relief. Saying so now will establish clear legal rules
and enable both sides to put their energy to productive use, rather than devoting it to endless emergency
litigation. Saying so now will dispel, as well, misconceptions about the role of the Constitution in times of
crisis, which have already been permitted to persist for too long.").
- 4 Ironically, the last public health event prompting a response of this magnitude by the CDC was the quarantine
imposed during the influenza pandemic of 1918. But the Halt Order is not a quarantine, and it is nothing like
anything the CDC has ever undertaken.
- 5 Unfortunately, the regulation does the opposite of what the statute allows. It authorizes the Director to take
such measures as she deems reasonably necessary, including those specifically enumerated. 42 C.F.R. §
70.2. This is arguably broader than—or beyond—the statute's authority. So, too, then is the Halt Order.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SKYWORKS, LTD., <i>et al.</i> ,)	Case No. 5:20-cv-2407
)	
Plaintiffs,)	Judge J. Philip Calabrese
)	
v.)	Magistrate Judge
)	Carmen E. Henderson
CENTERS FOR DISEASE)	
CONTROL AND PREVENTION,)	
<i>et al.</i> ,)	
)	
Defendants.)	
)	

OPINION AND ORDER

In the early days of the coronavirus pandemic, Congress swiftly enacted a nationwide moratorium on evictions. That congressional action expired on July 24, 2020. About two weeks later, President Trump directed his administration to consider whether such a measure should be part of efforts to combat the spread of Covid-19 moving forward. In response, the Centers for Disease Control and Prevention, commonly known as the CDC, ordered a moratorium on some, but not all, evictions. That moratorium differs somewhat from the one Congress enacted and is set to expire on March 31, 2021.

Plaintiffs, a collection of landlords, property managers, and a trade association representing similar persons, bring various challenges to the authority of the CDC to issue the moratorium and seek to enjoin its enforcement. Plaintiffs' challenges and CDC's response implicate any number of competing public interests—from public health and welfare during a pandemic to disruption of property rights and the

efficient operation of the nation's housing and rental markets, from providing economic relief to tenants struggling as so many are with the economic fallout resulting from the policy responses to the pandemic to the proper role of the national and State governments in our federal system. None of these interests compel a particular result in this case. That is, one may view the CDC's eviction moratorium as good and essential public policy or the opposite. But those considerations are not for the Court. Nor may the Court decide this case based on its own personal or policy preferences or its views of the competing public interests involved.

Instead, this dispute presents a narrower question. This case turns on whether Congress has authorized the CDC to adopt a nationwide eviction moratorium. That narrower issue depends on interpretation of the particular statutes at issue—a more lawyerly and arcane task about which reasonable people may ultimately disagree. It also requires more careful and thoughtful analysis than what typically drives headlines and broad public comment, particularly on social media, in cases of this sort.

STATEMENT OF FACTS

As Americans have come to know over the past year, the novel SARS-CoV-2 virus, first detected in China, has the potential to cause a severe respiratory disease known as Covid-19, which manifests with a variety of symptoms, including cough, fatigue, muscle or body aches, loss of taste or smell, and difficulty breathing, among others. *See generally* Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation 9994, 85 Fed. Reg. 15,337, 15,337 (Mar. 13, 2020); Temporary Halt in Residential Evictions to Prevent the

Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020). Persons infected with Covid-19 may require hospitalization, intensive care, or the use of a ventilator. 85 Fed. Reg. at 55,292. Though the medical community continues to develop new treatments and therapies, severe cases of Covid-19 may prove fatal. *Id.* Certain populations, including those with co-morbidities such as obesity, serious heart conditions, or diabetes have an increased risk for severe illness if infected. *Id.*

The virus spreads easily by airborne transmission. *Id.* Prolonged, close contact (within approximately six feet) creates conditions for easy transmission through droplets produced when a carrier talks, coughs, or sneezes. *Id.* Those who do not manifest symptoms but are infected can spread the disease. *Id.*

A. The CARES Act Statutory Moratorium

On March 13, 2020, President Trump declared Covid-19 a national emergency. 85 Fed. Reg. at 15337–38. Since then, the nation has undertaken extensive and unprecedented steps to manage the spread of the disease and address the economic fallout. Of relevance here, Congress passed and President Trump signed the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-134 (Mar. 27, 2020) (the “CARES Act”). Sections 4022 through 4024 of the CARES Act addressed housing-related issues, including protections for holders of federally backed mortgages. *See id.* § 4024(b).

Among other things, the CARES Act enacted a 120-day moratorium on eviction filings based on the failure of a tenant residing in certain federally financed properties to pay rent. The statute provides:

During the 120-day period beginning on the date of enactment of this Act, the lessor of a covered dwelling may not—

(1) make, or cause to be made, any filing with the court of jurisdiction to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges; or

(2) charge fees, penalties, or other charges to the tenant related to such nonpayment of rent.

Id. Additionally, the statute prevented a landlord from giving a notice of eviction to a tenant residing in a covered property until the 120-day statutory eviction moratorium expired and, even then, forestalled eviction proceedings for an additional 30 days. *Id.* § 4024(c). This moratorium and other protections for renters expired on July 24, 2020.

During this general timeframe, various States implemented eviction moratoria of their own. *See* 85 Fed. Reg. at 55,296 n.36. Some have since expired. *Id.*

B. The First CDC Order

On August 8, 2020, President Trump issued an executive order directing the Secretary of Health and Human Services and the Director of the CDC to “consider whether any measures temporarily halting residential evictions for 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).

Pursuant to Executive Order 13,945, the CDC so found, and issued its first eviction moratorium on September 4, 2020. *See Temporary Halt in Residential*

Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020). Acting on an emergency basis pursuant to Section 361 of the Public Health Service Act, 42 U.S.C. § 264, and 42 C.F.R. § 70.2, and affirmatively disclaiming promulgation of a rule under the Administrative Procedure Act, the CDC “determined the temporary halt in evictions in this Order constitutes a reasonably necessary measure . . . to prevent the further spread of COVID-19 throughout the United States.” 85 Fed. Reg. at 55,296. Indeed, the CDC acted based on “the convergence of COVID-19, seasonal influenza, and the increased risk of individuals sheltering in close quarters in congregate settings such as homeless shelters, which may be unable to provide adequate social distancing as populations increase” as fall and winter approached. *Id.* But the CDC also sought to head off further spread of Covid-19 when individuals become homeless and unsheltered. *Id.*

B.1. Key Provisions of the First CDC Order

The first CDC order imposed a moratorium on evictions through December 31, 2020, by directing 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.* Unlike the statutory moratorium enacted in the CARES Act, which applied to certain federally backed rental properties, the first CDC order applied throughout the nation to all residential properties. *Id.* at 55,293.

The CDC moratorium does *not* provide relief for tenants’ rent obligations. *Id.* at 55,292. That is, notwithstanding the moratorium, a tenant is still responsible for rent and other housing payments provided by lease, which continue to accrue, plus fees, penalties, and interest. *Id.* 55,296. Nor does the CDC moratorium preclude

eviction of tenants who, for example, engage in criminal activity on the premises, violate building codes, damage property, threaten the health and safety of others, or breach their lease in some way other than untimely payment of rent. *Id.* at 55,294.

Moreover, the moratorium is not self-executing. To receive protection under the first CDC order, tenants must submit to their landlords a declaration affirming that they satisfy seven criteria: (1) they have used best efforts to obtain government assistance to make rental payments; (2) they expect to earn less than \$99,000 in annual income in 2020, were not required to pay income taxes in 2019, or qualified for a stimulus check under the CARES Act; (3) they are unable to pay full rent due to “substantial loss of household income, loss of compensable hours of work or wages, lay-offs, or extraordinary out-of-pocket medical expenses”; (4) they are using best efforts to make partial payments; (5) they would likely experience homelessness or need to move into a shared residence if evicted; (6) they understand that rent obligations still apply; and (7) they understand the moratorium ends on December 31, 2020. *Id.* at 55,297.

B.1.a. Rental Assistance

The CDC’s first order notes that the Department of Housing and Urban Development informed CDC that recipients of certain federal funds under the CARES Act—States, cities, communities, and nonprofits—may use those funds to provide rental assistance and otherwise prevent evictions. *Id.* Likewise, the first order notes that the Treasury Department allows use of certain federal funds for rental assistance to prevent evictions. *Id.*

B.1.b. Enforcement

For its enforcement, the first CDC order contemplates federal cooperation with State and local officials and authorizes the Department of Justice to initiate proceedings to enforce the order. *Id.* at 55,296. It also provides for criminal penalties. A violation subjects individuals to a fine up to \$250,000, one year in jail, or both. *Id.* Corporate landlords who violate the order can be fined up to \$500,000. *Id.* Finally, the CDC found that “measures by states, localities, or U.S. territories that do not meet or exceed these minimum protections are insufficient to prevent the interstate spread of COVID-19.” *Id.* But the first CDC order did not identify which States, localities, or territories meet or exceed its protections for renters.

B.2. Guidance

In guidance issued in October 2020, the CDC stated that its first order “does not preclude a landlord from challenging the truthfulness of a tenant’s declaration in any state or municipal court.” *See* HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions at 4 (Oct. 12, 2020) (available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf>). Further, the guidance clarifies landlords may commence eviction proceedings so long as the eviction of a covered person for nonpayment of rent does not take place during the moratorium. *Id.* In this respect, CDC confirmed that its first order does not “terminate or suspend the operations of any state or local court.” *Id.* at 1.

C. Temporary Congressional Extension

Following the 2020 presidential election and as the December 31, 2020 expiration date for the first CDC order drew near, Congress passed the Consolidated Appropriations Act of 2021, which President Trump signed into law on December 27, 2020. That continuing resolution to fund the federal government for the balance of the fiscal year extended the CDC eviction moratorium through January 31, 2021. As relevant here, the Consolidated Appropriations Act provides:

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, div. N, tit. V, § 502, 134 Stat. 1182, 2079 (2020). In the legislation, Congress did not otherwise address the eviction moratorium in the first CDC order, amend the Public Health Service Act, or enact a separate statutory moratorium as it did in the CARES Act.

The Consolidated Appropriations Act also appropriates \$25 billion in emergency rental assistance to State and local governments to provide financial assistance to eligible households, “including the payment of rent [and] rental arrears,” *id.* § 501(c)(2), either directly to renters or to landlords, *id.* § 501(f).

D. The Second CDC Order

On January 29, 2021, the CDC issued its second order, extending its first order from September 2020 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 its second order, CDC incorporated much of its first order, but updated its findings. *Id.* at 8021. In particular, CDC referenced studies that “[p]reliminary modeling projections and observational data” from States that lifted eviction moratoria “indicate that evictions substantially contribute to COVID-19 transmission.” *Id.* at 8022. Further, CDC postulated, based on “statistics on interstate moves,” that “mass evictions would likely increase the interstate spread of COVID-19.” *Id.* at 8023.

As additional grounds for its second order, CDC pointed to worsening conditions since September 4, 2020, *id.* at 8025, and emerging variants of the virus, *id.* at 8021. Also, CDC documented outbreaks of Covid-19 at homeless shelters, *id.* at 8023, and made recommendations for shelters and other facilities housing those evicted to minimize the risk of transmission of SARS-CoV-2, *id.* at 8022, 8023. Finally, the CDC’s second order observed that eviction filings continued during the moratorium such that allowing it to expire would result in large numbers of evictions and contribute to the spread of Covid-19. *Id.* at 8024, 8025.

E. The American Rescue Plan Act of 2021

On March 10, 2021, Congress enacted the American Rescue Plan Act, H.R. 1319, an approximately \$1.9 trillion piece of legislation publicly touted as providing economic relief in the wake of Covid-19 and taking other measures to curb its spread. Beyond providing additional financial assistance to help prevent evictions, no provision of that legislation addresses the CDC’s moratorium.

STATUTORY AND REGULATORY BACKGROUND

Section 361 of the Public Health Service Act, enacted in 1944, permits the Secretary of the Department of Health and Human Services to authorize the CDC 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 United States or between States. 42 U.S.C. § 264(a). (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.) Section 361 goes on to direct the Secretary to make and enforce regulations for specific actions:

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) (emphasis added). Although other provisions of the statute do not bear directly on the dispute, they impose limits on the Secretary’s power to apprehend, detain, or release individuals, *id.* § 264(b) & (c); authorize the Secretary to issue regulations to apprehend and examine people crossing State lines believed to be infected, *id.* § 264(d); and preempt State laws that conflict with federal authority in this area, *id.* § 264(e).

In promulgating regulations pursuant to the delegation in Section 361(a), 42 U.S.C. § 264(a), the Secretary in turn charged the CDC with taking measures to

prevent the spread of disease in language tracking that of the statute. The applicable regulation provides:

Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, 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.

42 C.F.R. § 70.2. Under the regulation, a determination that State actions are insufficient to prevent the spread of a disease is a precondition to action by the CDC. As with the statute, the regulation requires the spread of a communicable disease across State lines before CDC may act. Finally, the regulation requires “reasonably necessary” agency actions but omits the last words of the statute, which authorizes “other measures” beyond the specific list of permissible actions introduced with the word “including.” *Compare* 42 U.S.C. § 264(a) *with* 42 C.F.R. § 70.2. This regulation provides for criminal penalties that track those set forth in the orders at issue. 42 C.F.R. § 70.18.

STATEMENT OF THE CASE

A. Parties and Claims

The National Association of Home Builders is a Nevada non-profit corporation that represents “companies that own and manage multi-family housing units.” (ECF No. 1, ¶ 16, PageID #4.) Apart from the National Association of Home Builders, Plaintiffs are property owners or managers of rental properties located in this District. (*Id.*, ¶¶ 12–15, PageID #3–4.) Plaintiff Monarch Investment and

Management Group manages two companies, Plaintiffs Cedarwood Village Apartments I & II Owner B, LLC and Toledo Properties Owner B, LLC. (ECF No. 12-2, PageID #119.) Plaintiff Skyworks, Ltd. manages Clear Sky Realty, Inc. (*Id.* at PageID #138.) Each of the three direct property managers—Cedarwood Village, Toledo Properties, and Clear Sky—had tenants who claimed protection under the first order. (*Id.* at PageID #119–20, 131–32 & 138–39.) Two of those tenants—those living at Toledo Properties’ and Clear Sky’s properties—have since moved out or abandoned their rental units. (ECF No. 41-1, PageID #512–13; ECF No. 44-1, PageID #559–60.) There are currently three tenants at Cedarwood’s property who have invoked the protections of either CDC order. (ECF No. 52, PageID #1850.)

In addition to the parties, various amici appeared supporting Plaintiffs. They include the New Civil Liberties Alliance, the National Apartment Association, and the National Association of Residential Property Managers. (ECF No. 20, PageID #184.)

In the complaint, Plaintiffs claim: (1) the CDC’s orders exceed the agency’s statutory and regulatory authority in violation of the Administrative Procedure Act (Count I); (2) the orders are an unconstitutional exercise of legislative power in violation of Article I, Section 1 of the Constitution (Count II); (3) the CDC failed to engage in required notice and comment rulemaking in violation of the APA (Count III), (4) and that the Order is arbitrary and capricious in violation of the APA (Count IV). (*Id.*, ¶¶ 58–101, PageID #12–19.) Plaintiffs seek a declaratory judgment,

injunctive relief, and attorneys' fees and costs. (*Id.*, PageID #19.) Plaintiffs moved for a preliminary injunction. (ECF No. 12.)

Plaintiffs named as Defendants the Centers for Disease Control and Prevention and various officials from the Trump Administration with responsibility for enforcing the CDC's first order. (ECF No. 1, PageID #1.) Under Rule 25(d), officials in the Biden Administration substitute for those officials. (*See* ECF No. 45, PageID #561 n.1.) At this point, Defendants are the CDC; its Director, Rochelle P. Walensky and its acting Chief of Staff, Sherri P. Berger; the Department of Health and Human Services and its acting Secretary Norris Cochran; and Monty Wilkinson, the acting United States Attorney General.

Various amici support the CDC's eviction moratoria. They include several organizations: Community Legal Aid Services, Inc. and the National Housing Law Project (ECF No. 31, PageID #360), as well as the American Academy of Pediatrics, American Medical Association, Children's Healthwatch, Coalition on Homelessness and Housing in Ohio, the George Consortium, GLMA: Health Professionals Advancing LGBTQ Equality, National Medical Association, Ohio Chapter of the American Academy of Pediatrics, and Public Health Law Watch (ECF No. 38, PageID #479). The amici also include multiple individuals: Emily A. Benfer, Matthew Desmond, Gregg Gonsalves, Peter Hepburn, Danya A. Keene, Kathryn M. Leifheit, Michael Z. Levy, Sabriya A. Linton, Craig E. Pollack, Julia Raifman, Gabriel L. Schwartz, and David Vlahov. (*Id.*)

B. Procedural Posture

Following the completion of briefing on Plaintiffs' motion for a preliminary injunction, the case was reassigned to the undersigned. (*See* Order, Dec. 16, 2020.) Because the Consolidated Appropriations Act of 2021 was pending at the time, the parties agreed to defer action on the motion for a preliminary injunction. (ECF No. 40, PageID #507.) After the CDC issued its second order, the parties submitted supplemental briefing. Defendants filed their supplement on February 12, 2021. (ECF No. 47.) Plaintiffs did the same on February 22, 2021. (ECF No. 48.)

At a subsequent status conference, the Court proposed, and the parties agreed, to advance determination of the merits pursuant to Rule 65(a)(2). (Minute Order, Feb. 26, 2021.) During that status conference, the parties also agreed that there are no material disputes of fact requiring presentation of evidence, so the Court converted the preliminary injunction hearing to oral argument on Plaintiffs' challenge to the CDC's eviction moratorium (*id.*), which the Court held on March 5, 2021. In addition to the parties' submissions, the Court analyzed the briefs of the amici for Plaintiffs and Defendants and the administrative record (ECF No. 49) as part of its ruling.

JURISDICTION

Although no party directly raises the issue, the Court has an independent obligation to examine its own jurisdiction. *See, e.g., Nikolao v. Lyon*, 875 F.3d 310, 315 (6th Cir. 2017) (citations and quotations omitted); *Mercurio v. American Express Centurion Bank*, 363 F. Supp. 2d 936, 938 (N.D. Ohio 2005). Federal courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or

treaties of the United States.” 28 U.S.C. § 1331. Therefore, the Court has jurisdiction over this dispute.

Nonetheless, standing presents a “threshold determinant[] of the propriety of judicial intervention.” *Warth v. Seldin*, 422 U.S. 490, 517–18 (1975). “[A]t an irreducible minimum, Article III requires the party who invokes the court’s authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant” and that “the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.” *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986) (cleaned up); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

To establish injury in fact, a plaintiff must show that it suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. A particularized injury “affect[s] the plaintiff in a personal and individual way.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). An injury must also be concrete, which means it must actually exist. *Id.* (citing Black’s Law Dictionary 479 (9th ed. 2009)). A concrete injury is real and not abstract, but not necessarily tangible. *Id.* (citations omitted).

Applying these principles to the claims here, upon examination of the record, the Court determines that Plaintiffs have standing. The landlord-Plaintiffs, Monarch (which manages Cedarwood and Toledo Properties) and Skyworks (which manages Clear Sky), were, are currently being, or will likely and imminently be harmed in an

Article III sense by the current order's requirement that they provide housing for non-paying tenants. All the landlord-Plaintiffs represented that, at one point at least, they had tenants who asserted they were covered persons under the order and did not pay their rent. (ECF No. 12-2, PageID #119–20, 131–32, 138–39.) The Clear Sky tenant moved out without settling rent arrears. (ECF No. 41-1, PageID #512.) Toledo Properties had a nonpaying tenant voluntarily vacate its property, but Monarch anticipates more tenants will imminently seek the protections of the order, although none yet have. (ECF No. 44-1, PageID #560.) The other landlord, Cedarwood (also managed by Monarch), has a tenant in possession who is a covered person and not currently paying rent. (ECF No. 12-2, PageID #119–20.)

As for the National Association of Homebuilders, it does not attempt to assert organizational standing, *see Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), but it does have representational standing because “its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit.” *American Canoe Ass’n, Inc. v. City of Louisa Water & Sewer Comm’n*, 389 F.3d 536, 540 (6th Cir. 2004) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 181 (2000)); *see also Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977). That is, the National Association of Homebuilders has standing to sue if one of its members can demonstrate: “(1) an injury in fact; (2) a causal connection between the alleged injury and the defendants’ conduct . . . ; and (3) redressability—that the

injury will likely be redressed by a favorable decision.” *Club v. United States E.P.A.*, 793 F.3d 656, 661–62 (6th Cir. 2015) (cleaned up).

In a footnote, Defendants question whether the National Association of Homebuilders has standing (ECF No. 23, n.9, PageID #259), to which the Plaintiffs replied and also submitted a supplemental declaration. (ECF No. 33, PageID #401 n.1.) That supplemental declaration comes from an Indiana landlord, a member of the organization, who had tenants fail to pay rent and seek protection under the order. (ECF No. 33-1, PageID #423–26.) In addition to this supplemental declaration, the evidence before the Court shows that landlords in Ohio who are members of the National Association of Homebuilders have received declarations from tenants seeking protection under the CDC’s orders. (ECF No. 12-2, PageID #148–49.) Those tenants have stopped paying rent and would be subject to eviction in the absence of the order. (*Id.*) For these reasons, the Court concludes, like other courts that have considered similar suits, that Plaintiffs have standing. *See Tiger Lily v. United States Dep’t of Hous. & Urban Dev.*, ___ F. Supp. 3d ___, 2020 WL 7658126, at *5 (W.D. Tenn. Nov. 6, 2020); *Brown v. Azar*, ___ F. Supp. 3d ___, 2020 WL 6364310, at *4–5 (N.D. Ga. Oct. 29, 2020).

ANALYSIS

“In a case of actual controversy within its jurisdiction,” the Declaratory Judgment Act authorizes a district court to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201. Judgment as a matter of law is

appropriate “if the movant 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).

Before a court may issue a permanent injunction, a plaintiff must demonstrate: (1) it has suffered an irreparable injury; (2) the remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) a permanent injunction serves the public interest. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (citations omitted). Essentially, this standard mirrors the considerations governing the issuance of a preliminary injunction, except that the plaintiff must also show actual success on the merits. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). While a court balances these factors, it must consider each of them, and “even the strongest showing on the other three factors cannot eliminate the irreparable harm requirement.” *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 326–27 (6th Cir. 2019) (quotation omitted).

I. The Merits of Plaintiffs’ Challenges

Plaintiffs mount several challenges to the CDC’s eviction moratorium. First, they argue that the order exceeds the statutory authority Congress delegated to the agency in Section 361 of the Public Health Services Act, 42 U.S.C. § 264. Similarly, Plaintiffs maintain that CDC acted outside the scope of authority delegated to it in 42 C.F.R. § 70.2. (ECF No. 12, PageID #91–100.) Defendants disagree, but also maintain that Congress ratified the agency’s action when it extended the moratorium in the Continuing Appropriations Act of 2021. (ECF No. 47, PageID #573–74.) These arguments raise two threshold issues, which in the Court’s view are dispositive:

(1) whether the CDC has the statutory and regulatory authority for a nationwide moratorium on evictions; and (2) whether Congress ratified the CDC's order(s).

I.A. Statutory and Regulatory Authority for the CDC's Orders

When construing a statute, the Court determines and gives effect to the intent of Congress as expressed in the statute it enacted. *See, e.g., Donovan v. FirstCredit, Inc.*, 983 F.3d 246, 253 (6th Cir. 2020) (citations omitted). The Court begins “where all such inquiries must begin: with the text of the statute itself.” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)). Where the statute's language is plain, the inquiry also ends with the text. *Id.* Courts “endeavor to ‘read statutes with an eye to their straightforward and commonsense meanings.’” *Black v. Pension Benefit Guar. Corp.*, 983 F.3d 858, 863 (6th Cir. 2020) (quoting *Bates v. Dura Auto. Sys., Inc.*, 625 F.3d 283, 285 (6th Cir. 2010)). In doing so, courts ascribe “terms the ordinary meaning that they carried when the statute was enacted.” *Id.* (citation and quotation omitted).

When reading a statute, the Court “consider[s] the entire text, in view of its structure and of the physical and logical relation of its many parts.” *Hueso v. Barnhart*, 948 F.3d 324, 333 (6th Cir. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at p. 167 (2012)). A court may not look to isolated words or phrases taken out of context to determine a statute's meaning, but instead must account for both the specific text and the broader scheme. *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U. S. 365, 371 (1988); *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 321 (2014)). “Lastly, before deferring to

an administrative agency's statutory interpretation, courts 'must first exhaust the traditional tools of statutory interpretation and reject administrative constructions' that are contrary to the clear meaning of the statute.'" *Black*, 983 F.3d at 863 (quoting *Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018)).

I.A.1. Plain Language

Accounting for amendments, Section 361 of the Public Health Service Act authorizes the promulgation and enforcement of regulations to protect the public health against the interstate spread of communicable diseases:

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) (emphasis added). In the statute's first sentence, Congress scarcely limits the power of the agency to accomplish this purpose, relying on its expert "judgment" of what is "necessary to prevent the introduction, transmission, or spread" of disease. *Id.* Standing alone, that first sentence sweeps broadly and appears to support Defendants' argument. If that were as far as the statute went, however, a reading that stopped there would likely raise a serious question whether Congress violated the Constitution by granting such a broad delegation of power unbounded by clear limitations or principles.

But the statute's first sentence does not stand alone. Its second sentence provides additional clarity and direction, both by virtue of following the first sentence and by expressly tying the first sentence to the power Congress authorized the agency to exercise. *Id.* ("For purposes of carrying out and enforcing such regulations . . ."). This second sentence then lists illustrative examples of the types of actions the CDC may take. For example, the statute contemplates the "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles." *Id.* Tying these actions to "animals or articles" links the agency's power to specific, tangible things on which the agency may act. Even a reading of the statute that links "destruction" to "animals or articles" leaves the other actions in the statute (inspection, fumigation, disinfection, sanitation, and pest extermination), which by their common meanings and understandings are tied to specific, identifiable properties. And the next limitation in the statute reinforces the agency's targeted power: "found to be so infected or contaminated as to be sources of dangerous infection to human beings." *Id.* With this language, Congress directs the agency to act on specific animals or articles which are themselves infected or a source of contagion that present a risk of transmission to other people.

That takes the Court to the final words of the first subsection of the statute, "and other measures, as in his judgment may be necessary," which at bottom drive the dispute between the parties. Defendants argue that the statute authorizes other measures beyond those specified. After all, the text uses examples and does not exhaust the range of permissible actions the agency may take. But to read the words

“other measures” as Defendants propose would divorce them from their context and take them in isolation without regard for what came before. This the Court may not do. *See Gundy*, 139 S. Ct. at 2126 (citing *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989)). Doing so creates at least three textual problems.

First, following the list of examples provided, “other measures” must be reasonably of the type Congress contemplated in the statutory text—fumigation, disinfection, destruction of animals or things, or other measures reasonably of this type.

Second, Congress directed the actions set forth in Section 361 to certain animals or articles, those so infected as to be a dangerous source of infection to people. On the face of the statute, the agency must direct other measures to specific targets “found” to be sources of infection—not to amorphous disease spread but, for example, to actually infected animals, or at least those likely to be, which also have the required nexus with interstate or foreign commerce.

Third, the common meaning of the word “article” does not extend the agency’s reach to an action such as evictions. As used in the statute, an article means “a particular object or item.” *Article*, The American Heritage Dictionary (4th ed. 2000); *see also Article*, Oxford English Dictionary (20th ed. 1981) & (supp. 1987) (defining article as a material thing); *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/article> (last visited Mar. 10, 2021) (a particular kind of object).

Nothing about the remaining sections of the statute alters this conclusion. The balance of Section 361 deals with quarantine, 42 U.S.C. § 264(b)–(d), and preemption, *id.* § 264(e). While these provisions confirm that CDC has broad authority to act under the statute to prevent the transmission of communicable diseases, the additional subsections do not supplant the reach of the first or create other grounds justifying the orders at issue.

The most natural and logical reading of the statute as a whole does not extend the CDC’s power as far as Defendants maintain. Such a broad reading of the statute, and the term “other measures” in particular, would authorize action with few, if any, limits—tantamount to creating a general federal police power. It would also implicate serious constitutional concerns, which Plaintiffs did not raise here. *See Terkel v. Centers for Disease Control & Prevention*, ___ F. Supp. 3d ___, 2021 WL 742877, at *4–6 (E.D. Tex. Feb. 25, 2021) (declaring that the moratorium exceeds the scope of federal power the Commerce Clause permits), *appeal filed*, No. 21-40137 (5th Cir. 2021). But the text does not authorize such boundless action or depend on the judgment of the Director of the CDC or other experts for its limits. The eviction moratorium in the CDC’s orders exceeds the statutory authority Congress gave the agency.

I.A.2. Other Relevant Decisions

Where the text of a statute is plain, the Court’s task is at an end. *Ron Pair Enters.*, 489 U.S. at 241. Because the meaning of the statute is clear, there is no need to look to the canons of statutory construction. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Further, because the statute does not authorize the

agency's action, the Court need not separately analyze the regulation at 42 C.F.R. § 70.2, which the parties agree largely tracks the language of Section 361(a), 42 U.S.C. § 264(a). “[A]n agency literally has no power to act, . . . unless and until Congress confers power upon it.” *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 357 (1986). Therefore, the regulation cannot save the statute.

I.A.2.a. *Brown and Chambless Enterprises*

Nonetheless, the Court acknowledges that, in reading the statute not to extend as far as Defendants contend, two district courts have reached the opposite conclusion. *Chambless Enters., LLC v. Redfield*, ___ F. Supp. 3d ___, 2020 WL 7588849, at *5 (W.D. La. Dec. 22, 2020); *Brown*, ___ F. Supp. 3d at ___, 2020 WL 6364310, at *9. Another court declined to enjoin the eviction moratorium without interpreting the statute. *Tiger Lily*, ___ F. Supp. 3d ___, 2020 WL 7658126, at *1. Differing readings of the statute do not render it ambiguous. *See Bank of America Nat. Trust & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 461 (1999) (Thomas, J., concurring) (“A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong.”); *see also Rosmer v. Pfizer, Inc.*, 263 F.3d 110, 118 (4th Cir. 2001).

Among other disagreements with these decisions, the CDC’s authority does not, in the Court’s view, depend on whether the examples used in Section 361(a) are illustrative or exhaustive, as the *Brown* Court suggests. ___ F. Supp. 3d at ___, 2020 WL 6364310, at *8. Nor do the provisions of subsections (b) through (d) somehow expand the language of subsection (a) or the agency’s powers relating to “articles”

there. *Id.* Neither court considered the meaning of the phrase “animals or articles” in the statute or how it relates to the power Congress ultimately gave the agency. The *Chambless Enterprises* Court appears to ground its reasoning in a healthy dose of deference to the judgment of federal experts in the face of medical and scientific uncertainty. ___ F. Supp. 3d at ___, 2020 WL 7588849, at *5. Without question, effective pandemic response depends on the judgment of reliable science—not political science. But that obvious truism does not empower agencies or their officials to exceed the mandate Congress gives them.

Overall, the *Brown* and *Chambless Enterprises* decisions have the feel of adopting strained or forced readings of the statute, stretching to rationalize the governmental policy at issue. That is not a proper methodology of statutory interpretation. Nor is it the proper role of the courts. Although the Court reaches a different result than the *Brown* and *Chambless Enterprises* Courts, the language of the statute compels that result.

I.A.2.b. FDA’s Ban on Turtle Sales

Beyond these cases that considered the eviction moratorium, Defendants rely on *Independent Turtle Farmers of Louisiana, Inc. v. United States*, 703 F. Supp. 2d 604 (W.D. La. 2010), as do the courts in *Brown*, ___ F. Supp. 3d at ___, 2020 WL 6364310, at *8–9, and *Chambless Enterprises*, ___ F. Supp. 3d at ___, 2020 WL 7588849, at *5.

In *Independent Turtle Farmers*, the district court addressed the authority of the Food and Drug Administration to ban the sale of baby turtles as a public health

measure to curb the spread of salmonellosis, especially among children who are particularly susceptible. As relevant here, FDA enacted the ban pursuant to Section 361(a) based on a delegation of authority from the Secretary. Deferring to FDA's judgment, the court read the statute as providing illustrative, not exhaustive, examples of available public-health measures and upheld the ban, even though the text of the statute does not specifically provide for one. *Id.* at 620–21. Additionally, the court based its ruling on FDA's narrow tailoring of the ban. It barred sales of turtles as pets, which more likely involved children, but exempted turtle transactions for business or educational purposes. *Id.* at 620 n.20. In reaching this result, the court reaffirmed an earlier decision in *Louisiana v. Mathews*, 427 F. Supp. 174, 176 (E.D. La. 1977), which upheld the ban even though it reached healthy turtles, not just those infected with disease-causing bacteria. *Independent Turtle Farmers*, 703 F. Supp. 2d at 618–19.

Here, the CDC moratorium is not tailored in the same way. It allows some evictions to proceed, including those based on criminal conduct, damage to property, or reasons other than nonpayment of rent. Such evictions have as much chance of spreading Covid-19 as those subject to the moratorium. More fundamentally, it does not follow that one district court's reading of Section 361(a) to authorize a ban on the sale of animals, which happen to be an uncommon pet and posed a health threat particularly to children, justifies the CDC's action here. Such a contention might well surprise a member of the public who is not a lawyer. In the end, *Independent Turtle Farmers* stands for the unremarkable proposition that the text of the statute provides

examples that are illustrative not exhaustive. Even then, the decision makes clear that the challenged ban at issue there was one other measure FDA could take that was reasonably of the type Congress permitted under the statute. *Id.* at 620. It has little to say about whether the statute authorizes the qualitatively different agency action here.

I.B. Congressional Ratification of the Order

In its supplemental brief, Defendants contend that Congress ratified the CDC's moratorium by enacting the Consolidated Appropriations Act of 2021. (ECF No. 47, PageID #573.) By extending the CDC's first order, which was set to expire on December 31, 2020, by thirty days, Congress expressed its view that the agency necessarily had the authority for the eviction moratorium, or so Defendants maintain. (*Id.* at PageID #573–74.)

It is well settled that Congress has the “power to ratify the acts which it might have authorized[,]” in the first place; when it does so, the ratification amounts to lawful action “equivalent to an original authority.” *United States v. Heinszen & Co.*, 206 U.S. 370, 384 (1907) (relating to ratification of a tax). Put another way, “Congress may, by enactment not otherwise inappropriate, ratify acts which it might have authorized and give the force of law to official action unauthorized when taken.” *Swayne & Hoyt v. United States*, 300 U.S. 297, 301–02 (1937) (cleaned up). When Congress ratifies prior actions, however, it must do so clearly and “explicitly so declare[.]” See *Heinszen*, 206 U.S. at 390 (citing *Lincoln v. United States*, 202 U.S. 484, 498 (1906)). Ratification, or “congressional authorization,” requires something

more than “mere acquiescence” to the action. *Hannah v. Larche*, 363 U.S. 420, 439 (1960).

Here, Congress in the Appropriations Act extended the date on which the CDC’s first order expired. Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, div. N, tit. V, § 502, 134 Stat. 1182, 2097 (2020). But Congress did not speak to the merits of the policy at issue, as it did in the CARES Act. Nor did Congress amend the organic statute, Section 361 of the Public Health Services Act, either to create a new subsection authorizing an eviction moratorium or add such an action to the list of permissible agency actions in subsection (a). All Congress did was change the expiration date of the first order. In context, such a limited action makes sense. At that moment, congressional action facilitated the transition between presidential administrations and, effectively, gave the incoming administration the opportunity to determine its own policies for responding to the pandemic. In this way, the Appropriations Act does not amount to a ratification in any sense in which Congress has historically ratified prior actions. Accordingly, the Appropriations Act does not change the Court’s conclusion that the agency’s action exceeds its statutory authority.

II. Relief

Because Plaintiffs succeed on their claim in Count I that the order exceeds the agency’s statutory authority, the Court need not reach Plaintiffs’ remaining claims. The Court turns to the appropriate relief or remedy. Plaintiffs seek both a declaratory judgment and an injunction. (ECF No. 1, ¶¶ 1–2, PageID #19.)

II.A. Relief Under the Administrative Procedure Act

Plaintiffs lay claim to relief under the Administrative Procedure Act. (ECF No. 1, ¶¶ 58–77, PageID #13–14.) Section 706 of the APA directs that a reviewing court “shall hold unlawful and set aside” agency action “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C). In evaluating agency action under the APA, assuming Section 361 leaves an eviction moratorium to the CDC’s discretion (so-called *Chevron* “step zero”), the first step “employ[s] ‘traditional tools of statutory construction’ to determine whether ‘Congress had an intention on the precise question at issue.’” *Tennessee Hosp. Ass’n v. Azar*, 908 F.3d 1029, 1037 (6th Cir. 2018) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). Where, as here, the statutory text is clear, that is the end of the matter because the Court and the agency “must give effect to the unambiguously expressed intent of Congress.” *Id.* (quoting *Chevron*, 467 U.S. at 842–43). Because the Court determines that the statute is unambiguous and, by issuing a nationwide eviction moratorium, CDC exceeded the authority Congress gave it in Section 361, the Court holds that action unlawful and sets it aside, as the APA requires.

II.B. Injunctive Relief

Where an agency exceeds its authority, the APA contemplates an injunction as one form of relief. *See* 5 U.S.C. § 703. In addition to success on the merits, to obtain an injunction Plaintiffs must also show irreparable harm, which is an “indispensable” prerequisite for injunctive relief. *D.T.*, 942 F.3d at 326. On this score, the Court agrees with those that have addressed the issue in other cases and determines that

money damages can redress Plaintiffs' injury (though they do not seek them here) such that an injunction is not appropriate. *See Chambless Enterprises*, ___ F. Supp. 3d ___, 2020 WL 7588849, at *12–14; *Tiger Lily*, ___ F. Supp. 3d ___, 2020 WL 7658126, at *8–9; *Brown*, ___ F. Supp. 3d ___, 2020 WL 6364310, at *17–21. Contrary to Plaintiffs' argument, the Court does not read Section 706 of the APA as mandating injunctive relief every time an agency exceeds its statutory authority.

II.C. Relief Under the Declaratory Judgment Act

The APA also envisions declaratory judgments as a remedy. *See* 5 U.S.C. § 703. “[I]n a case of actual controversy within its jurisdiction,” except for certain circumstances not relevant here, the Court “may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 142 (1967).

Plaintiffs here are entitled to declaratory judgment. The Court determines that the Centers for Disease Control and Prevention's orders—Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020) and Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021)—exceed the agency's statutory authority provided in Section 361 of the Public Health Service Act, 42 U.S.C. § 264(a), and the regulation at 42 C.F.R. § 70.2 promulgated pursuant to the statute, and are, therefore, invalid.

CONCLUSION

This case involves the limited question whether Congress has given the Centers for Disease Control and Prevention the authority to make and enforce a nationwide moratorium on evictions. This case does not implicate broader policy considerations regarding such a moratorium or depend on judgments whether it constitutes sound public policy. On that issue, the Court expresses no opinion. Indeed, such a consideration falls outside the task of interpreting the applicable statutes and determining their meaning. Because of the plain meaning of Section 361, the Court enters judgment accordingly.

SO ORDERED.

Dated: March 10, 2021



J. Philip Calabrese
United States District Judge
Northern District of Ohio

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

No. 6:20-cv-00564

Lauren Terkel et al.,

Plaintiffs,

v.

Centers for Disease Control and Prevention et al.,

Defendants.

OPINION AND ORDER

This lawsuit presents the question whether the federal government has authority to order property owners not to evict specified tenants. Plaintiffs argue that this authority is not among the limited powers granted to the federal government in Article I of the Constitution, and thus the decision whether to enact an eviction moratorium rests with a given State. Disagreeing, the federal government argues that a nationwide eviction moratorium is within Article I's grant of federal authority to regulate commerce among the States.

Only that issue is posed here. This lawsuit does not question that the States may regulate residential evictions and foreclosures, as they have long done. For instance, during the Great Depression, 27 States enacted foreclosure moratoriums and other laws meant to mitigate the effects of a wave of foreclosures. Geoff Walsh, *The Finger in the Dike: State and Local Laws Combat the Foreclosure Tide*, 44 Suffolk U. L. Rev. 139, 139-43 (2011). In upholding one such law against a challenge not raised here, the Supreme Court recognized the "control which the state retains over remedial processes" in this area as part of the State's "police power, [which] is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people." *Home Bldg. Ass'n v. Blaisdell*, 290 U.S. 398, 434, 437 (1934).

But while “[t]he States have broad authority to enact legislation for the public good — what we have often called a ‘police power’” — “[t]he Federal Government, by contrast, has no such authority[.]” *Bond v. United States*, 572 U.S. 844, 854 (2014). The question here is whether a nationwide moratorium on evicting specified tenants is within the limited powers that our Constitution grants to the federal government, namely, its authority to legislate as necessary and proper to regulate commerce among the several States.

The federal government cannot say that it has ever before invoked its power over interstate commerce to impose a residential eviction moratorium. It did not do so during the deadly Spanish Flu pandemic. Hr’g Tr. (Doc. 21) at 52:3-8 (government’s representation). Nor did it invoke such a power during the exigencies of the Great Depression. *Id.* The federal government has not claimed such a power at any point during our Nation’s history until last year. *Id.* at 55:9-17.

And the government’s claim of constitutional authority is broad. The government admits that nothing about its constitutional argument turns on the current pandemic:

THE COURT: [T]here’s nothing special about COVID 19? Congress could do the same thing, the same temporary suspension of tenant evictions, if there was an inability to pay rent because of some other reason that Congress finds important? My example was cohabitating spouses sent to prison, but there could be others. That is your Commerce Clause argument; correct?

MS. VIGEN: That is our Commerce Clause argument, correct.

Hr’g Tr. at 56:13-21. The federal government thus claims authority to suspend residential evictions for any reason, including an agency’s views on “fairness.” *Id.* at 53:11-23.

Given the open-textured nature of the relevant constitutional text, “the question of congressional power under the

Commerce Clause ‘is necessarily one of degree.’” *United States v. Lopez*, 514 U.S. 549, 566 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). Reasonable minds may differ given the lack of “precise formulations.” *Id.* at 567. But here, after analyzing the relevant precedents, the court concludes that the federal government’s Article I power to regulate interstate commerce and enact laws necessary and proper to that end does not include the power to impose the challenged eviction moratorium.

Background

1. COVID-19 is a disease “caused by a new coronavirus first identified in Wuhan, China, in December 2019.” *See* Centers for Disease Control and Prevention, *About COVID-19* (Sept. 1, 2020), www.cdc.gov/coronavirus/2019-ncov/cdcreponse/about-COVID-19.html. “Although most people who have COVID-19 have mild symptoms, COVID-19 can also cause severe illness and even death.” *Id.* The disease “is thought to spread mainly through close contact from person to person.” *See* Centers for Disease Control and Prevention, *How COVID-19 Spreads* (Oct. 28, 2020), www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html. The public and private response to COVID-19 has led to business disruptions for many.

On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act. Pub. L. No. 116-136, 134 Stat. 281 (2020) (the CARES Act). Among other things, the Act included a 120-day prohibition on the initiation of eviction proceedings for “covered properties,” defined as those participating in specified federal programs or with specified federally backed loans. *Id.* § 4024, 134 Stat. at 492-93. Congress did not renew the CARES Act, and the Act’s eviction moratorium lapsed on July 27, 2020. A number of States, however, have eviction moratoria or rent-assistance programs of their own. As noted, this lawsuit does not call into question state and local-government measures.

In September 2020, the Centers for Disease Control and Prevention—a component of the U.S. Department of Health and Human Services—issued the agency order challenged here. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020). The order was originally set to expire on December 31, 2020. *Id.* at 55,297. Federal legislation then extended the order's expiration date to January 31, 2021. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078-79 (2020). A subsequent agency order further extended the eviction moratorium, with minor modifications and additional findings, to be effective through the end of March 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8,020, 8,021 (Feb. 3, 2021) (“This Order further extends and modifies the prior Orders until March 31, 2021[.]”). No party argues that supplemental pleading is necessary to give fair notice of plaintiffs’ continuing challenge to the order as extended, which the government agrees “is identical in substance and effect” to the original order. Doc. 42 at 2; *accord* Doc. 43 at 2.

The CDC order generally makes it a crime for a landlord or property owner to evict a “covered person” from a residence. 86 Fed. Reg. at 8,020. A “covered person” is any resident who provides the landlord or property owner with a declaration that makes five certifications, namely:

- (1) the resident has used best efforts to obtain available government assistance for rent or housing;
- (2) the resident falls below certain income thresholds, generally \$99,000 annually or \$198,000 annually if filing a joint tax return;
- (3) the resident is unable to pay the full rent 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) the resident is using best efforts to make timely partial payments that are as close to the full payment as circumstances permit; and
- (5) the resident has no other available space for occupancy at the same or less housing cost and, if evicted, would either need to live without housing or move into a congregate or shared-living setting.

Id. at 8,020-8,021.

The order prohibits any action to remove or cause the removal of a covered person from a residential property. *Id.* The order allows evictions, however, if a resident is (1) engaging in criminal activity on the premises; (2) threatening the health and safety of other residents; (3) damaging or posing an immediate and significant risk of damage to property; (4) violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or (5) violating any other contractual obligation, other than timely payment of rent or similar fees. *Id.* at 8,022.

A person who engages in a prohibited eviction is subject to a criminal penalty of up to one year of imprisonment, to be followed by up to one year of supervised release, and a fine of up to \$250,000. 42 U.S.C. § 271; 18 U.S.C. §§ 3559(a)(6), 3583(b)(3); 42 C.F.R. § 70.18; *see* 86 Fed. Reg. at 8,025 (citing criminal provisions). An organization that engages in a prohibited eviction is subject to a criminal penalty of a fine of up to \$500,000. 42 C.F.R. § 70.18; *see* 86 Fed. Reg. at 8,025. The order applies in any State that does not offer “the same or greater” protections than does the order. *Id.* at 8,021.

The order pauses only evictions, not financial obligations. *Id.* at 8,021-8,022 (“This Order does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation that the individual may have under a tenancy, lease, or similar contract.”). Thus, a person whose eviction is barred still incurs liability for rent while inhabiting the property. *See* Centers for Disease Control and

Prevention, *Frequently Asked Questions* at 3, www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf ("Covered people still owe rent to their landlords.").

2. Plaintiffs Lauren Terkel; Lufkin Creekside Apartments, Ltd.; Lufkin Creekside Apartments II, Ltd.; Lakeridge Apartments, Ltd.; and MacDonald Property Management, LLC own or manage residential properties and seek to evict some residents there for nonpayment of rent. Doc. 3 at 45-46, 49-52, 54-56, 57-60. They are prohibited from doing so by the CDC order, *id.*, and they challenge that order as exceeding the federal government's constitutional authority, Doc. 1.

The remaining two plaintiffs, Pineywoods Arcadia Home Team, Ltd. and Weatherford Meadow Vista Apartments, LP, have not submitted declarations that residents of their properties claim "covered person" status under the CDC order. *See* Doc. 3 at 50-51 ¶¶ 1-17 (representing that at least one Pineywoods tenant is delinquent on rent but not representing that any such tenant has presented a declaration pursuant to the CDC order); Doc. 3 at 58-59 ¶¶ 1-13 (not representing that any Weatherford tenant has presented a declaration pursuant to the CDC order). Nor does the complaint allege with particularity that any tenant at Pineywoods or Weatherford has presented a declaration that is preventing an eviction. *See* Doc. 1 at 9 ¶¶ 34-36, 12-13 ¶ 67. As those two plaintiffs joined in the request for final judgment on the current record, Hr'g Tr. at 81:9-19, their claims are now dismissed without prejudice for lack of standing. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Defendants are the United States, CDC, HHS, and three HHS officials responsible for the order. Doc. 1 at 4-5; Doc. 26. Against those defendants, plaintiffs seek a declaration that the order exceeds the government's constitutional authority. Doc. 1 at 17-18 (citing 28 U.S.C. § 2201 and 5 U.S.C. § 706). Plaintiffs also seek a permanent injunction setting aside the order as

contrary to constitutional authority and barring the order's enforcement. *Id.* (citing 5 U.S.C. § 706).

Plaintiffs moved for a preliminary injunction and provided argument on the merits of their case and the equities of injunctive relief. Doc. 3. Defendants opposed that motion and provided their views on the merits and injunctive relief. Doc. 11. The court then heard extensive oral argument from both parties. Hr'g Tr. 1-86.

Plaintiffs asked that, given the purely legal nature of the merits question and the likely efficacy of declaratory relief, the court proceed to consideration of summary judgment rather than preliminary relief. *Id.* at 80:10-81:19. The government requested an opportunity to file the administrative record and additional merits briefing, as some of the space spent briefing plaintiffs' motion for preliminary relief had been devoted to the equities and not the merits. *Id.* at 78:16-22, 82:19-20. The court accepted both requests. It gave notice, pursuant to Federal Rule of Civil Procedure 56(f), that it would consider summary judgment. Doc. 18. And it allowed submission of the original and supplemental administrative records and 45 more pages of briefing per side. Docs. 18, 26, 41. The court has now considered the administrative record and all briefing.

Analysis

Summary judgment is appropriate when the movant 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). The "substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Here, plaintiffs' merits case presents a pure question of law. The only relevant facts are judicially noticeable or legislative facts such as congressional findings, as opposed to adjudicative facts to be resolved in this case. *See* Doc. 18; *United States v. Clark*, 582 F.3d 607, 612 (5th Cir. 2009) ("[A] facial challenge to the constitutionality of a statute presents a pure

question of law.”). The government thus agrees that discovery is not necessary in this case. Hr’g Tr. at 82:16.

Because no material factual dispute exists, the issue becomes whether plaintiffs are entitled to judgment as a matter of law. The government does not defend the order as an exercise of the “executive Power” granted to the President in Article II of the Constitution. So plaintiffs’ entitlement to judgment as a matter of law on their constitutional claim turns on whether the order is within the “legislative Powers” granted to Congress in Article I of the Constitution, which could be delegated to an agency. Specifically, the government defends the order under the Commerce Clause and, in the alternative in response to plaintiffs, the Necessary and Proper Clause of Article I. Doc. 11 at 14-26 & n.4.

The Supreme Court has held that the commerce power allows regulation of three categories of activity: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.” *Lopez*, 514 U.S. at 558-59. The parties agree that, if the order is authorized, it is under the third category, referred to as the substantial-effects test. *See* Doc. 11 at 15-16; Doc. 13 at 3.

In considering whether the substantial-effects test is met, the Supreme Court has “undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.” *Lopez*, 514 U.S. at 557. That standard respects Congress’s ability to gather facts and assess regulatory effectiveness. *See id.* at 562-63 (allowing that Congress may find a substantial effect on interstate commerce “even though no such substantial effect was visible to the naked eye”); *accord Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (asking whether a rational basis exists for concluding that local cultivation and use of marijuana, taken in the aggregate,

substantially affects interstate commerce “in fact”). At the same time, a court presented with a Commerce Clause challenge must make an “independent evaluation” of the legal effect of such facts and findings. *Lopez*, 514 U.S. at 562; cf. *United States v. Morrison*, 529 U.S. 598, 616 (2000) (“Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.”); *United States v. Bass*, 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”).

As described by the Supreme Court in *Morrison*, the reach of Congress’s power to regulate based on a local activity’s substantial effect on interstate commerce turns on at least four “significant considerations”: (1) the economic character of the intrastate activity; (2) whether the regulation contains a “jurisdictional element” that may “establish whether the enactment is in pursuance of Congress’ regulation of interstate commerce”; (3) any congressional findings regarding the effect of the regulated activity on commerce among the States; and (4) attenuation in the link between the regulated intrastate activity and commerce among the States. 529 U.S. at 609-13. Those considerations are discussed below in turn.

1. Discerning how a local activity may have an “economic” character requires understanding the nature of the substantial-effects test that poses that question. The substantial-effects test rests on the insight that regulation of local activity may be necessary to effectuate a broader regulation of interstate commerce. Courts examine the extent to which a local activity is economic in nature to help gauge whether regulation of that local activity is an “appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.” *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

The parties dispute whether the substantial-effects test should be viewed “through the lens of the Necessary and

Proper Clause.” Doc. 11 at 15 n.4. The government argues that it should not be. But ignoring the Necessary and Proper Clause would disregard the origins of the substantial-effects test and thereby diminish the fidelity of its application. The Supreme Court has repeatedly grounded the substantial-effects test in the Necessary and Proper Clause. Both *Lopez* and *Morrison* traced that test to *Wickard v. Filburn*, 317 U.S. 111 (1942). *Lopez*, 514 U.S. at 556; *Morrison*, 529 U.S. at 610. *Wickard*, in turn, cited Necessary and Proper Clause precedent as justifying the substantial-effects test. *Wickard*, 317 U.S. at 129 (citing the famous Necessary and Proper Clause discussion in *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

Wickard also cited, *id.* at 124, the Court’s earlier decision in *Wrightwood Dairy*, which upheld federal price regulations on milk produced and sold intrastate, 315 U.S. at 115-16, 125. And *Wrightwood Dairy* also relies on *M’Culloch*’s explication of the Necessary and Proper Clause. *Id.* at 119 (permitting Congress to regulate intrastate activities whose character would “make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce”) (citing *M’Culloch*, 17 U.S. at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”))).

More recently, *Gonzales v. Raich* grounded the substantial-effects test in the Necessary and Proper Clause. 545 U.S. at 2. *Raich* upheld, under the “substantially affect” test, federal regulation of the local cultivation and use of marijuana. *Id.* at 22. The Court reasoned that such legislation is within Congress’s “authority to ‘make all Laws which shall be necessary and proper’ to ‘regulate Commerce . . . among the several States.’” *Id.* (quoting U.S. Const. art. I, § 8). Unsurprisingly, *United States v. Comstock* referred to *Lopez*, *Morrison*, and *Raich* as

Necessary and Proper Clause cases. *Comstock*, 560 U.S. 126, 134-35, 148 (2010); *accord United States v. Whaley*, 577 F.3d 254, 258, 260 (5th Cir. 2009).

As those precedents show, the substantial-effects test does not examine the economic character of a regulated activity as an abstract exercise. The point is to assess the nexus between the local activity and interstate commerce or federal regulation thereof. For instance, in concluding that a law restricting firearm possession did not regulate economic activity, *Lopez* reasoned that the restriction “[was] not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” 514 U.S. at 561. In contrast, the law in *Wickard* “involved economic activity in a way that the possession of a gun in a school zone does not.” *Id.* at 560. Specifically, the law in *Wickard* “was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices,” which would be influenced by any consumption of wheat, a fungible commodity. *Id.*

Here, the regulated activity is not the production or use of a commodity that is traded in an interstate market. Rather, the challenged order regulates property rights in buildings—specifically, whether an owner may regain possession of property from an inhabitant. 86 Fed. Reg. at 8,021 (defining “eviction” as any action “to remove or cause the removal of a covered person from a residential property”). Real estate is inherently local. Residential buildings do not move across state lines. And eviction is fundamentally the vindication of the property owner’s possessory interest. *See Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 920 (Tex. 2013) (“[E]viction is allowed only if the tenant has no remaining legal or possessory interest.”). Indeed, the challenged order disclaims any effect on the parties’ financial relationship: “Nothing in this Order precludes the charging or collecting of fees,

penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis, under the terms of any applicable contract.” 86 Fed. Reg. at 8,022. The order’s disclaimer of any change in financial obligations provides little support for characterizing the order as economic.

The law at issue in *Lopez* criminalized the possession of one’s handgun when in a covered area. 514 U.S. at 551. The order at issue here criminalizes the possession of one’s property when inhabited by a covered person. 86 Fed. Reg. at 8,020. Neither regulated activity is economic in material respect. Although public health and safety are important goals on which the government may act pursuant to its commerce power, neither alone makes a law economic in character.

To be sure, the market for rental housing consists of economic relationships between landlords and tenants. But courts applying the substantial-effects test must look “only to the expressly regulated activity” itself. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003). Here, that is only eviction. As noted, the challenged order does not change a landlord’s or tenant’s financial obligations. In regulating only recourse to a remedy under state law, the order is unlike the regulation in *Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000), which addressed conduct that “directly interfere[d] with a commercial transaction.” *Id.* at 206. And although a person’s residence in a property may have a commercial origin, that alone is not enough to make the regulated activity itself economic in character. *See GDF Realty*, 326 F.3d at 634-35 (“[L]ooking primarily beyond the regulated activity in such a manner would ‘effectually obliterate’ the limiting purpose of the Commerce Clause.”).

Whether evictions themselves are economic in nature for the sake of constitutional analysis is not decided in any of the government’s cited cases. Two of those cases, *Russell v. United States* and *Jones v. United States*, decided whether an apartment building “affect[ed] commerce” within the meaning of

a statute. *Russell v. United States*, 471 U.S. 858, 859 (1985); *Jones v. United States*, 529 U.S. 848, 850-51 (2000). The meaning of an act of Congress is not the same question as the scope of power granted by the Constitution. Moreover, that a building's use may "affect" commerce and thus fall within the terms of a statute does not mean that every interaction dealing with the building "substantially" affects interstate commerce or is economic in character for purposes of constitutional analysis. See *United States v. Corona*, 108 F.3d 565, 569 (5th Cir. 1997), *as modified on denial of reh'g* (Apr. 7, 1997) ("By inserting the word 'substantially' in its formulation of the 'effects test,' the Court reminded us that federal courts have a duty to scrutinize the Congress's commerce power and dispelled the notion that *de minimis* connections to interstate commerce can legitimate federal legislative powers.").

2. Second, the court considers whether the challenged order has a "jurisdictional element" that "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce." *Morrison*, 529 U.S. at 612; *accord M'Culloch*, 17 U.S. at 421 (focusing, under the Necessary and Proper Clause, on "the end" pursued by a law). A jurisdictional element of a federal crime, for instance, might limit the crime to instances where certain materials are "transported in interstate or foreign commerce." E.g., *United States v. Kallestad*, 236 F.3d 225, 228-29 (5th Cir. 2000). A jurisdictional element alone, however, is insufficient to deem a regulation constitutional. *Id.* at 229; *accord United States v. Ho*, 311 F.3d 589, 600 (5th Cir. 2002) ("Congress may not add the words 'interstate commerce' to every statute and expect the courts meekly to comply.").

The government admits that the CDC order "does not limit its application based on a connection to interstate commerce." Doc. 11 at 24. Accordingly, the order has no jurisdictional element. The government misunderstands the inquiry in arguing that a jurisdictional element is present because the

order was issued under the HHS Secretary's statutory authority 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.*" *Id.* (quoting 42 U.S.C. § 264(a) and similar language in 42 C.F.R. § 70.2). A jurisdictional element for purposes of constitutional analysis is one that "ensure[s], through case-by-case inquiry," that all applications of a regulation "have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 561-62. The government's cited authority does not impose such a case-by-case limitation.

3. *Morrison* held that the existence of "formal findings as to the substantial burdens that an activity has on interstate commerce" may allow a court to find satisfactory evidence of a substantial effect on interstate commerce even if not immediately apparent. 529 U.S. at 612; *accord Ho*, 311 F.3d at 600 (noting that such findings can be "helpful," even if not dispositive). As to regulation of noneconomic, intrastate activity, helpful findings would demonstrate that the regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. Whether such findings show that an intrastate activity is within Congress's regulatory power "is ultimately a judicial rather than a legislative question." *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557 n.2).

Here, neither Congress nor the agency made findings that a broader regulation of commerce among the States would be undercut without the order. *See* § 502, 134 Stat. at 2078-79; 85 Fed. Reg. at 55,292-55,297; 86 Fed. Reg. at 8,020-8,025. The fact that an activity has some ultimate tie or correlation to national-employment or socio-economic statistics, as noted in the administrative record here, is not enough of a nexus under the constitutional test. *E.g.*, Doc. 44-4 at 18 (finding that

homelessness may strain healthcare systems). A great many things in this country are connected in some way. But *Morrison* rejected the sufficiency of observations of that nature. 529 U.S. at 612 (finding inadequate the government's argument that local, noneconomic activity "can be expected to affect the functioning of the national economy" by creating costs that are spread throughout the population and threaten the productivity of the workforce).

At times, the government's briefing points to the agency's findings about public-health benefits of the order. *See, e.g.*, 85 Fed. Reg. at 55,294 ("[H]ousing stability helps protect public health because homelessness increases the likelihood of individuals moving into close quarters in congregate settings, such as homeless shelters, which then puts individuals at higher risk to COVID-19."). Those findings may or may not help show statutory authority for the order under 42 U.S.C. § 264(a). But they are findings about public health, a quintessential concern of the police power. They are not findings explaining how a broader federal regulation of commerce among the States is undercut without the order. *Cf. GDF Realty*, 326 F.3d at 639 ("[N]on-commercial, intrastate activities must be 'essential' to an *economic* regulatory scheme's efficacy . . ."). So this case again stands in contrast to *Groome Resources*, where the court noted extensive congressional findings tying discrimination in housing to burdens on interstate commerce. 234 F.3d at 212-14.

4. The substantial-effects test also examines the extent of attenuation between interstate commerce and the regulated activity. *Morrison*, 529 U.S. at 612. Here, the relationship between interstate commerce and an eviction criminalized by the order is attenuated in several dimensions.

First, the eviction of one person from a dwelling does not alone have a self-evident substantial effect on interstate commerce, and the government has not pointed to any findings demonstrating such a substantial effect. *See supra* pp. 13-15.

Because evictions are not themselves economic activity, their effects cannot be aggregated under the *Wickard* principle. See *supra* pp. 9-12.

Second, the eviction moratorium is not a backstop in a larger regulation of commerce. See *Lopez*, 514 U.S. at 561. In comparison, a law barring landlords from refusing to lease property for a prohibited reason could likewise bar landlords from evicting tenants for the same prohibited reason, lest the equal-leasing rule be readily undermined. Cf. 42 U.S.C. § 3604; *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982). The CDC order, in contrast, is not part of a broader federal regulation of the landlord-lessee relationship. No federal law requires that a landlord give possession of a dwelling in the first instance to a person who cannot pay rent and who would otherwise live in congregate housing. The federal order against *evicting* such persons is thus not supportable as a backstop to avoid undercutting such a broader regulation.

Third, even though quarantining an infected person from new contacts would keep the person from traveling interstate (or anywhere else), the CDC order is not such a quarantine. The order applies without regard to a tenant's infection with, prior exposure to, or vaccination against COVID-19. It applies without regard to whether an evicted tenant would move to a new city, much less a new State.

Fourth, the attenuation analysis must preserve "the distinction between what is national and what is local in the activities of commerce." *Lopez*, 514 U.S. at 567; see *NFIB v. Sebelius*, 567 U.S. 519, 560 (2012) (Roberts, C.J., concurring) (concluding that "an expansion of federal power" into traditional matters of state concern was "not a 'proper' means for" federal insurance reforms). The attenuation here threatens that distinction, as to both the challenged order itself and "the implications of the Government's arguments." *Lopez*, 514 U.S. at 564.

The order itself criminalizes the use of state legal proceedings to vindicate property rights. That scope alone treads into an area of traditional state concern: remedies protecting property rights. In upholding state regulation in this field against a different challenge, the Supreme Court observed that such regulation is part of the “police power, . . . an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people.” *Home Bldg. Ass’n*, 290 U.S. at 437; accord, e.g., *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 233 (1945) (upholding a state moratorium on mortgage foreclosures as within “the reserve power of a State”). Unsurprisingly, then, the federal government has never before invoked its commerce power to impose a nationwide eviction moratorium. Hr’g Tr. at 52:3-7, 55:9-14 (government’s admission). Nor has the court’s attention been called to a longstanding analogous use of federal power.

Although not cited by the parties, one possible contender might be the rent-control provisions of the Emergency Price Control Act of 1942, which the Supreme Court considered in *Bowles v. Willingham*, 321 U.S. 503 (1944). But unlike the order here, that Act addressed commercial relations by regulating rental prices and, being applicable only in “defense areas,” was premised on Congress’s powers regarding the military. *Id.* at 506-08. See generally *United States v. Kebodeaux*, 570 U.S. 387, 403 (2013) (Roberts, C.J., concurring) (noting that a challenged law’s “connection to the Military Regulation Clause . . . is less attenuated, and the power it produces less substantial, than would be true of a federal police power”).

The absence of an historical analog here calls to mind the Supreme Court’s instruction that “[p]erhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent.” *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010) (cleaned up). Similarly, the Necessary and Proper Clause inquiry asks whether a challenged law is “a modest addition to a set of federal . . . statutes that have

existed for many decades” or “reasonably extended [a] longstanding [] system.” *Comstock*, 560 U.S. at 137, 142. Here, no historical practice of analogous federal regulation has been cited. *See generally Corona*, 108 F.3d at 569 (asking whether, like “the statute in *Lopez*, [the challenged law] imposes a criminal penalty in an area that has been the domain of state jurisprudence throughout our history”). Indeed, the CDC’s eviction moratorium goes beyond the CARES Act’s moratorium responding to the same COVID-19 pandemic, which was limited to dwellings that received federal funding. *See* 15 U.S.C. § 9058(2).

As to the broader implications of the government’s arguments, they too suggest a breakdown in the demarcation of traditional areas of state concern. While valid federal law is of course supreme, a court assessing a law’s validity under the Commerce Clause may not “pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Lopez*, 514 U.S. at 567.

That sort of inference has been offered here. For instance, the government’s briefing argued that evictions covered by the CDC order may be rationally viewed as substantially affecting interstate commerce because 15% of changes in residence each year are between States. Doc. 11 at 19 (citing 85 Fed. Reg. at 55,295). Of course, people change residences for many reasons other than eviction. So that statistic does not readily bear on the effects of the eviction moratorium here. More fundamentally, that statistic does not show a meaningful link between the eviction moratorium and a broader federal regulation of interstate commerce. The focus of the challenged order is people moving into congregate housing, irrespective of whether those moves are between or within States. The incidental fact that some moves are between States, while the bulk are not, does not show that the order is an “appropriate means to the attainment of a legitimate end, the

effective execution of the granted power to regulate interstate commerce.” *Wrightwood Dairy*, 315 U.S. at 119.

If statistics like that were enough, Congress could also justify national marriage and divorce laws, as similar incidental effects on interstate commerce exist in that field. The same census data cited by the government here show that changes in marital status result in almost ten times more residential moves than do evictions and foreclosures. U.S. Census Bureau, *CPS Historical Migration/Geographic Mobility Tables*, Table A-5, cells C9, P9 (Dec. 2020), *available at* www.census.gov/data/tables/time-series/demo/geographic-mobility/historic.html (showing, for the most recent study period, 1,827,000 moves because of a change in marital status compared to 190,000 moves because of eviction or foreclosure); *see* 86 Fed. Reg. at 8,023 n.24 (citing same mobility tables).

In other words, the government’s cited data show almost ten times more changes in residence—the same 15% of which the government says cross state lines—from marriage and divorce than from eviction and foreclosure. So the government’s argument about predicted effects on interstate travel would support federal regulation of marriage and divorce even more strongly than it supports the eviction moratorium here. But the Supreme Court has found a link between local activity and interstate commerce too attenuated when the same link “may . . . be applied equally as well to family law and other areas of traditional state regulation.” *Morrison*, 529 U.S. at 615.

Finally, the government concedes that its view of constitutional authority would allow a federal eviction moratorium for any reason, including views on “fairness.” Hr’g Tr. at 56:11-21, 55:18-25. The government’s argument would thus allow a nationwide eviction moratorium long after the COVID-19 pandemic ends. The eviction remedy could be suspended at any time based on fairness as perceived by Congress or perhaps an agency official delegated that judgment. Such broad

authority over state remedies begins to resemble, in operation, a prohibited federal police power.

As Justice Kennedy explained in his *Lopez* concurrence: “In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.” 514 U.S. at 580, *quoted in Morrison*, 529 U.S. at 611. The court reaches a similar conclusion here. The considerations discussed in the governing cases point to the same conclusion: the CDC order exceeds the power granted to the federal government to “regulate Commerce . . . among the several States” and to “make all Laws which shall be necessary and proper for carrying into Execution” that power. U.S. Const. art. I, § 8. The challenged order is therefore held unlawful as “contrary to constitutional . . . power.” 5 U.S.C. § 706(2)(B).

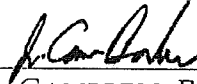
Conclusion

Because the remaining plaintiffs are entitled to judgment as a matter of law, the court enters summary judgment granting declaratory relief in their favor. Although the COVID-19 pandemic persists, so does the Constitution. Declaring the scope of constitutional power is thus proper relief, and a federal court with jurisdiction has a “virtually unflagging obligation . . . to exercise that authority” to resolve a case before it. *Mata v. Lynch*, 576 U.S. 143, 150 (2015) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)) (cleaned up).

Given defendants’ representations to the court, Hr’g Tr. at 77:8-12, it is “anticipated that [defendants] would respect the declaratory judgment.” *Poe v. Gerstein*, 417 U.S. 281, 281 (1974). So the court chooses not to issue an injunction at this time. *See Morrow v. Harwell*, 768 F.2d 619, 627 (5th Cir. 1985). Plaintiffs may, of course, seek an injunction should defendants threaten to depart from the declaratory judgment. *See* 28 U.S.C. § 2202; *Powell v. McCormack*, 395 U.S. 486, 499 (1969).

Any pending motion is denied without prejudice as moot.
Final judgment will issue forthwith.

So ordered by the court on February 25, 2021.

A handwritten signature in black ink, appearing to read "J. Campbell Barker", is written over a horizontal line.

J. CAMPBELL BARKER
United States District Judge