No. 21-30037

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs – Appellants,

v.

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

Defendants – Appellees.

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

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Certificate of Interested Persons

No. 21-30037, *Chambless Enterprises, L.L.C. v. Walensky*

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

1. Acadiana Legal Service Corporation, Amicus Curiae
2. Alker & Rather, LLC, Law firm for Plaintiffs-Appellants
3. American Academy of Pediatrics, Amicus Curiae
4. American Medical Association, Amicus Curiae
5. Apartment Association of Louisiana, Inc. (AAL), Plaintiff-Appellant
6. Benfer, Emily A., Amicus Curiae and Counsel for Amici Curiae
7. Berger, Sherri, Defendant-Appellee
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9. Chambless Enterprises, L.L.C., Plaintiff-Appellant
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11. Children's Healthwatch, Amicus Curiae
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13. Desmond, Matthew, Amicus Curiae
14. Doughty, Terry A., U.S. District Court Judge
15. Esponge, Tammy, Association Executive for AAL
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17. George Consortium, Amicus Curiae
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19. Gonsalves, Gregg, Amicus Curiae
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22. Hepburn, Peter, Amicus Curiae
23. Keene, Danya A., Amicus Curiae
24. Leifheit, Kathryn M., Amicus Curiae
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In accordance with Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the named Appellants have

any parent corporation and that no publicly held corporation owns 10% or more of their stock.

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

s/ Luke A. Wake
Luke A. Wake
Attorney of Record for Chambless Enterprises, L.L.C., and Apartment Association of Louisiana, Inc.

Statement Regarding Oral Argument

Appellants respectfully request oral argument. Oral argument would be helpful because it would allow the Court to clarify issues of statutory construction, background principles of administrative law, and the Supreme Court's non-delegation doctrine in resolving the difficult and profoundly important issues presented.

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Introduction

Since September 2020, the Centers for Disease Control and Prevention (CDC) has imposed a nationwide eviction moratorium that abrogates the rights of landlords throughout the country. Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020); 86 Fed. Reg. 8020 (Feb. 3, 2021). The Government maintains that the CDC has authority for this moratorium under the Public Health Service Act (PHSA), 42 U.S.C. § 264(a)—a statute that confers what Congress referred to as "conventional" disease control measures to prevent cross-border transmission of disease. H.R. Rep. No. 78-1364, at 24-25 (1944).

Under the Government's interpretation, the CDC's power to limit human interaction would be limitless, as virtually any interaction can transmit disease and be traced ultimately to someone crossing states lines. But Congress did not convey such unbounded power to the CDC, and it could not have without violating the non-delegation doctrine. The District Court nonetheless concluded that the CDC was acting within its authority and denied Appellants' request for a preliminary injunction. This Court should reverse that judgment.

Jurisdictional Statement

This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702 because Plaintiffs seek to preliminarily enjoin the enforcement of the CDC's eviction moratorium adopted pursuant to Section 361 of the PHSA (42 U.S.C. § 264(a)), and 42 C.F.R. § 70.2. *See* 85 Fed. Reg. 55,292 (Sept. 4, 2020); 86 Fed. Reg. 8020 (Feb. 3, 2021). This Court has jurisdiction to hear this interlocutory appeal under 28 U.S.C. § 1292(a)(1). Plaintiffs filed a timely notice of appeal. ROA.008.

Statement of the Issue Presented

Whether Appellants are likely to prevail on the merits and are entitled to a preliminary injunction enjoining enforcement of the CDC's eviction moratorium.

Statement of the Case

On September 4, 2020, the CDC imposed a nationwide ban on evictions, purporting to exercise sweeping powers under the PHSA. 85 Fed. Reg. 55,292. The CDC prohibited landlords from taking any action to evict qualifying residential tenants through December 31, 2020, within any jurisdiction that failed to impose an equally broad eviction moratorium. *Id.* at 55,296. Landlords who violated the moratorium order

faced criminal penalties of up to $100,000, up to a year in jail, or both. *Id*. For organizational landlords, fines would go up to $200,000 per event. *Id*.

To qualify for the moratorium, tenants need only execute a "Renter's or Homeowner's Declaration" stating that: (1) they have used best efforts to obtain government housing assistance; (2) they make less than $99,000 annually ($198,000 if filing jointly); (3) they are unable to pay full rent due to a substantial loss of income, a lay-off, or extraordinary medical expenses; (4) they have used their best efforts to make partial rent payments; and (5) if evicted, they are likely to be rendered homeless or have to live in close quarters with others. 86 Fed. Reg. at 8020-21.

Chambless Enterprises, L.L.C., has non-paying tenants whom it would like to evict but cannot. ROA.045. Chambless sought to evict one of its non-paying tenants in September 2020; however, the Louisiana state court refused to issue a writ to compel eviction because the tenant submitted a Renter's Declaration. *Id*. Chambless cannot evict any other non-paying tenant who has signed a Renter's Declaration. *Id*. The Apartment Association of Louisiana, Inc. (AAL) represents over 376 landlords that own and rent approximately 118,000 units. ROA.055.

Many of these members cannot evict because tenants have submitted Renter's Declarations. ROA.056.

Plaintiffs filed a complaint and motion for preliminary injunction on November 12, 2020. ROA.001. On December 22, 2020, the Western District of Louisiana ruled that Plaintiffs were unlikely to prevail on the merits and had failed to satisfy the other requirements for a preliminary injunction. Plaintiffs appeal that judgment. ROA.012.

Since the decision below, the President signed a bill that imposed a one-month national eviction moratorium of identical scope and substance as the CDC's eviction moratorium. ROA.059. As the statutory eviction moratorium was set to expire on January 31, 2021, the CDC renewed its eviction moratorium order, 86 Fed. Reg. 8020 (Feb. 3, 2021), to prohibit evictions through March 31, 2021. A contemplated order to further extend the eviction moratorium is currently under review. *See* RIN: 0920-ZA17, Office of Information and Regulatory Affairs, Office of Management and Budget (Mar. 18, 2021).[1]

[1] https://www.reginfo.gov/public/do/eoDetails?rrid=156265&source=email

Standard of Review

The preliminary injunction elements are "mixed questions of fact and law," for which the Court of Appeals is deferential only on factual findings. *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 463 (5th Cir. 2003). While "[t]he ultimate decision for or against issuing a preliminary injunction is reviewed under an abuse of discretion standard[,]" conclusions of law are reviewed *de novo*. *Id.*

Summary of the Argument

The PHSA provides the CDC with authority to pursue conventional disease control measures to control the spread of contagious disease across state lines. For example, 42 U.S.C. § 264(a) authorizes the CDC to fumigate railcars crossing state lines, to disinfect an airport terminal where there has been an exposure, or to take other similar measures to prevent interstate transmission. But, the Government contends that this provision confers a far more expansive authority—a sweeping power to impose regulations limiting private conduct in whatever manner the CDC Director deems necessary. Under the Government's interpretation, the CDC can regulate any conduct where individuals may come within near proximity. Indeed, the Government has never disputed Appellants'

repeated concern that the Government's interpretation would allow the CDC to impose any of the extraordinary measures taken by governors and state legislatures to contain the pandemic—or to reimpose such measures after they are lifted.

But the plain meaning of the statute does not support the Government's statutory interpretation. Moreover, the Government's construction must be rejected because it violates settled canons of statutory construction—not least the constitutional-avoidance canon and the federalism canon, which require a narrowing construction to avoid encroachment into areas of traditional state concern in the absence of clear congressional intent. Yet, if the statute truly confers boundless authority to regulate virtually every human interaction, whenever the CDC deems such action necessary, then Subsection 264(a) violates the non-delegation doctrine for lack of an intelligible principle.

The CDC also violated the Administrative Procedure Act in two ways. First, because the CDC's Order is clearly a legislative rule, the agency should have promulgated it through the notice and comment procedure. Second, the moratorium is arbitrary and capricious because the CDC examined only one aspect of the problem and failed even to

consider any evidence that the moratorium might have unintended consequences. Also, the CDC has proceeded without any objective standard guiding its decisions to extend the moratorium.

If this Court agrees that the CDC's eviction moratorium is unlawful, it should issue a preliminary injunction. Appellants suffer irreparable injury simply by being subjected to unlawful federal action, as they face ruinous fines and criminal liability if they exercise their rights under state law. There is also irreparable harm because the moratorium abrogates the right to control Appellants' properties and because Appellants cannot remedy their harm through damages. Finally, it is always in the public interest to strictly enforce separation of powers.

Argument

Appellants are entitled to a preliminary injunction because: (1) they are likely to prevail on the merits; (2) they are suffering irreparable harm; and (3) the balance of equities and public interest weigh in favor of a preliminary injunction.[2]

[2] Due to the timing and the unique nature of this case, Appellants respectfully urge the Court to rule on all four prongs to give clarity to the District Court, so as to provide for prompt resolution of the merits on remand.

I. Appellants Are Likely to Prevail on the Merits

A. The Order Exceeds the CDC's Statutory Authority.

Agency actions "must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Here, the CDC Order exceeds the authority granted by 42 U.S.C. § 264 and 42 C.F.R. § 70.2. These provisions authorize the CDC to do what anyone might expect a federal disease-prevention-and-control agency to do: control the interstate spread of disease by conventional means, such as disinfection, fumigation, and pest extermination at specific locations deemed to pose a risk of disease transmission. Two federal district courts have recently held that the statute does not authorize an action as extraordinary and unexpected as a nationwide ban on evictions. *See Tiger Lily, LLC v. United States Dep't of Housing and Urban Development*, No. 2:20-cv-02692-MSN-atc (W.D. Tenn. Mar. 15, 2021); *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, No. 5:20-cv-2407, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021).

Section 264(a) authorizes the Secretary of Health and Human Services (HHS) to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of

communicable diseases" from foreign countries or between states. The Secretary exercised this authority in promulgating 42 C.F.R. § 70.2.

The statute then elaborates on permissible measures in carrying out the regulations promulgated under the statute:

> 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). 42 C.F.R. § 70.2 largely tracks the statute:

> 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.

The Secretary cannot grant the CDC more authority than Congress granted to him, for an administrative agency "literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The relevant question is

therefore whether the language in the statute authorizes the CDC to enact a nationwide eviction moratorium. As the federal district courts *in Tiger Lily* and *Skyworks* forcefully established, the answer is "no."

The *Skyworks* court explained that while the first sentence in 42 U.S.C. § 264(a) grants broad discretion in crafting regulations, it "does not stand alone, [and the] 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." 2021 WL 911720, at *9. While the *Skyworks* court acknowledged that the phrase "other measures, as in his judgment may be necessary" indicated a non-exhaustive list, the CDC cannot "divorce them from their context and take them in isolation without regard to what came before." *Id.* at *10. *See also Tiger Lily*, slip op. at 13 ("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. These measures do not include moratoria on evictions." (citation omitted)).

If it were otherwise, the CDC would possess the authority to take actions that would render the other measures listed in the regulation and

statute—inspection, disinfection, fumigation, and the like—superfluous. *See Tiger Lily*, slip op. at 14 (stressing that the government's interpretation would render the enumerated list "superfluous or surplusage which must be resisted"). It would also mean the CDC possessed the breathtakingly broad authority to control virtually any action taken by private parties or state and local governments that could in some way contribute to the spread of disease. Indeed, the CDC could, under its view of the statute, reverse the will of every governor and state legislature who has lifted lockdowns and impose a federal edict reinstating those police power actions. *See* 2021 WL 911720, at *10 ("Such a broad reading of the statute . . . would authorize action with few, if any, limits—tantamount to creating a general federal police power."). The Government has not once denied that this is the necessary implication of its position. Neither the statute nor the regulation can bear such a brazen interpretation of federal agency power.

As the Supreme Court has said, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). A close look at the statute and regulation confirm that there are no elephants in sight.

1. The statute and regulation authorize conventional, site-specific disease-control measures, not nationwide mandates with tangential effects on disease transmission.

The canons of statutory construction illustrate that the *Skyworks* and *Tiger Lily* courts adopted the correct reading of the statute. Under the interpretive canon, ejusdem generis, a general term following an enumerated list is limited to those things related in kind to the list: "[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 223 (2008) (quoting *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991)). The rationale behind the rule is that "Congress remained focused on the common attribute when it used the catchall phrase." *Id.* at 225. The canon applies with particular force to statutes imposing criminal penalties. *United States v. Kaluza*, 780 F.3d 647, 661 (5th Cir. 2015).

Similarly, under the canon noscitur a sociis, or the associated-words canon, words in a list are interpreted to have a similar meaning because they are associated in a similar context. *See Yates v. United States*, 574 U.S. 528, 544 (2015) (applying both noscitur a sociis and

ejusdem generis in the interpretation of a criminal statute). *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199-213, 107-11, 195-98, 93-100, 174-79 (Thompson/West 2012).

The Fifth Circuit has applied these canons to legal provisions that are similar to Sections 264(a) and 70.2. For instance, in *Kaluza*, 780 F.3d 647, the Fifth Circuit employed ejusdem generis in the Deepwater Horizon litigation to interpret the "seaman's manslaughter" statute, which applied to "[e]very captain, engineer, pilot, or other person employed on any steamboat or vessel." *Id.* at 657 (quoting 18 U.S.C. § 1115). The statutory question was whether the phrase "other person employed on any steamboat or vessel" included petroleum engineers tasked with preventing a well blowout. *Id.* at 656-57. Applying ejusdem generis, the court held that "other person," in light of the list preceding it, only included people responsible for the "marine operations, maintenance, or navigation of the vessel . . . in its function as . . . a means of transportation on water." *Id.* at 662; *see also Yates*, 574 U.S. at 544 ("'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."); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 115 (2001) ("contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" held to include only transportation workers in foreign or interstate commerce); *McBoyle v. United States*, 283 U.S. 25, 26-27 (1931) ("automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails" held not to apply to an airplane).

The lower court declined to apply these canons of construction on the theory that "there is no ambiguity to which they could be applied." ROA.025-27. Yet a court can only conclude a statute is ambiguous *after* employing the canons of construction. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (noting that, for both rules and statutes, ambiguity only arises "*after* a court has resorted to *all* the standard tools of interpretation" (emphasis added)); *id.* at 2415 ("[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction."); *Yates*, 574 U.S. at 537 (applying ejusdem generis

before determining whether the text was ambiguous); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (a statute is not ambiguous "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue"). The District Court should have employed these canons.

If the court had done so, it would have found that the second sentence of 42 U.S.C. 264(a) imposes important constraints. Section 264(a)'s list of express measures offers a window into the actions that Congress envisioned: "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 [the agency's] judgment may be necessary." 42 U.S.C. § 264(a). The "other measures," under ejusdem generis and noscitur a sociis, are limited to actions akin to the list that precedes it: conventional, localized disease-prevention measures targeting specific locations or articles and directly aimed at preventing interstate transmission, which do not involve substantial control over human activity. As the *Skyworks* court reasoned: "following the list of

examples provided, 'other measures' must be reasonably of the type contemplated in the statutory text—fumigation, disinfection, destruction of animals or things, or other measures reasonably of this type." *Skyworks*, 2021 WL 911720, at *10. *See also Tiger Lily*, slip op. at 14 ("If the Director were not limited in his or her authority, why list any specific examples of measures within that authority?"). These canons thus demonstrate that the CDC has overstepped its authority.

To be sure, the statute opens with broad language establishing that the Secretary may adopt regulations "as in his judgment are necessary to prevent" interstate spread of disease. 42 U.S.C. § 264(a). But the following sentence adds critical limiting language to that authority by listing the types of authorized agency actions. As the court in *Skyworks* court noted, the first sentence cannot be read in isolation because the limits imposed on the agency in the second sentence relate back to the grant of power in the first sentence. *See Skyworks*, 2021 WL 911720, at *9 ("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."). The type of

measures that can be taken informs the kind of regulations the agency may pursue and enforce.

The district court, however, erred by focusing on the first sentence in isolation from the critical clarifying language in the second sentence. According to the lower court, "Congress's use of the phrase 'such regulations as in his judgment are necessary' shows that it intended to defer to agency expertise." ROA.020. This might be a valid point if Appellants were challenging the regulation itself, 42 C.F.R. § 70.2, rather than a measure adopted pursuant to the regulation. But this phrase seized upon by the court has no bearing on the agency's authority to adopt measures applying such regulations, which is the authority at issue in this case. Agency actions in furtherance of regulations adopted under Section 264(a) are governed by the statutory grant of authority in the *second* sentence, not the first. Nor would the first sentence of 264(a) have any bearing on whether the CDC Order is ultra vires with respect to the regulation itself.

To the extent that the District Court did consider the second sentence, it wrongly read the list of expressly permitted measures as "underscor[ing] the breadth of this authority" rather than imposing a

contextual limit on the range of permissible agency actions. ROA.019-21. In so reading the statute, the District Court reversed the reasoning of longstanding canons of construction. Under canons such as ejusdem generis and noscitur a sociis, lists that precede a catch-all *limit* the scope of the catch-all phrase rather than "underscore the breadth of this authority" granted by the catch-all. *Id. See, e.g.*, *Yates*, 574 U.S. at 546; *Kaluza*, 780 F.3d at 662. Under the District Court's reasoning, the enumerated list means nothing; an outcome that applicable canons exist to avoid. *See Yates*, 574 U.S. at 546 ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless.") (quoting *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 295 (2011)).

The District Court wrongly derived its reading of Section 264(a)'s second sentence from *Independent Turtle Farmers of Louisiana v. United States*, 703 F. Supp. 2d 604 (W.D. La. 2010). But *Independent Turtle Farmers* involved a legal challenge to a *regulation* promulgated on the authority of the first sentence of Section 264(a), not a *measure* taken under the second sentence. *Id.* at 619. Indeed, the court in *Independent Turtle Farmers* expressly acknowledged that the second sentence "is not

phrased as a limitation upon the *type* of regulation that may be promulgated" and therefore the challenged regulation, unlike an order applying a regulation, was "not limited by" the second sentence. *Id.* at 620.

Nor does the interpretation of the second sentence by the court in *Independent Turtle Farmers* justify the lower court's interpretation of the statute. The court in *Independent Turtle Farmers* correctly held that the catch-all phrase in the second sentence "precludes interpretation of the list as exhaustive." *Id.* No one disputes that here—rather, Appellants simply argue that the enumerated list is not meaningless when seeking to understand "other measures," something *Independent Turtle Farmers* did not deny.

Considering the agency's authority in light of the enumerated list, "other measures" takes on a more limited and discernible meaning. First, all the measures listed involve conventional disease mitigation measures, such as the inspection and disinfection of train cars, the fumigation of an airport, or the destruction of contaminated livestock. The statute authorizes what a reasonable person would expect an organization like the CDC to do. *See Skyworks*, 2021 WL 911720, at *12

(CDC's actions here "might well surprise a member of the public who is not a lawyer"). Indeed, legislative history confirms this by noting that the legislation was intended to sanction "the use of *conventional* public-health enforcement methods." H.R. Rep. No. 78-1364, at 24-25 (1944) (emphasis added). Nothing in the list even hints at allowing the CDC to control the contractual relationships of millions of Americans, to say nothing of legal processes in every municipality in the nation.

If the statute authorizes such sweeping measures as a nationwide eviction ban, it is hard to imagine what the CDC cannot do. Almost every human activity—from gatherings, to vacations, to business meetings, to retail, and much more—carries some risk that people will transmit an infectious disease across state lines. If Congress had meant to grant such sweeping authority, it would have included in the list of measures something more than conventional methods for eliminating disease. Given the nature of the measures Congress did choose to include in the statute, courts should not conclude that a broad grant of authority was hidden in general language such as "other measures," for that would render the remainder of the statute meaningless surplusage. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion)

(stating that under the non-surplusage canon, "no provision should be construed to be entirely redundant"). *See also Yates*, 574 U.S. at 546 ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless." (quoting *CSX Transp., Inc.* 562 U.S. at 295)).

Second, the list contemplates actions limited to specific sites, objects, or animals that are suspected to be infected with a disease. Inspection, disinfection, fumigation, sanitation, and pest extermination all occur at particular locations with limited geographic scope. *See Skyworks*, 2021 WL 911720, at *9 ("[B]y their common meanings and understandings," the actions listed in the statute "are tied to specific, identifiable properties."). One does not sanitize a nation. And the list follows a logical progression, beginning with "inspection," indicating that some factual basis for believing that disease is actually present is incorporated into the actions that follow. This is affirmed by the phrase "found to be so infected or contaminated as to be sources of dangerous infection." 42 U.S.C. § 264(a). The targeted and fact-based nature of the items in the list supports the conclusion that Congress's intent was to authorize conventional, fact-based disease mitigation strategies, rather

than broad, prophylactic measures that control activities across the nation. Congress knows how to enact an eviction moratorium, as it did so in the CARES Act and again for the month of January in the 2021 Consolidated Appropriations Act. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 4024, 134 Stat. 281, 492-94 (2020); Consolidated Appropriations Act, 2021 Pub. L. No. 116-260, div. N, tit. V, § 502, 134 Stat. 1182, 2078-79 (2020). Given the limited nature of the items listed in section 264(a), it is inconceivable that Congress intended to hide such sweeping authority in "other measures."

Third, none of the listed items in Section 264(a) contemplate substantial control over human activity or property. Indeed, the only power to restrict human activity in Section 264 is contained in separate subsections and involves apprehension and detention of people who pose a transmission risk. *See* 42 U.S.C. § 264(b)-(d). Those sections place careful limits on HHS's authority to detain people. For example, the HHS must operate pursuant to an executive order, *id.* § 264(b), and the agency must make specific factual findings as to the particular detainee. *Id.* § 264(d). Nor do these sections contain a catch-all provision that leaves the scope of such authority to agency discretion. In short, when Congress

gave significant control to the HHS over the activities of individuals, that authority was limited in discretion it gave the agency, and it included significant protections for individual liberty.

Likewise, where Congress gave the HHS the authority to damage an individual's property in Section 264(a), it limited that authority to circumstances where the facts show a direct threat to human welfare. Thus, before the agency can undertake the "destruction of animals or articles," it must make a finding that the animals or objects are "so infected or contaminated as to be sources of dangerous infection to human beings." 42 U.S.C. § 264(a). This finding of high risk to health is not required for less intrusive actions, such as disinfection. The reason is easy to infer: destruction of livestock or goods is likely to have a greater impact on property interests than the other enumerated actions, so such action can only be taken if there is a clearer health risk.

The CDC Order makes no such finding. Instead, the CDC speculates that evictions could lead to homelessness, which could lead to increased risk of transmission, which might result in someone (someday) crossing a border who might pose a serious risk of infection. *See* 85 Fed. Reg. at 55,296 (speculating on "potentially" increased transmission if

evictions "potentially" increase in number). The CDC's sweeping assault on landlords' property interests, based only on conjecture, clashes with the statute's demanding standards of individualized evidence when imposing burdens on property and liberty interests.

Fourth, the statute authorizes actions directly connected to "prevent[ing] the introduction, transmission, or spread of communicable diseases" from foreign countries or between states. *See* 42 U.S.C. § 264(a). The authority granted to the agency does not include regulation of intrastate activity, such as eviction proceedings, that bear only a tenuous and speculative connection to interstate transmission of disease.

If the CDC can regulate wholly intrastate activity like an eviction proceeding on the speculation that it might prompt an individual to move out of state, then any human activity, however attenuated, would fall within the CDC's regulatory crosshairs, a conclusion that the Government has never disputed. *See Skyworks*, 2021 WL 911720, at *10 ("Such a broad reading of the statute . . . would authorize action with few, if any, limits—tantamount to creating a general federal police power."). This would, in turn, render the statute's focus on cross-border transmission pointless surplusage. *See United States v. Butler*, 297 U.S.

1, 65 (1936) ("These words cannot be meaningless, else they would not have been used."). The CDC's action—banning evictions nationwide—is not related in kind to the list of actions permitted under the statute or regulation. It does not fit within a conventional understanding of typical disease control measures. It is a sweeping, nationwide action, not limited to specific hot spots. It is not aimed directly at the prevention of disease—rather, it deals with matters that are several causal steps removed from disease transmission. And, unlike the traditional disease mitigation measures listed, the CDC order is a breathtaking exercise of control over human activity. Given how far removed the CDC's action is from the list of activities contemplated by Congress, the CDC Order cannot be authorized by the statute.

The District Court once again looked to *Independent Turtle Farmers* in reading "other measures" broadly to include drastic actions to constrain conduct with only a tenuous relationship to disease prevention. Yet the regulation at issue in *Independent Turtle Farmers* was much more akin to the items in the enumerated list than the CDC Order. In *Independent Turtle Farmers*, 703 F. Supp. 2d at 607, the FDA adopted a regulation banning sale of baby turtles due to risk of salmonella

contamination. The regulation did not thwart rights in real property, did not meddle with a massive swath of American economic life, and was closely related to the express allowance for destruction of infected animals.

The District Court made another critical misstep by reading a power to detain individuals into Section 264(a) in order to further justify a broad reading of "other measures." ROA.023-25. But it is not Subsection (a) that authorizes the power to detain—that is what Subsection (b) does. Section 264(b) states that the statute does *not* allow for detention except under the carefully prescribed rules established in Subsection (b). Thus, Subsection (b) *creates* a limited power to detain, and the phrasing makes clear that the preceding subsection contemplates no such power. The regulations implementing Section 264 underscore this reading; the power to detain is dealt with in a separate regulation from the power to adopt "other measures" pursuant to Section 264(a), indicating that "other measures" does not encompass a detention authority. *Compare* 42 C.F.R. § 70.2 *with* 42 C.F.R. § 70.6.

The District Court should have employed well-recognized canons of construction to reach the common-sense conclusion that Congress, in

giving federal agencies the authority to fumigate train cars and disinfect airports, did not think it was authorizing the CDC to suspend state statutes across the nation.

2. Interpretive presumptions regarding congressional intent demonstrate that the CDC order exceeds statutory parameters.

Courts employ various canons of construction to avoid imputing to Congress intentions that may clash with important policy or legal standards unless Congress has spoken clearly. These include the constitutional-avoidance canon, the federalism canon, and the rule of lenity. Here, all three canons favor a reading of the statute that would not authorize the sweeping power wielded by the CDC.

i. This Court should avoid the CDC's audacious reading of the statute to avoid serious constitutional concerns.

Courts must prefer a plausible reading of a statute that avoids serious constitutional concerns. This "cardinal principle" applies "if a serious doubt of constitutionality is raised," requiring the court to "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of*

Engineers, 531 U.S. 159, 174 (2001) (explaining that when an agency interpretation of a statute raises serious constitutional questions, the Supreme Court expects to find a "clear statement from Congress" supporting the interpretation). This canon was recently employed to narrow the neighboring statutory provision in 42 U.S.C. § 265, rejecting a "breathtakingly broad" interpretation of the CDC's authority over non-citizens because the interpretation "would raise serious constitutional issues." *P.J.E.S. ex rel. Escobar Francisco v. Wolf*, No. 1:20-cv-2245, 2020 WL 6770508, at *30 (D.D.C. Nov. 18, 2020).

The court below did not employ the avoidance canon because the court considered the statute unambiguous. *See* ROA.025-27. But the canon applies so long as there is more than one plausible reading of the statute. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). Appellants have already demonstrated above how a narrower reading of the statute meets this plausibility standard.

Here, as discussed above, any reading of the statute that would authorize a nationwide ban on evictions would place no meaningful limits or guidance on what "other measures" the CDC might deem necessary to prevent transmission of disease state-to-state. This interpretation would

raise serious constitutional concerns under the non-delegation doctrine, the Commerce Clause, and the Tenth Amendment.

The non-delegation issue is discussed at length in subsection B, below, but it merits a summary here. A non-delegation concern arises because a broad reading of the statute leaves it without any intelligible principle to guide the agency's discretion. If the statute allows the CDC eviction moratorium, then it effectively would allow any action that the agency may consider to be necessary in its "judgment" to prevent transmission of communicable disease. As the court in *Skyworks* noted, such a reading "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." 2021 WL 911720, at *9. Since disease transmission is an ever-present risk, the CDC's interpretation offers no guidance to the exercise of agency authority—effectively delegating the legislative power reserved to Congress under Article I of the Constitution to the HHS and the CDC. The Court should opt for a narrower reading of the statute to evade the serious constitutional question raised by the CDC's interpretation.

For similar reasons, the Government's interpretation raises Commerce Clause concerns. Indeed, the United States District Court for the Eastern District of Texas recently held that the CDC Order violated the Commerce Clause. *Terkel v. Centers for Disease Control and Prevention*, No. 6:20-cv-00564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021). Although Congress can regulate intrastate economic activity that substantially affects interstate commerce, *see United States v. Morrison*, 529 U.S. 598, 610 (2000), the state court eviction process is not economic activity within the meaning of the Commerce Clause, such as "the production, distribution, and consumption of commodities." *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (citation omitted). While a person's occupancy of a home "may have a commercial origin, that alone is not enough to make the regulated activity itself economic in character." *Terkel*, 2021 WL 742877, at *6.

The Supreme Court has repeatedly held that the Commerce Clause does not create a federal police power. *See United States v. Lopez*, 514 U.S. 549, 567 (1995). Yet Section 264(a), if read broadly enough to allow the CDC to impose an eviction moratorium, would effectively allow the CDC to adopt any of the measures that state governors and legislatures

have adopted to fight the pandemic—from eviction bans, to business closures, to limits on church and social gatherings. In short, the statute as interpreted by the CDC would create a federal police power, allowing a federal agency to control activity on a nationwide basis, however distant its impact on interstate commerce. *See Skyworks*, 2021 WL 911720, at *10 (CDC's reading of the statute would be "tantamount to creating a general federal police power").

Such a federal police power would likewise run afoul of the Tenth Amendment, which provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The states thus "retain a significant measure of sovereign authority to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *New York v. United States*, 505 U.S. 144, 156 (1992) (cleaned up) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)). The police power is the most fundamental reservation of all, intended to allow for more accountable and localized exercise of authority to watch after the common welfare: "Because the police power is controlled by 50

different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *NFIB v. Sebelius*, 567 U.S. 519, 536 (2012). The statute should not be read to grant the CDC a roving authority to override the localized model of governance built into our constitutional structure.

This Court need not even decide the merits of these constitutional questions to apply the constitutional avoidance doctrine. It suffices that the doubts raised as to the constitutionality of a particular interpretation are "substantial." Scalia & Garner, *supra* § 38 (quoting William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L. Rev. 831, 871 (2001)). One federal court has held that the CDC's action violates the Constitution, *see Terkel*, 2021 WL 742877, while two federal district courts have voiced concern that the CDC's reading of the statute would violate the non-delegation doctrine. *See Tiger Lily*, slip op. at 19-20; *Skyworks*, 2021 WL 911720, at *9. The constitutional concerns with a broad reading of the statute are more than substantial.

ii. The statute contains no clear intent to alter the state-federal balance.

Federal courts presume that Congress did not intend to step into traditional areas of state concern unless Congress says so in unmistakably clear terms: "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *United States Forest Service v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849-50 (2020); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the 'usual balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'") (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). Where a court faces competing "plausible interpretations" of a statute, "the proper course [is] to adopt a construction which maintains the existing balance" between "federal and state power[ ]," "absent a clear indication of Congress' intent to change the balance." *Salinas v. United States*, 522 U.S. 52, 59 (1997).

Here, the use of state legal proceedings to enforce private property rights and contractual remedies falls within an area of traditional state

concern. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1934) (describing foreclosure remedies bearing on contract and property rights as within the traditional police powers of the state). The statute states that the CDC may prevent disease through conventional disease control measures. There is not a whisper about congressional intent to exercise control over state contractual or property law in general or state landlord-tenant law.

The District Court denied that the CDC Order alters the balance between the states and the federal government. *See* ROA.026-27. The court did not contest that contract and property law lie within the realm of traditional state concern—rather the Court stated that the "Order simply puts into play the settled constitutional principle that federal law preempts contrary state law." ROA.026. No one disputes that Congress is capable of legislating in traditional areas of state concern or even overriding state statutes; the dispute is over whether Congress has done so here. In fact, federal preemption is the very reason courts hesitate to interpret uncertain language as overriding state prerogatives.

The District Court also argued that the federalism canon is not implicated because "the Order does not alter existing state law, but only

pauses the ultimate execution of one remedy for breach of a rental agreement when certain other conditions are met." *Id.* But the forced suspension of state statutory remedies even for a temporary period defies the expedited timeframe for eviction offered by state unlawful detainer statutes. There is no question that Appellants in this matter, as well as landlords across the country, would be able to avail themselves of state statutory remedies but for the CDC Order. And even a temporary suspension of state law by the federal government constitutes an exercise of federal power over areas of traditional state concern, with no discernible limiting principle. *See Terkel*, 2021 WL 742877, at *9 ("As to the broader implications of the government's arguments, they too suggest a breakdown in the demarcation of traditional areas of state concern."). Moreover, as the *Skyworks* court noted, the CDC's reading of its statutory authority, if accepted, would amount to a "general federal police power," 2021 WL 911720, at *10, which would transform the federal-state balance. *See Lopez*, 514 U.S. at 567-68 (accepting a general federal police power would obliterate the "distinction between what is truly national and what is truly local").

iii. The rule of lenity favors a narrower reading than the CDC's aggressive interpretation of its power.

The rule of lenity is a "venerable rule" designed to protect citizens from being "held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008). The rule therefore requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates*, 574 U.S. at 528, 544, 547-48 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). The CDC's interpretation of Sections 264(a) and 70.2 trigger lenity because that interpretation creates an ambiguity in the statute that HHS or the CDC are then entitled to fill with whatever measures these agencies believe might prevent the spread of disease. As noted, above, this would not just be limited to an eviction moratorium but would cover virtually anything that might help prevent the spread of COVID-19 or any other disease. Those in the position of Appellants would face criminal liability based on nothing more than the Government's ad hoc interpretation of these provisions. The rule of lenity does not permit such a flexible and wide-ranging interpretation of criminal laws. As the Supreme Court has

stated, "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014).

3. The Consolidated Appropriations Act did not ratify the CDC Order or grant the CDC power to impose an eviction moratorium.

The Government is likely to argue that the 2021 Consolidated Appropriations Act, legislatively adopting the CDC's eviction moratorium for the month of January 2021, ratified the CDC's Order. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N., tit. V, § 502, 134 Stat. at 2078-79. But Congress did not offer an ongoing ratification to CDC's actions simply by imposing a one-month moratorium. If anything, the fact that Congress felt a need to take direct action in this manner indicates that, at least in Congress' mind, the statute relied upon by the CDC did not authorize the CDC's Order. Otherwise, further action by Congress would have been redundant.

Congress can render at least some prior executive actions lawful by expressly approving what has already taken place, but only if Congress's intent to ratify what an agency has already done is explicit. *See United States v. Heinszen*, 206 U.S. 370, 389 (1907). Courts should hesitate to find ratification, moreover, where the agency has undertaken an action

of great economic or political significance. Ratification exists to deal with "slight technical defect[s]," *Forbes Pioneer Boat Line v. Board of Comm'rs of Everglades Drainage Dist.*, 258 U.S. 338, 339 (1922), so that the government is not "defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." *Graham v. Goodcell*, 282 U.S. 409, 430 (1931) (quoting *Charlotte Harbor & Northern Railway Co. v. Welles*, 260 U.S. 8, 11-12 (1922)). Here, the Appropriations Act says nothing about congressional approval of what the CDC had already done or might do in the future. Instead, it simply extended the Order with no further commentary, and only through the month of January. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N., tit. V, § 502, 134 Stat. at 2078-79 (stating that the CDC's Order "is extended through January 31, 2021, notwithstanding the effective dates specified in such Order"). There is nothing on the face of the law that suggests ratification. It is simply a new law that imposes a one-month moratorium. This does not rise to the level of express clarity that can trigger a valid ratification.

Moreover, the agency action here is far more audacious than a "slight technical defect," *Forbes*, 258 U.S. at 339, such as a tax collected

after a limitations period. *See Graham*, 282 U.S. at 414-18. This is a total national preemption of state eviction laws for an undefined period, with serious consequences for landlord property rights across the country and the national housing industry. While the parties disagree about the justification for such drastic action, there is no question that it has deep economic and political significance for the nation. Such a rule cannot be ratified by implication.

But even if this Court were to conclude that the Appropriations Act ratified the CDC's September 2020 Order, such ratification of past action has no bearing on the CDC's actions after the Order expired. Congress has taken no action to ratify the CDC's current order extending beyond Congress's express intent to end its own moratorium. A ratification of the CDC's original Order, if it had occurred, would have granted congressional approval to not only the Order but also the moratorium's original expiration date. In other words, the Appropriations Act would have approved ending the moratorium in December 2020, and the CDC's extension of that Order would defy Congress' will in ratifying the original Order.

B. If the Government's Interpretation Is the Only Acceptable Interpretation of the Statute, Then the Statute Violates the Non-Delegation Doctrine.

Article I of the United States Constitution vests "[a]ll legislative Powers" in Congress. U.S. Const. art. I, § 1. This assignment implies a "bar on [the legislative power's] further delegation." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). Statutes that grant too much discretion to agencies tasked with enforcing them effectively hand the task of lawmaking to the agency. Hence, statutes must contain "an intelligible principle to guide the delegee's use of discretion." *Id.*

Congress can authorize executive officers and agencies to determine facts and can delegate "the duty to carry out the declared legislative policy." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 426 (1935). Congress cannot, however, "[leave] the matter to the [executive] without standard or rule, to be dealt with as he please[s]." *Id.* at 418. For instance, in *Panama Refining*, the Supreme Court struck down a statute granting the President authority to outlaw the transportation of excess oil without providing "definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430. Similarly, in *A.L.A Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38

(1935), the Court struck down a statute enabling the President to approve codes of fair competition, leaving him free to "exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable."

If the Government's reading of the statute is correct, then it grants even broader discretion than the statutes in *Panama Refining* and *Schechter*. Almost any activity that causes people to come into close proximity to each other can contribute to the introduction, transmission, or spread of communicable disease, which, in turn, can then travel easily across borders. If the CDC's interpretation is correct, then it has the ability to regulate, control, or outlaw any such activity, which is to say that the CDC possesses the limitless discretion to make law concerning any of the wide range of activities that could conceivably lead to the transmission of disease in the United States. The Government has never disputed that this roving discretion is the logical end point of its interpretation.

The fathomless scope of the statute under the Government's interpretation is exacerbated by the statute's failure to define "communicable disease." *See* 42 U.S.C. § 264. Communicable diseases, from the common cold to conjunctivitis, are always with us. Yet the

statute does not limit itself to uncommon or particularly virulent or dangerous diseases. As a result, any activity that may end up passing the sniffles from one person to another would appear to fit within the agency's discretion to regulate.

Further, the statute does not limit the agency's authority to times of emergency, such as an outbreak or epidemic. Rather, the agency has authority to limit spread where no clear danger of a serious epidemic exists. Since the risk of disease transmission never sleeps, the statute appears to give the agency extraordinary authority to wield however it wants, whenever it wants. The result is an ever-ready font of power that the CDC may draw from at will.

This reading of the statute goes far beyond determining facts or carrying out an articulated legislative policy. The statute does not, for instance, give the agency instructions on what to do should a certain set of circumstances arise, leaving the agency to decide when those circumstances eventuate. Rather, it fails to limit the factual conditions under which the authority can be exercised, since transmission of communicable disease is an ever-present risk, and it offers no guidance

on the nature of actions that can be taken when factual conditions are met, leaving that to the agency's "judgment." *Id*.

Consequently, the statute, under the CDC's reading, delegates "an unfettered discretion to make whatever laws [the agency] thinks may be needed or advisable." *Schechter*, 295 U.S. at 537-38. The statute would allow the agency to shut down widespread and commonplace activity at any time, given that communicable disease is always lurking, however small the risk or minor the disease. *See Tiger Lily*, slip op. at 16 (The enumerated list limits "other measures," "without which Congress' delegation of authority in this instance would be too broad to withstand constitutional scrutiny."); *Skyworks*, 2021 WL 911720, at *9 (If the statute "sweeps [as] broadly" as the government urges, then the statute "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.").

The statute's lack of specific standards by which to guide the agency is all the more troubling given the extraordinary scope of power the Government's interpretation assumes and the criminal sanctions the eviction moratorium imposes. *See Whitman v. Am. Trucking Ass'ns, Inc.*,

531 U.S. 457, 475 (2001) (stating that "the degree of agency discretion that is acceptable varies according to the scope of the power . . . conferred"); *Synar v. United States*, 626 F. Supp. 1374, 1386 (D.D.C. 1986) (stating that where the scope of power "increases to immense proportions (as in *Schechter*) the standards must be correspondingly more precise"); *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring in the result) (stating that courts should exercise less tolerance for nebulous grants of power "when the regulation invokes criminal sanctions and potentially affects fundamental rights"); *In re Certified Questions From U.S. Dist. Ct., West. Dist. of Mich., Southern Div.*, No. 161492, 2020 WL 5877599, at *15 (Mich. Oct. 2, 2020) (striking down legislative delegation of emergency powers to a governor in part because of the breadth of the power delegated, which granted "power to reorder social life and to limit, if not altogether displace, the livelihoods of residents across the state and throughout wide-ranging industries").

Indeed, the statute here, as understood by the Government, offers *less* guidance to the CDC than the statute at issue in *Schechter* offered to the President. The National Industrial Recovery Act authorized the President to approve and adopt a code of fair competition drafted by

industry participants. He could only adopt such a code, however, after making certain findings. *See* 48 Stat. 195, 196 § 3 (1933). Once a trade association submitted a proposed code, the President could adopt it only if he found "that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof" and "that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title." 48 Stat. at 196 § 3(a). The President, moreover, could not adopt a code if it "permit[ted] monopolies or monopolistic practices," and anyone impacted by the code had to be given the opportunity to be heard prior to approval and adoption. *Id.* Granted, the President had authority to create exceptions to the codes as "in his discretion deems necessary to effectuate the policy herein declared," *id.* But even here the President's exercise of discretion was guided by the "policy herein declared," which included a long list of statutory objectives, such as promoting trade group cooperation, eliminating unfair competitive practices, and promoting productivity. *See* 48 Stat. at 195, § 1. The *Schechter* Court, however,

denied that these objectives adequately guided presidential discretion and therefore did not satisfy the non-delegation doctrine. *Schechter*, 295 U.S. at 533-35.

Here, by contrast, the statute as understood by the Government offers far fewer guides to how the agency should go about preventing cross-border disease transmission. The best the statute offers, if the Government is correct that the enumerated list in the second sentence does not limit "other measures," is that the judgment must be used as "necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." 42 U.S.C. § 264(a). But, much like with *Schechter*'s list of objectives, this language only operates to set the purpose and subject matter of the agency's authority, not to actually impose any meaningful guide as to how the agency should exercise its judgment in accomplishing this purpose. *See* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 372-73 (2002) ("[T]he crucial distinction for this [non-delegation purposes] is between statutes that set rules and statutes that set goals. A valid statute must set forth a rule of conduct and not merely

a goal or set of goals to which executive or judicial actors must strive."). Thus, as interpreted by the Government, the statute gives the CDC power co-extensive with Congress' authority to enact legislation in response to contagious disease.

The District Court cites a fleet of Supreme Court cases that addressed statutes with little resemblance to the statute in this matter. *See* ROA.030-31. In *Whitman*, for instance, the Supreme Court upheld EPA authority to set national ambient air quality standards. But the agency's determination of what was "requisite" for air quality standards had to be based on statutory air quality criteria reflecting the latest scientific knowledge. 531 U.S. at 466. No similar statutory criteria must be considered in determining what is "necessary" under 42 U.S.C. § 264(a).

Moreover, *Whitman* recognized that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Id.* at 475. Setting air quality standards involved "judgments of degree" somewhere along a single public safety continuum. *Id.* By contrast, the CDC claims a broad, roving authority to

alter the very substance of American life and restrict any activity that could risk disease transmission.

The other cases relied on by the District Court involve statutes that, like the statute in *Whitman*, impose statutory criteria on the agency's determination of necessity and involve a much narrower scope of power. For example, in *Touby v. United States*, 500 U.S. 160, 166 (1991), the Attorney General had authority to temporarily mark drugs as controlled substances if he found it "necessary to avoid an imminent hazard to the public safety." But in making that determination, the Attorney General had to consider three factors: pattern of abuse, severity of abuse, and risk to public health. *Id.* These statutory factors guided the Attorney General's discretion, and his authority was relatively narrow in scope: he could only temporarily insert specific substances into a preexisting statutory regime. No similar temporal or subject-matter limit exists with respect to the CDC's claimed authority.

Again, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), the Occupational Safety and Health Act gave OSHA power to set standards for toxic materials, but constrained that discretion by imposing a feasibility standard, a cost-

benefit analysis, a required finding of "significant risk," and a "best available evidence" standard. *Id.* at 644-45. Indeed, the Court in *Industrial Union* rejected a broad reading of the statute that would not require the agency to quantify the public safety risk because such a reading would pose a serious non-delegation problem. *Id.* at 646. The Court refused to give the agency "the unprecedented power over American industry that would result from the government's view." *Id.* at 645. This Court should likewise reject the District Court's view that would give the CDC not only unprecedented power over American industry, but power even to dictate American social life with as much discretion as any state legislature.

The District Court also cited to *NBC v. United States*, 319 U.S. 190, 214-16, 225-26 (1943), wherein the Supreme Court rejected a non-delegation challenge to the Communications Act's grant of radio station licensing authority to a federal commission based on "public interest, convenience, or necessity." But the statute, after announcing this broad discretion, gave a specific list of what the Commission could do with that discretion. *Id.* at 214-15. The statute here, when properly interpreted, operates much the same way—a broad grant of discretion stated at the

outset, followed by more detailed language to guide that discretion. But the Government would have this Court ignore that clarifying language. If similar limiting language had not existed in *NBC*, that case may well have come out differently. And, much like the other cases cited by the Court, the power granted to the Commission to act as a gatekeeper for radio licensing is far more limited in its scope than the power claimed by the Government here to regulate any and all social and economic activity in the nation.

In summary, the statute at issue here, as understood by the Government, imposes none of the constraints that the Supreme Court considered important in the cases cited by the lower court. There is no feasibility standard, no "significant risk" requirement, no list of statutory criteria to consider, no cost-benefit analysis, no "best available science" standard. And the scope of the power CDC seeks is far broader than the statutes in the above cases. One could paraphrase *Whitman* as follows: "[42 U.S.C. § 264(a)] has conferred authority to regulate the entire economy on the basis of no more precise a standard than [preventing transmission of disease that the agency deems 'necessary' based on its own unencumbered 'judgment']." *Whitman*, 531 U.S. at 474. The statute

is nothing more than a "roving commission to inquire into evils and then, upon discovering them, do anything [the agency] pleases." *Panama Refining*, 293 U.S. at 435 (Cardozo, J., dissenting).

C. CDC Should Have Provided Notice and Comment.

The Administrative Procedure Act (APA) requires notice and comment for legislative rules, which includes all rules substantively affecting "individual rights and obligations." *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628 (5th Cir. 2001). *E.g.*, *Davidson v. Glickman*, 169 F.3d 996, 999 (5th Cir. 1999) (rules pronounced in an agency handbook). A rule is deemed legislative if it has the "force of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (stressing the importance of notice and comment procedures). In this case, the CDC's national eviction moratorium is a legislative rule subject to notice and comment because it affects the rights of millions of landlords and tenants nationwide.

The District Court errantly concluded that the moratorium was exempt from notice and comment because it was pronounced under 42 C.F.R. § 70.2. ROA.032. But the APA requires notice and comment for *all* legislative rules with only narrowly defined exceptions. And there is no

exception for rules pronounced pursuant to promulgated regulation. *See Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) (stressing that substantive rules must "scrupulously" adhere to notice and comment requirements). What is more, the CDC's choice to label the moratorium as an "order" is irrelevant because the analysis focuses on "the *contents* of the agency's action, not the agency's self-serving *label*." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019); *see also PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (recognizing that an FCC pronouncement constituted a rule under the APA, even as it was deemed an "order" for the purposes of the Hobbs Act).

The Government maintains that there was "good cause" for dispensing with notice and comment requirements because it was responding to an emergency. 5 U.S.C. § 553(b)(3)(B). But the mere assertion that a rule is issued on an emergency basis cannot suffice. *See N.J., Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980) ("The exemption of situations of emergency or necessity is not an 'escape clause[.]'") (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946)). The "good cause" exception "must be narrowly construed." *See Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir.

1995) (quoting *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989)).

The District Court was wrong in its assumption that CDC could not have started the rulemaking process earlier. ROA.034. From the outset of the pandemic, CDC knew that there would be no national uniformity in eviction rules absent federal action. *See United States v. Johnson*, 632 F.3d 912, 929 (5th Cir. 2011) (finding no good cause where an agency waited seven months from the triggering event); *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (stressing the exception should not be used "to circumvent the notice and comment requirements"). Yet, even if CDC could not have completed notice and comment before issuing its first order in September, it certainly could have completed notice and comment before issuing its second eviction moratorium order in late January. *See Sharon Steel Corp. v. EPA*, 597 F.2d 377, 380-81 (3d Cir. 1979) (concluding there was in fact time to proceed in notice-and-comment). In fact, one of the Defendant agencies proposed and finalized a significant rule *with proper notice and comment* within this period. *See* Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed.

Reg. 5694 (Jan. 19, 2021) (finalizing after notice and comment commenced on November 4, 2020).

D. CDC's Entire Approach Has Been Arbitrary and Capricious.

Failure to follow notice and comment rulemaking is indicative of the agency's fly-by-night approach. It belies a predetermined and outcome-oriented approach, which is contrary to the careful and deliberative process that the APA demands. For one, if an agency is only considering one side of the equation, it is likely failing to consider an important aspect of the problem.

Here the CDC focused myopically on studies supporting moratoria policy without stopping to consider the impact on the housing market—including the possibility that landlords may choose to withdraw from the rental market or the risk that landlords may respond by instituting policies that may make it more difficult for low-income tenants to secure housing. Failure to consider such important aspects of housing policy when imposing a national eviction moratorium is arbitrary and capricious. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (concluding federal agency charged with promulgating vehicular safety regulations acted arbitrarily

and capriciously by failing to consider the possibility of requiring airbags); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 561-62 (2009) (finding arbitrary and capricious FCC's failure to consider whether the regulated community could afford to implement technology required under its rule and the impact the rule might have on free speech).

Moreover, the CDC moratorium orders are arbitrary and capricious because the agency has proceeded in issuing short-term rules without any objective standard guiding its decision as to whether to extend the moratorium going forward. *See State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 ("We may not supply a reasoned basis for the agency's action that the agency itself has not given.") (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). *E.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1912 (2020) (holding that the Attorney General failed to sufficiently explain a change in policy). In September the CDC said that a moratorium was necessary to prevent evictions during the colder months and during flu season, even as it set an expiration date for December 31, 2020. 85 Fed. Reg. at 55,296. The CDC then issued a second short-term moratorium order in January, but

without committing itself to any guiding principle for future extensions. 86 Fed. Reg. at 8025. This ad hockery leaves the regulated community totally guessing as to what to expect next, even now as a further extension is under review at the Office of Management and Budget. *See* RIN: 0920-ZA17.

II. Appellants Are Suffering Irreparable Harm

A. Unlawful Infringement of Liberty Violates Separation of Powers and Constitutes Irreparable Harm

The CDC's eviction moratorium violates separation of powers and effects constitutional injuries, whether this Court holds the PHSA violates the non-delegation doctrine or that CDC exceeded its authority. Either way, Appellants are burdened with a federal rule in violation of the Constitution's structural protections. This constitutes irreparable harm.

Where an agency exceeds its statutory powers, it is violating the Constitution because it is making law. *See Louisiana Pub. Serv. Comm'n. v. F.C.C.*, 476 U.S. 355, 374-77 (1986) (affirming this foundational principle). Our constitutional system vests the lawmaking power exclusively in Congress, which is why federal agencies are limited strictly to the confines of their delegated authority. To exceed that authority does

violence to individual liberty, which the separation of powers doctrine is intended to protect.

Separation of powers "serves not only to make Government accountable but also to secure individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 742 (2008). *See Bowsher v. Synar*, 478 U.S. 714, 730 (1986) (our system is designed to protect individual liberties). As such, federal action that violates these foundational constitutional doctrines is a grave matter. *See Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."). Individuals suffering such injuries are deprived of the guarantees of constitutional governance and—as in this case—suffer abrogation of their rights under state law. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381-82 (1992) (obeying an unconstitutional law causes injury).

Moreover, a constitutional injury "'unquestionably constitutes irreparable injury." *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (affirming this principle). *See*

also Awad v. Ziriax, 670 F.3d 1111, 1131 (10th Cir. 2012) (observing that "most courts" recognize that a constitutional injury is irreparable harm); 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2948.1 (3d ed. 2018) (same). The reason is that constitutional injuries—by their nature—require injunctive relief. Here it is only possible to get prospective injunctive relief because there is no way to compensate for an already consummated constitutional injury. *Cf. Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106, at *6 (U.S. Mar. 8, 2021) (stating that nominal damages would represent only a partial remedy for constitutional violations, but not "full redress").

The fact that unconstitutional regulation may have economic consequences is immaterial because there is a constitutional injury merely in being required to abide by unlawful regulation. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (finding a Dormant Commerce Clause violation caused irreparable harm). *Cf. Iowa League of Cities v. EPA*, 711 F.3d 844, 870-71 (8th Cir. 2013) (recognizing the compliance costs as the relevant injury). Courts within this jurisdiction have not hesitated to find that invalid regulations inflict irreparable harm in imposing unlawful regulatory burdens. *See*

Texas Food Indus. Ass'n v. U.S. Dep't of Agric., 842 F. Supp. 254, 260-61 (W.D. Tex. 1993) (cost of compliance with regulation promulgated in violation of the APA constitutes irreparable injury); *Am. Farm Bureau Fed'n v. EPA*, No. 3:15-CV-00165, 2018 WL 6411404, at *1 (S.D. Tex. Sept. 12, 2018) (irreparable harm in compliance burdens imposed by an unlawful expansion of Clean Water Act regulation); *Nevada v. United States Dep't of Lab.*, 218 F. Supp. 3d 520, 532 (E.D. Tex. 2016) (irreparable harm in regulatory burdens imposed on employers).

B. Appellants Are Suffering Irreparable Harm in Loss of Dominion Over Private Property

The Government has argued that only permanent deprivation or destruction of private property constitutes irreparable harm. But the right to control dominion over one's property is "universally held to be a fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). Under Louisiana law a landlord has a right not only to evict non-paying tenants, La. Civ. Code Ann. art. 4701, but also to decide what to do with a vacant unit. La. Civ. Code Ann. art. 477 (affirming that an owner "may use, enjoy, and dispose of [property]"). A landlord might wish to renovate a unit—a project that cannot be done with tenants present. Or they might intend to occupy a

unit they had been renting. Likewise, it is their prerogative to allow a unit to remain vacant, perhaps because they would like to sell. Yet they are foreclosed from reasserting control over the property under the eviction moratorium.

Thus, Appellants are suffering irreparable harm in that the moratorium abrogates their state law right to assert exclusive dominion over their properties. *See Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011) (recognizing irreparable harm where owners were denied immediate use of real property); *E. Tenn. Nat. Gas. Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004) (same). This is not an economic injury, but rather an injury of the right of quiet enjoyment of one's property. Accordingly, only injunctive relief will suffice to restore Appellants' rights. A later judgment on the merits will not suffice to remedy the harm currently suffered. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1090 (7th Cir. 2008) (holding that "[a]s a general rule, interference with the enjoyment or possession of land is considered 'irreparable'"). Not even monetary damages could turn back time to retroactively restore the right of exclusive dominion that is currently impaired. *See Roda Drilling Co. v. Siegal*, 552 F.3d 1203, 1211

(10th Cir. 2009) (concluding real estate investors suffered irreparable harm in a suit against an investment manager because they were "miss[ing] opportunities").

C. Appellants Cannot Remedy Their Harm Through Damages

Appellants are also suffering irreparable harm because they cannot remedy their harm through damages. Monetary damages will not suffice if they are impossible to collect.[3] And one cannot collect against an insolvent party.

The Government argues that the Appellants must prove it is impossible to collect from non-paying tenants in a subsequent action. But the burden should rest on the Government to prove that Appellants are likely to collect from third parties. *See Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011) (finding that damages are irreparable if assets needed to pay damages are likely to dissipate); *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 630 n.12 (5th Cir. 1985) (Garwood, J., dissenting) (where a party is "unable to respond in

[3] For one, there is no guarantee that a tenant will even remain subject to the jurisdiction of Louisiana courts. Should a tenant vacate without paying, it may prove difficult or impossible to pin down their whereabouts.

damages") (citing Restatement (Second) of Contracts §§ 359(1), 360 (1981)). That is especially true where there is reason to believe that those third parties are insolvent. *E.g.*, *Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 290 (1940) (holding that a preliminary injunction was appropriate because there were "allegations" of insolvency).

The Government speculates that Appellants' tenants might have illiquid assets or might find some means of catching-up on back-rent. But the tenants have submitted sworn statements that they are unable to pay their debts. By definition that means they are insolvent. And there is simply no basis for assuming that an insolvent person will see a windfall. At the least, there is great risk that Appellants may be left without recourse. *See Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995) (recognizing irreparable harm where a "defendant is likely to be insolvent at the time of judgement") (quoting *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 52 (1st Cir. 1986)); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (same).

And a judgment in Appellants' favor will not possibly redress their economic injuries. That point alone should warrant a finding of

irreparable harm. *See Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 206 (3d Cir. 1990) (recognizing that the possibility of an unsatisfied money judgment may establish irreparable injury). Simply put, speculation of possible remedies in another action against third parties who might be insolvent should not defeat Appellants' right to injunctive relief.

III. An Injunction Is in the Public Interest

The District Court erred as a matter of law in concluding that an injunction would be contrary to the public interest. The Government insists that the CDC is entitled to deference in setting health policy and that this counsels against an injunction. But there is no basis for deferring to public health officials where they are acting outside the law. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (citing with approval *Awad*, 670 F.3d at 1132). When it comes to deciding what serves the public interest, Congress' choice to deny a federal agency statutory authority is of paramount importance—as is its statutorily imposed procedural requirements constraining agency action. *See Tex. Food Indus. Ass'n*, 842 F. Supp. at 257, 261 ("[E]nforcing the APA strictly [ ] serve[s] the public interest."). And beyond that the

Constitution represents the supreme statement of what serves the public interest. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[T]he Constitution is the ultimate expression of the public interest.") (quoting *Llewelyn v. Oakland Cty. Prosecutor's Office*, 402 F. Supp. 1379, 1393 (E.D. Mich. 1975)). So where it is clear that a federal agency has exceeded its statutory powers, violated the APA, or otherwise acted in conflict with the Constitution, an injunction is necessarily in the public interest. *See Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 928 (6th Cir. 2020) (finding that speculative claims about health risks cannot outweigh concrete harms to constitutional liberties).

Further, CDC's eviction moratorium orders interfere with legal remedies that Louisiana deems to be in the public interest. *Cf. Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (affirming that state statutes generally serve legitimate public interests which federal law must generally respect); *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002) (affirming the right of access to courts). It would, therefore, be

contrary to the public interest to allow the CDC to continue enforcing an *unlawful* federal eviction moratorium that upsets state law intended to protect contractual rights and to encourage a functioning housing market. Such federalism concerns—along with the separation of powers implications presented—represent the animating features of our constitutional system and cannot be shrugged off simply in the name of deference to federal public health officials. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (affirming that "the Constitution cannot be put away and forgotten" during a pandemic). No deference is owed where an agency exceeds its lawful authority. *Louisiana Pub. Serv. Comm'n.*, 476 U.S. at 374 ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *Skyworks*, 2021 WL 911720, at *11 ("[E]ffective pandemic response depends on the judgment of reliable science . . . [b]ut that obvious truism does not empower agencies or their officials to exceed the mandate Congress gives them.").

Conclusion

For the foregoing reasons, Appellants respectfully request that this Court reverse and remand with direction for the District Court to either

grant a preliminary injunction or to enter judgment on the merits for the Appellants.

DATED: March 22, 2021.

Respectfully submitted,

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Case Name:	Chambless Enterprises, L.L.C. v. Rochelle Walensky
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APPELLANTS' BRIEF FILED. # of Copies Provided: 0
(PAPER COPY REQUESTS SUSPENDED AT THIS TIME). A/Pet's Brief deadline satisfied. Appellees' Brief due on 04/21/2021, for Appellees Xavier Becerra, Secretary, U.S. Department of Health and Human Services, Sherri Berger, Center for Disease Control and Prevention, Merrick Garland, U.S. Attorney General, United States Department of Health and Human Services and Rochelle Walensky. [21-30037] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANT'S BRIEF FILED by Chambless Enterprises, L.L.C. and Apartment Association of Louisiana, Incorporated. Date of service: 03/22/2021, via email - Attorney for Appellees: Klein, Springer, Vigen; Attorney for Appellants: Rather, Simpson, Wake. [21-30037] (Luke A. Wake)

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