

**THE STURM UND DRANG OF THE CDC'S HOME EVICTION**

**MORATORIUM**

PAUL J. LARKIN

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*Damn the torpedoes! Full speed ahead!*

Admiral David Glasgow Farragut at the Battle of Mobile Bay, 1864\*

## INTRODUCTION

The pandemic that has roiled the globe since late in 2019 has begun to have the same effect on the law. Beginning in March 2020, Congress, former President Donald Trump, and current President Joe Biden have engaged in a *pas de trois*, taking turns directing the U.S. Centers for Disease Control and Prevention (CDC) to issue nationwide moratoria preventing qualifying tenants from being evicted for not paying their rent. Most recently, Biden, bowing to political pressure to prevent evictions from restarting after more than a year's delay, ordered the CDC to issue yet another moratorium, and, on August 3, 2021, the CDC did so. As it had done for some of its earlier orders, the CDC relied on a 1944 statute, the Public Health Service Act.<sup>1</sup> The CDC did so even though, prior to 2020, the CDC had never before invoked that law as a rental protection device or an indirect form of rent control.<sup>2</sup>

Not surprisingly, the legality of the CDC's most recent moratorium has generated considerable public policy debate.<sup>3</sup> Some of that debate has taken place in court. Landlords,

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\* Apparently, what is quoted above is a bowdlerized version of Farragut's famous quote. A biography of Farragut says that he shouted "Damn the torpedoes! Four bells! Captain Drayton, go ahead. Jouett, full speed!" The quotation in the text is the popular culture version. See Nat'l Parks Serv., U.S. Dep't of the Interior, Farragut, Admiral David Glasgow, Gravesite Bronx, New York, [https://www.nps.gov/nr/travel/american\\_latino\\_heritage/farragut\\_gravesite.html](https://www.nps.gov/nr/travel/american_latino_heritage/farragut_gravesite.html) [<https://perma.cc/LGD5-B6V3>] (last visited Aug. 8, 2021).

<sup>1</sup> Ch. 373, 58 Stat. 682 (codified as amended at 42 U.S.C. §§ 201–300mm-61 (West 2021)).

<sup>2</sup> See Sean-Michael Pigeon, *The Tragedy of the Eviction Moratorium Debate*, NAT'L REV., Aug. 3, 2021, <https://www.nationalreview.com/2021/08/the-tragedy-of-the-eviction-moratorium-debacle/> [<https://perma.cc/C82A-3FNA>] ("The harmful policy was not intended to be a form of rent control, a fact that progressives seem willing to ignore."); cf. *Loretto v. Teleprompter Manhattan Cable TV Corp.*, 458 U.S. 419, 440 (1982) ("This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.").

<sup>3</sup> See, e.g., Edit. Bd., *Biden's Lawless Eviction Ban*, WALL ST. J., Aug. 4, 2021, <https://www.wsj.com/articles/joe-biden-lawless-eviction-ban-centers-for-disease-control-and-prevention-moratorium-11628115210> [<https://perma.cc/6LY4-K8A3>] [hereafter *WSJ Editorial*]; James Freeman, *Rochelle Walensky and 'Impending Doom'*, WALL ST. J., Aug. 4, 2021,

real estate companies, and trade associations have brought a series of lawsuits challenging both the CDC’s statutory authority to issue those orders and their constitutionality.<sup>4</sup> One

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<https://www.wsj.com/articles/rochelle-walensky-and-impending-doom-11628102849> [https://perma.cc/M7BH-V2NZ]; Brent Kendall, *Legal Battle Looms Over New Eviction Moratorium*, WALL ST. J., Aug. 4, 2021, <https://www.wsj.com/articles/legal-battle-looms-over-new-eviction-moratorium-11628104428> [https://perma.cc/W8EN-JBSS]; Howard Kurtz, *Biden Flips on Eviction Ban He Called Likely Illegal, But Media Don’t Care*, FOX NEWS, Aug. 6, 2021, <https://www.foxnews.com/media/biden-flips-on-eviction-ban-he-called-likely-illegal-but-the-media-dont-care> [https://perma.cc/SQ3S-GPXL]; Naomi Lim, *Liberal Democrats and Pelosi Emerge as ‘Winners’ from Biden’s Eviction Moratorium Bungle*, WASH. EXAMINER, Aug. 5, 2021, <https://www.washingtonexaminer.com/politics/liberal-democrats-pelosi-biden-eviction-moratorium> [https://perma.cc/KLP9-N274]; Andrew C. McCarthy, *DOJ on Biden’s Lawless Eviction Moratorium: What Supreme Court Ruling?*, NAT’L REV., Aug. 10, 2021, <https://www.nationalreview.com/2021/08/doj-on-bidens-lawless-eviction-moratorium-what-supreme-court-ruling/> [https://perma.cc/E9ZP-BK5G]; Andrew C. McCarthy, *The Eviction-Moratorium Decree: Why It’s Unconstitutional*, NAT’L REV., Aug. 4, 2021, <https://www.nationalreview.com/2021/08/the-eviction-moratorium-decree-why-its-unconstitutional/> [https://perma.cc/E9ZP-BK5G]; Dan McLaughlin, *Joe Biden Is Daring Brett Kavanaugh to Do His Job*, NAT’L REV., Aug. 5, 2021, <https://www.nationalreview.com/2021/08/joe-biden-is-daring-brett-kavanaugh-to-do-his-job/> [https://perma.cc/D4EY-5HK2]; Ilya Somin, *The CDC’s New Eviction Moratorium Has Virtually all the Same Flaws as the Old*, VOLOKH CONSPIRACY, Aug. 3, 2021, <https://reason.com/volokh/2021/08/03/the-cdcs-new-eviction-moratorium-has-virtually-all-the-same-flaws-as-the-old/> [https://perma.cc/6YP2-844X]; cf. Josh Blackman, *The Statutory Authority for the Nationwide Eviction Moratorium*, VOLOKH CONSPIRACY, Sept. 1, 2020, <https://reason.com/volokh/2020/09/01/the-statutory-authority-for-the-nationwide-eviction-moratorium/> [https://perma.cc/2JSP-JDHN] (analyzing the CDC’s statutory authority for its September 2020 moratorium); Ilya Somin, *Trump’s Eviction Moratorium Could Set a Dangerous Precedent*, VOLOKH CONSPIRACY, Sept. 2, 2020, <https://reason.com/volokh/2020/09/02/trumps-eviction-moratorium-could-set-a-dangerous-precedent/> [https://perma.cc/8CTC-E6JV] (same); Adam Winkler, *The Supreme Court Might Strike Down Biden’s Eviction Ban. It Shouldn’t*, N.Y. TIMES, Aug. 5, 2021, <https://www.nytimes.com/2021/08/05/opinion/supreme-court-biden-eviction.html> [https://perma.cc/349H-R9VL]. What is surprising, however, is that the parties do not all line up in the way that we would ordinarily expect. For example, the Washington Post editorial page took the position that Biden’s August 3 order was unlawful. See Editorial Board, *The CDC’s Eviction Moratorium Is Almost Certainly Illegal*, WASH. POST, Aug. 4, 2021, <https://www.washingtonpost.com/opinions/2021/08/04/cdcs-eviction-moratorium-is-almost-certainly-illegal/> [https://perma.cc/32UK-SUBG] (“Americans behind on their rent payments may have cheered when the Centers for Disease Control and Prevention announced Tuesday a new eviction moratorium for most of the nation, this one set to last until October. . . . But the CDC’s action was almost certainly illegal. Under pressure from House Speaker Nancy Pelosi (D-Calif.) and progressive Democrats, President Biden and the CDC may have muted accusations that they failed to stick up for desperate renters. The administration also may succeed in giving many Americans a short reprieve from eviction. But perhaps not as long as advertised — because courts may strike it down before October — and at the expense of the rule of law. . . . If the Trump administration had ignored a direct warning from the Supreme Court, Democrats would rightfully line up to condemn the president. Mr. Biden does not get a pass on the rule of law because his heart is in the right place.”).

<sup>4</sup> See, e.g., John Fritze, *Real Estate Groups Ask Federal Court to Block Enforcement of CDC’s New Eviction Moratorium*, USA TODAY, Aug. 4, 2021, <https://www.usatoday.com/story/news/politics/2021/08/04/real-estate-groups-sue-block-bidens-new-eviction-moratorium/5493790001/> [https://perma.cc/CL9R-Z7MB]; Dan McLaughlin, *Argument Recap: D.C. Judge Holds Hearing Considering Challenge to New CDC Moratorium*, NAT’L REV. Aug. 9, 2021, <https://www.nationalreview.com/corner/dc-judge-considering-challenge-to-new-cdc-moratorium/> [https://perma.cc/Q3EA-TVZ3]. There also has been considerable litigation over a host of related issues, such as the validity of the CDC’s regulations governing the disembarkation of cruise line passengers. See, e.g., *Florida v. Becerra*, No. 8:21-cv-839, 2021 WL 2514138 (M.D. Fla. June 18, 2021) (ruling that Florida was likely to succeed on merits of its claim that the CDC’s cruise ship order exceeded its statutory authority and entering a preliminary injunction against enforcement of the CDC order), *supplemented* 2021 WL 2882828 (July 7, 2021) (denying a stay pending appeal of the preliminary injunction), granting a stay pending appeal, No. 21-12243-D, 2021 WL 2514138 (11th Cir. July 17, 2021), vacating order staying the injunction pending appeal and denying motion for a stay pending appeal *sub nom.* *Florida v. HHS*, No. 21-12243-D, 2021 WL 2514138 (11th Cir. July 23, 2021); see also, e.g., *Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020) (prisoner lawsuit challenging conditions of confinement because of COVID-19). Those issues are beyond the scope of this Article.

case reached the Supreme Court of the United States, twice in fact.<sup>5</sup> The first time, by a 5-4 vote the Court seemed to agree with the plaintiffs that the CDC had exceeded its statutory authority but nonetheless denied them injunctive relief pending appeal because one justice guessed that the few remaining weeks of the moratorium would enable an orderly distribution of appropriated but undisbursed federal rental assistance funds.<sup>6</sup> By contrast, when the case reached the Court a second time, the Court, by a 6-3 vote, granted the plaintiffs interim relief and went out of its way to belittle the government’s argument, sending a strong message of displeasure at having to revisit the issue.<sup>7</sup>

This Article will address the legality of the CDC’s August 3 moratorium: Part I will describe the steps that Congress and the President have taken to prevent a new and often fatal virus from engulfing the nation and killing a large part of its population. That discussion will include a history of the different CDC eviction moratoria. Part II will summarize the litigation that has unfolded since the moratoria went into effect, focusing on the Supreme Court’s two orders in *Alabama Association of Realtors v. Department of Health and Human Services*.<sup>8</sup> The Supreme Court did not issue a final ruling on the meaning of the statute, so Part III will analyze whether the CDC has the power to issue its August 3 order. Part IV asks why Biden directed the CDC to enter that order and what the long-term consequences might be for him by having done so.

## I. THE COVID-19 PANDEMIC

Late in 2019, as if witnessing the resurrection of the Spanish or 1918 Flu that killed millions globally a century ago, the world saw the entry of another highly contagious, infectious, and potentially fatal influenza virus: Severe Acute Respiratory Syndrome Coronavirus-2, or SARS-CoV-2.<sup>9</sup> The disease it causes—COVID-19—first appeared in Wuhan,

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<sup>5</sup> See *Alabama Ass’n of Realtors v. HHS*, No. 20-cv-3377, 2021 WL 1779282 (D.D.C. May 5, 2021) (ruling that the CDC lacked authority to issue its eviction moratorium), *supplemented*, 2021 WL 1946376 (May 14, 2021) (granting a stay pending appeal), on a motion to vacate the district court stay pending appeal, No. 21-5093, 2021 WL 2221646 (D.C. Cir. June 2, 2021) (denying motion), on a motion to vacate the district court stay pending appeal, 141 S. Ct. 2320 (2021) (denying motion), on remand, No. 20-cv-3377, 2021 WL 3577367 (D.D.C. Aug. 13, 2021) (denying renewed motion to vacate stay pending appeal), on emergency motion to vacate the stay pending appeal, No. 21-5093, 2021 WL 3721431 (D.C. Cir. Aug. 20, 2021), vacating stay pending appeal, 141 S. Ct. 2485 (2021), granting government’s motion to dismiss its appeal, No. 21-5093, 2021 WL 4057718 (D.C. Cir. Sept. 3, 2021). Hereafter, I will refer to the lower court rulings as *Alabama Realtors*, followed by a citation where the decisions can be found. I will refer to the two Supreme Court orders as *Alabama Realtors 1* and 2.

<sup>6</sup> *Alabama Realtors 1*, 141 S. Ct. at 2320–21 (Kavanaugh, J., concurring).

<sup>7</sup> *Alabama Realtors 2*, 141 S. Ct. 2485 (2021).

<sup>8</sup> *Alabama Realtors 1*, 141 S. Ct. 2320 (2021), and *Alabama Realtors 2*, 141 S. Ct. 2485 (2021).

<sup>9</sup> See, e.g., *1918 Pandemic (H1N1 Virus)*, CNTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 19, 2019), <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> [<https://perma.cc/8PVS-2ZK4>] (last visited Aug. 8, 2021); JOHN BARRY, *THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PLAGUE IN HISTORY* 4–5 (2004); LAURA SPINNEY, *PALE RIDER: THE SPANISH FLU OF 1918 AND HOW IT CHANGED THE WORLD* 4 (2017) (all describing the Spanish Flu and the global response to it); Paul J. Larkin, Marie Fishpaw & Lauren McCarthy, *Telemedicine and Occupational Licensing*, 73 ADMIN. L. REV. (forthcoming 2021) (manuscript 2–3) (describing the new pandemic).

China. The virus is spread from person to person by infected airborne respiratory droplets that enter through the mouth or nasal passages or across another mucous membrane by a recipient's own hands.<sup>10</sup> It rapidly spread across the globe, reaching this country in 2020.<sup>11</sup> Since the virus's onset, more than 279 million people have suffered from COVID-19 worldwide, with more than 5 million fatalities, and counting.<sup>12</sup> In this country, more than 46.4 million people have been infected and 752,000-plus have died.<sup>13</sup>

In the United States, the federal, state, and local governments, as well as the private sector, immediately took a host of complementary responses.<sup>14</sup> Their short-term goals

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<sup>10</sup> See, e.g., CNTRS FOR DISEASE CONTROL & PREVENTION, SCIENTIFIC BRIEF: SARS-COV-2 TRANSMISSION (May 7, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html> [<https://perma.cc/A63K-YC6H>].

<sup>11</sup> WORLD HEALTH ORG., *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19*, (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/KEQ2-REX8>]; WORLD HEALTH ORG., *Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It*, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) [<https://perma.cc/ETV7-BC5N>] (last visited Dec. 24, 2020); The first confirmed case of COVID-19 in the United States came from someone who had traveled to Wuhan. Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 NEW ENG. J. MED. 929, 929–30 (2020), <https://www.nejm.org/doi/full/10.1056/NEJMoa2001191> [<https://perma.cc/J8MH-E54Z>].

<sup>12</sup> See WORLD HEALTH ORGAN., WHO CORONAVIRUS (COVID-19) DASHBOARD (Aug. 9, 2021), <https://covid19.who.int/> [<https://perma.cc/9Q74-HEHK>] (last visited Nov. 8, 2021).

<sup>13</sup> The risk of death is greatest for individuals who suffer from certain medical disorders (such as diabetes and heart disease) or who are immunocompromised. See *Norwegian Cruise Lines Holdings, Ltd. v. Rivkees*, No. 1:21-cv-22492-KMW, slip op. 2–3 (S.D. Fla. Aug. 8, 2021); CNTRS FOR DISEASE CONTROL & PREVENTION, SCIENTIFIC BRIEF: COVID DATA TRACKER: UNDERLYING MEDICAL CONDITIONS, <https://covid.cdc.gov/covid-data-tracker/#underlying-med-conditions> [<https://perma.cc/7HWH-XSBS>] (last visited Nov. 8, 2021). The majority of SARS-CoV-2-infected people have been able to recover fully, but various long-term health problems are unknown and might linger. The federal government is collecting data on the effectiveness of the vaccines. See CNTRS FOR DISEASE CONTROL & PREVENTION, SCIENTIFIC BRIEF: COVID DATA TRACKER: COVID-19 VACCINE EFFECTIVENESS, <https://covid.cdc.gov/covid-data-tracker/#published-sars-cov-2-sequences> [<https://perma.cc/8GZ7-WQLL>] (last visited Nov. 8, 2021).

<sup>14</sup> In March 2020, President Trump formally declared the epidemic a national emergency, which gave states, localities, and territories access to billions of dollars in federal financial assistance for health-care related resources; he created the White House Coronavirus Task Force to head the nation's response; and he invoked the Defense Production Act of 1950 to increase the manufacturing of ventilators for COVID-19 patients. See, e.g., *Declaring A National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). Congress authorized billions of dollars for healthcare facilities, medical professionals, patients, insurance providers, research into treatment for and a vaccine against the disease. Larkin, Fishpaw & McCarthy, *supra* note 9 (manuscript 8–9). Congress passed acts authorizing billions of dollars for acts to fund healthcare facilities, medical professionals, patients, and insurance providers, as well as research to discover a treatment for, or vaccine against, the disease. See, e.g., *Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020*, Pub. L. No. 116–123, 134 Stat. 152 (2020); *Families First Coronavirus Response Act*, Pub. L. No. 116–127, 134 Stat. 178 (2020); *Coronavirus Aid, Relief, and Economic Security Act*, Pub. L. No. 116–136, 134 Stat. 281 (2020); *Paycheck Protection Program and Health Care Enhancement Act*, Pub. L. No. 116–139, 134 Stat. 620 (2020). Governors declared states of emergency, closed schools, limited the size of public and private gatherings, and restricted unnecessary movement across or within their borders. See, e.g., GOVERNOR CHARLES D. BAKER, ORDER INSTITUTING A MANDATORY 14-DAY QUARANTINE REQUIREMENT FOR TRAVELERS ARRIVING IN MASSACHUSETTS § 1, July

were to treat infected people and shut down or reduce the number of interpersonal interactions normally seen in a modern-day society in the hope of preventing further spread of the virus and the collapse of the nation’s medical systems.<sup>15</sup> To do so, Trump and state governors urged or ordered businesses to close and people to remain at home except to obtain necessities, such as food and medicine, and with or for with exceptions for emergency personnel, such as physicians and law enforcement officers.<sup>16</sup> The result, however, was a cascading series of adverse events: numerous small businesses collapsed, leaving their employees without a paycheck, putting them at risk of eviction for nonpayment of rent. The prospect was a human and economic tragedy unseen since the Dust Bowl that occurred during the Great Depression.

To avert that outcome, Congress included in a law enacted in March 2020—the Coronavirus Aid, Relief, and Economic Security Act, also known as the CARES Act<sup>17</sup>—a 120-day nationwide moratorium on the eviction of nonpaying tenants from rental properties receiving federal financial assistance.<sup>18</sup> That moratorium expired on July 25, but President Trump directed Alex Azar, the Secretary of Health and Human Services, and Robert Redfield, Director of the Centers for Disease Control and Prevention, to “consider whether

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24, 2020, <https://www.mass.gov/doc/july-24-2020-travel-order-pdf/download> [<https://perma.cc/WAK6-TNVY>]; Press Release, Washington Gov. Jay Inslee, Inslee Issues COVID-19 Emergency Proclamation (Feb. 29, 2020), <https://www.governor.wa.gov/news-media/inslee-issues-covid-19-emergency-proclamation> [<https://perma.cc/MW6D-WHFH>]; CONG’L RES. SERV., SCOPE OF CDC AUTHORITY UNDER SECTION 361 OF THE PUBLIC HEALTH SERVICE ACT (PHSA) R46758, at 2 (Apr. 13, 2021) [hereafter CRS PHSA REPORT] (“Consistent with this framework, states and localities have been at the leading edge of the United States’ pandemic response in many respects. For instance, to varying degrees, states have issued numerous mandates aimed at promoting the relevant public health measures, including temporary stay-at-home orders that require the closure of nonessential businesses, restrictions on public gatherings, requirements to wear face masks under specified circumstances, and quarantine requirements for out-of-state travelers.”) (footnotes omitted); Rebecca L. Haffajeet al., *Thinking Globally, Acting Locally: The U.S. Response to Covid-19*, 382 NEW ENG. J. MED. 22, 22 (2021) (“As of March 27, 2020, all 50 states, dozens of localities, and the federal government had declared emergencies for Covid-19. The resulting executive powers are sweeping; they can range from halting business operations, to restricting freedom of movement, to limiting civil rights and liberties, to commandeering property.”) (footnotes omitted); Larkin, Fishpaw & McCarthy, *supra* note 9 (manuscript 10–11).

<sup>15</sup> Larkin, Fishpaw & McCarthy, *supra* note 9 (manuscript 11 & nn.30–32). The long term-goal was to develop a vaccine to prevent parties infected with SARS-CoV-2 from acquiring COVID-19. *See id.* (manuscript 2–5). Fortunately, there was good news on that front. Before 2020 was out, three pharmaceutical companies developed, and the U.S. Food and Drug Administration approved for use on an emergency basis, three COVID-19 vaccines: Pfizer-BioNTech, Moderna, and Johnson & Johnson’s Janssen. *See Norwegian Cruise Lines Holdings, Ltd. v. Rivkees*, No. 1:21-cv-22492-KMW, slip op. 4–5 (S.D. Fla. Aug. 8, 2021). By now, more than 80 percent of adults have received at least one round of a vaccine. *See* CNTRS FOR DISEASE CONTROL & PREVENTION, SCIENTIFIC BRIEF: COVID DATA TRACKER <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> [<https://perma.cc/N3Y7-7QZX>] (last visited Nov. 6, 2021). Unfortunately, life does not imitate art. Complicating matters, there has been a mutation of the virus into different variations, with one, known as the Delta Variant, being particularly infectious. Yet, like the cavalry arriving to save the day, the approved vaccines appear to be 80–90 percent effective against the Delta variant. *See Rivkees*, slip op. 5. As a result, we have not yet seen the final act in this drama.

<sup>16</sup> *See* Larkin, Fishpaw & McCarthy, *supra* note 9 (manuscript 2–5).

<sup>17</sup> Pub. L. No. 116–136, 134 Stat. 281 (2020).

<sup>18</sup> *Id.* Div. A, Tit. IV, § 4024 (codified at 15 U.S.C. § 9058 (West 2021)).

any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary” to prevent the interstate spread of the virus.<sup>19</sup> In response, on September 4, the CDC issued a temporary eviction moratorium suspending execution of eviction orders for nonpayment of rent.<sup>20</sup>

The CDC estimated that, absent a moratorium, 30–40 million people could be at risk of eviction, which could spread the SARS-CoV-2 virus as evicted parties moved in with family members or friends, or moved to “congregate settings” (such as homeless shelters and transitional housing) or other locations involving close interpersonal contact and the use of shared items.<sup>21</sup> Some evicted parties would become homeless, which could also exacerbate the spread of the virus and worsen the condition of infected and uninfected parties given their “inadequate access to hygiene, sanitation facilities, health care, and therapeutics.”<sup>22</sup> Eviction would not confine any problem to the state where parties had lived, because approximately 15 percent of the people who move each year relocate in another state.<sup>23</sup> Accordingly, the CDC prohibited landlords from evicting a qualifying party<sup>24</sup> for nonpayment of rent during the duration of the order.<sup>25</sup> The order did not, however, relieve anyone of the obligation to pay rent.<sup>26</sup>

As authority, the CDC relied on the Public Health Act of 1944. Among other things, a provision in that statute entitled “Regulations to control communicable diseases” empowers the CDC to issue and enforce such rules that the Director deems “necessary to prevent the introduction, transmission, or spread of communicable diseases” from foreign nations or from one state or possession to another.<sup>27</sup> For “purposes of carrying out and enforcing

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<sup>19</sup> Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, Exec. Order No. 13,945, 85 Fed. Reg. 49,935, 49,936 (Aug. 8, 2020).

<sup>20</sup> Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

<sup>21</sup> *Id.* at 55,294–95.

<sup>22</sup> *See id.* at 55,295.

<sup>23</sup> *See id.* at 55,293, 55,295.

<sup>24</sup> *See id.* at 55,293 (discussing the qualifications).

<sup>25</sup> *See id.* at 55,292.

<sup>26</sup> *See id.* at 55,294. Some states adopted eviction moratoria. *Ala. Ass’n of Realtors v. HHS*, No. 20-cv-3377, 2021 WL 1779282, at \*1 (D.D.C. May 5, 2021) (subsequent history cited *supra* note 5).

<sup>27</sup> 42 U.S.C. § 264(a) (2018):

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,

such regulations,” the act states that the CDC “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.” The CDC argued that the last portion of the statute—“other measures, as in his judgment may be necessary”—justified the agency’s eviction moratorium.

The CDC’s order was scheduled to expire on December 31, 2020.<sup>28</sup> Days beforehand, Congress passed the Consolidated Appropriations Act, 2021, which extended the CDC’s order through January 31, 2021.<sup>29</sup> Thereafter, Congress did not renew a statutory moratorium. Acting on its own, the CDC extended its order in January, February, and June 2021.<sup>30</sup> That last extension expired on July 31.

## II. LITIGATION CHALLENGING THE CDC’S MORATORIUM

### A. THE LOWER FEDERAL COURT LITIGATION

Individual landlords, trade associations, and other parties challenged the moratoria. Some lower federal courts held that Section 264 of the Public Health Act authorized the CDC’s orders, some held to the contrary, and some punted, deciding only whether to issue a preliminary injunction pending a final decision.<sup>31</sup> The difference in the courts’

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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.

The Public Health Service Act literally assigns authority to the Surgeon General, but Reorganization Plan Number 3 of 1966 abolished the Office of the Surgeon General and transferred its statutory responsibilities and powers to the Secretary of Health, Education, and Welfare, now the Secretary of Health and Human Services. *See* 20 U.S.C. § 3508 (2018); Reorganization Plan No. 3 of 1966, §§ 1–3, 31 Fed. Reg. 8855, 8855-01 to -02 (June 25, 1966). The Office of the Surgeon General was reestablished in 1987, but the Secretary of HHS has retained authority under the Public Health Service Act. *Tiger Lily, LLC v. U.S. Dep’t of Hous. and Urb. Dev.*, 992 F.3d 518, 521 n.1 (6th Cir. 2021), *aff’d* 5 F.4th 666 (6th Cir. 2021). For clarification and ease of explanation, I will refer to the CDC rather than the Surgeon General throughout this Article.

<sup>28</sup> 85 Fed. Reg. at 55,292.

<sup>29</sup> Pub. L. No. 116–260, Tit. V, Subtit. A, § 502, 134 Stat. 1182, 2079 (2020) (“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.”).

<sup>30</sup> On January 29, 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). As that deadline approached, the CDC again extended its order, this time through June 30. *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 86 Fed. Reg. 16,731 (Mar. 31, 2021). On June 24, 2021, the CDC pushed the order’s expiration date back yet again, until July 31. *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 86 Fed. Reg. 34,010 (June 28, 2021).

<sup>31</sup> *See, e.g., Brown v. Azar*, 497 F. Supp. 3d 1270, 1281–85 (N.D. Ga. 2020) (denying a preliminary injunction against the CDC’s moratorium), *aff’d* *Brown v. Sec’y, U.S. Dep’t of Health and Hum. Servs.*, 4 F.4th 1220 (11th Cir. 2021); *Tiger Lily, LLC v. U.S. Dep’t of Hous. and Urb. Dev.*, 525 F. Supp. 3d 850 (W.D. Tenn. 2021) (granting an injunction), denying a stay pending appeal, 992 F.3d 518 (6th Cir. 2021), *aff’d* 5 F.4th 666 (6th Cir. 2021); *Skyworks, Ltd. v. CDC*,

analyses is largely a matter of a difference in their focus. Some judges homed in on the phrase allowing the CDC to “take such measures to prevent such spread of the diseases as he deems reasonably necessary,” and read it to grant the CDC plenary authority to decide how best to halt the spread of the virus.<sup>32</sup> The courts that held the moratoria exceeded the CDC’s Section 264 power approached the issue from a different perspective. They took a step back and read that phrase in conjunction with the remainder of the statute, particularly the sentence that immediately follows, specifying that, “[f]or the purpose of enforcing” the CDC’s regulations, the Director’s power “includ[es] inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.” Those courts limited the “catch-all” phrase in the preceding sentence to measures akin to the ones it specified.<sup>33</sup>

One case—*Alabama Realtors*—made its way through the lower courts to the Supreme Court—twice—in a few months. That case merits a detailed discussion.

## B. THE ALABAMA REALTORS CASE

### 1. ALABAMA REALTORS ROUND 1

Two individual plaintiffs, the corporate entities they use to manage their rental properties, and two trade associations brought suit in federal court in the District of Columbia against the CDC, claiming that the moratoria it imposed after the 2021 appropriations act expired exceeded the agency’s statutory authority and was unconstitutional to boot.<sup>34</sup> On cross-motions for summary judgment, the district court ruled in the plaintiffs’ favor,

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524 F. Supp. 3d 745 (N.D. Ohio 2021) (ruling that the CDC’s order likely exceeds its statutory authority, but declining to enter a preliminary injunction); *Chambless Enterprises, LLC v. Redfield*, 508 F. Supp. 3d 101, 108–15 (W.D. La. 2020) (ruling that the CDC’s eviction moratorium did not exceed its statutory authority), *appeal filed*, No. 21-30037 (5th Cir. 2021); *see also* *Terkel v. CDC*, No. 6:20-cv-00564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021) (ruling that Congress lacks authority under the Article I Commerce Clause to authorize the CDC order to impose a nationwide moratorium on evictions).

<sup>32</sup> *See Brown*, 497 F. Supp. 3d at 1281–85 (denying landlords’ motion for a preliminary injunction and ruling that the government was likely to prevail on the merits); *cf. Indep. Turtle Farmers of La. v. United States*, 703 F. Supp. 2d 604, 618–20 (W.D. La. 2010) (upholding an FDA rule prohibiting the sale of viable turtle eggs and small-size turtles to curb the spread of salmonellosis in reliance on the “catch-all” provision of 42 U.S.C. § 264).

<sup>33</sup> *See Brown v. Sec’y, U.S. Dep’t of Health and Hum. Servs.*, 4 F.4th 1220 (11th Cir. 2021) (Branch, J., dissenting); *Tiger Lily, LLC v. U.S. Dep’t of Hous. and Urb. Dev.*, 525 F. Supp. 3d 850 (W.D. Tenn. 2021) (granting an injunction), denying stay pending appeal, 992 F.3d 518 (6th Cir. 2021), *aff’d* 5 F.4th 666 (6th Cir. 2021); *Skyworks*, 524 F. Supp. 3d 745, 757–59 (N.D. Ohio 2021) (same). Some courts have expressed doubt that the CDC’s order is authorized by Section 264, but only resolved the issue whether the CDC’s order should be enjoined pending a decision on the merits of the case. *See, e.g., Brown v. Sec’y, U.S. Dep’t of Health and Hum. Servs.*, *supra* (expressing doubt that the CDC has authority to declare an eviction moratorium but refusing to overturn the district court’s denial of relief); *Skyworks*, 2021 WL 911720, at \*9–13. Other courts have reached the merits of the dispute. *See, e.g., Tiger Lily*, 992 F.3d at 522–24.

<sup>34</sup> *Alabama Realtors*, No. 20-cv-3377, 2021 WL 1779282, at \*2. The plaintiffs raised other claims as well, but they are not relevant to the issue discussed in this Article. *See id.*

holding that the Public Health Service Act did not authorize the agency to halt evictions.<sup>35</sup> The court acknowledged that the Public Health Service Act “grants the [CDC] broad authority to make and enforce regulations necessary to prevent the spread of disease,” but added that that the CDC Director’s “authority is not limitless.”<sup>36</sup> The “broad grant of rule-making authority in the first sentence of § 264(a) is tethered to—and narrowed by—the second sentence,” which identifies specific mechanisms that the CDC Director may use to protect the public health.<sup>37</sup> So read, the CDC’s order exceeded the agency’s Section 246 regulatory power because the “other measures” it authorizes must resemble or be closely analogous to the ones specified in the statute.<sup>38</sup> That is, they “must be directed toward” infected items, like animals or clothing, and the infected items must be the “sources” of a dangerous infection to humans.<sup>39</sup> “In other words, any regulations enacted pursuant to § 264(a) must be directed toward “specific targets ‘found’ to be sources of infection.”<sup>40</sup>

The court rejected the government’s argument that the first sentence in Section 264 empowered the CDC to adopt any measures necessary it deemed necessary to prevent the spread of an infectious disease.<sup>41</sup> That interpretation “goes too far,” the court concluded, because it “would ignore the text and structure” of Section 264 and renders “superfluous” the specific designation of mechanisms elsewhere in the next sentence.<sup>42</sup> “If the first sentence empowered the [CDC Director] to enact *any* regulation that, in his ‘judgment,’ was ‘necessary’ to prevent the interstate spread of communicable disease,” the court reasoned, “there would be no need for Congress to enumerate the ‘measures’ that the [Director] ‘may provide for’ to carry out and enforce those regulations.”<sup>43</sup> In the court’s view, several considerations bolstered its reading of the text. One was the canon directing courts to give effect to every portion of a statute, if possible.<sup>44</sup> Another was the injunction to avoid construing a statute in a manner that needlessly raises “serious constitutional problems,” such as Commerce Clause and Delegation Doctrine problems,<sup>45</sup> “unless such a

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<sup>35</sup> *Id.* at \*4–9.

<sup>36</sup> *Id.* at \*5.

<sup>37</sup> *Id.* at \*5.

<sup>38</sup> *Id.*; see, e.g., *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018) (“Where, as here, a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”) (citation and internal punctuation omitted).

<sup>39</sup> *Id.* at \*6.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *infra* text accompanying notes 143–47.

construction is contrary to the clear intent of Congress.”<sup>46</sup> And the last factor was the “major questions doctrine,” which presumes that Congress does not intend to make major revisions to our economic and social welfare in murky statutory terms.<sup>47</sup> Indeed, the court noted that the CDC had never used this authority in the nationwide manner that it sought to do so here, which provided strong evidence that Congress had never empowered the agency to do so.<sup>48</sup> “The Court is “confident that the enacting Congress did not intend to grow such a large elephant in such a small mousehole.”<sup>49</sup>

The government urged the district court to stay its ruling pending appeal, and the district court granted the government’s request.<sup>50</sup> The court ruled that “the Department has not shown a substantial likelihood of success on the merits,”<sup>51</sup> but concluded that the other equitable factors to be considered on a stay application justified granting the government’s motion. The government “made a showing of irreparable injury,” some of the damages that would be suffered by the plaintiffs from a stay might be recoverable later, and the public interest justified a stay.<sup>52</sup>

The plaintiffs asked the D.C. Circuit Court of Appeals to vacate the district court’s stay, but the court rejected the request.<sup>53</sup> At the outset, the appellate court completely disagreed with the district court’s reading of Section 264. First, the court found that the text of the first sentence was itself sufficiently broad to justify the moratorium.<sup>54</sup> Second, Congress had endorsed the CDC’s reading of the statute in the 2021 appropriations bill by extending the CDC’s moratorium, rather than adopting a new law with that effect.<sup>55</sup> Third, even apart from the “other measures” phrase, the breadth of the text of Section 264 as a whole evidenced Congress’s intent to empower the CDC Director to protect the public against harmful communicable diseases.<sup>56</sup> Fourth, none of the concerns that had troubled the district court—viz., the potential Commerce Clause problem from allowing Congress to regulate local evictions, the rule that Congress should not be deemed to have disrupted longstanding federalism principles absent clear language to the contrary, and the novelty of the CDC’s use of Section 264 to regulate landlord-tenant relations—justified cabining

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<sup>46</sup> *Id.* at \*7.

<sup>47</sup> *Id.* at \*4–5

<sup>48</sup> *Id.* at \*8.

<sup>49</sup> *Id.* (internal punctuation omitted).

<sup>50</sup> *Alabama Realtors*, No. 20-cv-3377, 2021 WL 1779282, at \*1–4 (granting a stay pending appeal).

<sup>51</sup> *Id.* at \*2; *see id.* at \*2–4.

<sup>52</sup> *Id.* at \*2; *see id.* at \*2–4.

<sup>53</sup> *Alabama Realtors*, No. 21-5093, 2021 WL 2221646, at \*1–4 (D.C. Cir. June 2, 2021).

<sup>54</sup> *Id.* at \*1–2.

<sup>55</sup> *Id.* at \*2.

<sup>56</sup> *Id.*

the breadth of the power that Congress gave the CDC Director.<sup>57</sup> By contrast, the circuit court agreed with the district court’s treatment of the equitable factors justifying a stay of its judgment and injunction.<sup>58</sup> Accordingly, the court denied the request to lift the stay.

The plaintiffs then asked the Supreme Court to lift the stay, and they came within a hair’s breadth of succeeding.<sup>59</sup> Technically, the vote was 5-4 to deny the plaintiffs’ motion, as reflected in the order entered in the case.<sup>60</sup> But the outcome was much closer than that.

Four justices—Chief Justice Roberts, as well as Justices Breyer, Sotomayor, and Kagan—voted to deny the plaintiffs’ request for an injunction pending appeal.<sup>61</sup> They did not offer any reasons for their vote. It is possible that they voted to deny the plaintiffs the interim equitable relief of an injunction pending appeal for either of two reasons: One is that they saw no need to overturn the concurrent decision of two lower courts to stay any injunction until the D.C. Circuit had resolved the merits of the appeal. The other reason is that they agreed with the government’s reading of the statute. Four members—Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Amy Coney Barrett—voted to grant the application.<sup>62</sup> They also did not offer any reasons for their votes. At a minimum, however, their vote to grant the plaintiffs interim relief means that those justices saw no reason to defer to the lower courts’ concurrent refusal to enjoin the CDC’s order. It also is likely that they saw no merit in the CDC’s reading of the statute because the equities seemed to balance out in favor of denying the plaintiffs’ request. That explanation is a sensible one, given the opinion issued by Justice Brett Kavanaugh explaining why he voted against a stay.

In a short concurring opinion, Justice Kavanaugh explained that “I agree with the District Court and the applicants that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium.”<sup>63</sup> As support for that conclusion, Justice Kavanaugh cited *Utility Air Regulatory Group v. EPA*,<sup>64</sup> a 2014 Supreme Court decision in which the Environmental Protection Agency argued that its authority to regulate the emission of pollutants by *motor vehicles* also empowered the agency to regulate *stationary sources* and thereby demand “permits for the construction and modification of tens of thousands, and the operation of millions, of small sources

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<sup>57</sup> *Id.* at \*3.

<sup>58</sup> *Id.* at \*3–4.

<sup>59</sup> *Alabama Realtors*, 141 C. Ct. at 2320.

<sup>60</sup> *Id.* (“The application to vacate stay presented to THE CHIEF JUSTICE and by him referred to the Court is denied.”); see *Nken v. Holder*, 556 U.S. 418, 433 (2009) (discussing the factors courts must consider when deciding whether to stay a judgment pending appeal).

<sup>61</sup> *Alabama Realtors*, 141 C. Ct. at 2320.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 573 U.S. 302 (2014).

nationwide.”<sup>65</sup> The Court unanimously rejected that argument. Justice Kavanaugh’s reliance on *Utility Air Regulatory Group* shows that he thought the CDC was running on fumes.

But (admit it, you knew that there was a “but” coming), Justice Kavanaugh then concluded that the plaintiffs should not receive interim relief they were seeking. Why?—Because in relatively short order the entire matter would become *macht nichts*. “Because the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds.”<sup>66</sup> Having performed his Solomonic role, Justice Kavanaugh then returned to the law, saying that, “In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.”<sup>67</sup> Given Justice Kavanaugh’s internal 5-4 vote and the four votes to grant a stay cast by Justices Thomas, Alito, Gorsuch, and Coney Barrett, the better reading of the Supreme Court’s order is that five justices concluded that the CDC lacks authority for an eviction moratorium.<sup>68</sup>

## 2. ALABAMA REALTORS ROUND 2

The Supreme Court issued its ruling on June 29, giving Congress ample time to pass a third statutory moratorium before the CDC’s order expired on July 31. The Biden Administration did not publicly urge Congress to enact a new moratorium for quite some time.<sup>69</sup> On July 29, however, the White House finally did so, taking the position that the CDC could not act without new statutory authorization.<sup>70</sup> Nonetheless, Congress recessed

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<sup>65</sup> *Id.* at 324.

<sup>66</sup> *Alabama Realtors*, 141 S. Ct. at 2321 (Kavanaugh, J., concurring).

<sup>67</sup> *Id.*

<sup>68</sup> See *Alabama Realtors*, No. 20-cv-3377, 2021 WL 3577367, at \*5 (D.D.C. Aug. 13, 2021) (“It is true that the Supreme Court’s recent decision in this case strongly suggests that the CDC is unlikely to succeed on the merits. Four Supreme Court Justices voted to vacate the stay, an action which would have been improbable if not impossible had the government, as the stay applicant, . . . made a strong showing that it was likely to succeed on the merits. . . . And while Justice Kavanaugh voted to uphold the stay, he squarely concluded the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium.”) (citations and internal punctuation omitted).

<sup>69</sup> See Andrew Ackerman, *Biden Asks Congress to Extend Federal Eviction Moratorium*, WALL ST. J., July 29, 2021, <https://www.wsj.com/articles/biden-asks-congress-to-extend-federal-eviction-moratorium-11627571409> [<https://perma.cc/HWY6-NKL8>].

<sup>70</sup> See *Alabama Realtors*, No. 20-cv-3377, 2021 WL 3577367, at \*2 (“In the following weeks [after the Supreme Court’s order], the Biden Administration repeatedly stated that it would not further extend the eviction moratorium in light of the Supreme Court’s ruling, which it interpreted to ‘mak[e] clear’ the option ‘is no longer available.’ Pls.’s Reply at 1–2, Dkt. 71 (quoting White House, Statement by White House Press Secretary Jen Psaki on Biden-Harris Administration Eviction Prevention Efforts (July 29, 2021)). And the Administration stressed that the CDC agreed with this interpretation, stating that “the CDC Director and her team have been unable to find legal authority, even for a more targeted eviction moratorium that would focus [just] on counties with higher rates of COVID spread.” Mot. Hr’g Tr. at 20 (quoting White House, Press Briefing by Press Secretary Jen Psaki and White House American Rescue Plan

without empowering the CDC to issue a new moratorium, and July 31 came and went without one.<sup>71</sup>

Two days later, in response to heavy lobbying from members of Congress, including Speaker of the House Nancy Pelosi,<sup>72</sup> Biden changed his position. He directed the CDC to

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Coordinator and Senior Advisor to the President Gene Sperling (Aug. 2, 2021).”); Press Briefing by Press Secretary Jen Psaki and White House American Rescue Plan Coordinator and Senior Advisor to the President Gene Sperling, Aug. 2, 2021, <https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/02/press-briefing-by-press-secretary-jen-psaki-and-white-house-american-rescue-plan-coordinator-and-senior-advisor-to-the-president-gene-sperling-august-2-2021/> [https://perma.cc/P9LU-GE4T] (“To date, the CDC Director and her team have been unable to find legal authority, even for a more targeted eviction moratorium that would focus just on counties with higher rates of COVID spread. . . . One of the things that is — that he is requesting today is that state and local governments extend or pass eviction moratoriums to cover the next two months. . . . I would say that on this particular issue, the President has not only kicked the tires; he has double, triple, quadruple checked. He has asked the CDC to look at whether you could even do targeted eviction moratorium—that just went to the counties that have higher rates—and they, as well, have been unable to find the legal authority for even new, targeted eviction moratoriums.”); Statement by White House Press Secretary Jen Psaki on Biden-Harris Administration Eviction Prevention Efforts, July 29, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/statement-by-white-house-press-secretary-jen-psaki-on-biden-harris-administration-eviction-prevention-efforts/> [https://perma.cc/SX6T-YKJM] (“Given the recent spread of the Delta variant, including among those Americans both most likely to face evictions and lacking vaccinations, President Biden would have strongly supported a decision by the CDC to further extend this eviction moratorium to protect renters at this moment of heightened vulnerability. Unfortunately, the Supreme Court has made clear that this option is no longer available. In June, when CDC extended the eviction moratorium until July 31st, the Supreme Court’s ruling stated that ‘clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.’”); see also Siobhan Hughes & Alex Leary, *As Eviction Moratorium Expires, White House Clashes With Progressives*, WALL ST. J., Aug. 2, 2021, <https://www.wsj.com/articles/progressives-raise-heat-on-nancy-pelosi-over-eviction-moratorium-11627918766> [https://perma.cc/E55J-LMD6] (“The White House, under fire from progressives for the expiration of a moratorium on evictions, said it lacked the legal authority to order an extension while blaming state and local governments for slow distribution of rental aid already approved by Congress. [¶] ‘There is simply no excuse, no place to hide for any state or locality that is failing to accelerate their emergency rental assistance fund,’ Gene Sperling, a senior adviser to President Biden, said in defending the administration’s handling of the issue on Monday. . . . The White House said that on Sunday Mr. Biden asked the CDC to come up with a new, 30-day eviction moratorium focused on areas with high Covid-19 rates, rather than the monthslong options previously proposed. But the White House said the CDC said it hadn’t found the legal authority for that action either, and signaled it was loath to take an action that could lead to the high court striking down its public-health powers.”); Glenn Thrush & Matthew Goldstein, *Administration Seeks to Blunt Efforts from End of Eviction Moratorium*, N.Y. TIMES, Aug. 2, 2021, <https://www.nytimes.com/2021/08/02/us/politics/administration-seeks-to-blunt-effects-from-end-of-eviction-moratorium.html> [https://perma.cc/Q65F-SLKH] (“Over the weekend, Mr. Biden called on Dr. Rochelle Walensky, the C.D.C. director and the official with the authority to extend the freeze, to explore the possibility of limiting an extension to areas hit especially hard by the Delta variant, but was told that was not possible. [¶] Mr. Sperling said in an interview that West Wing officials wanted to extend the moratorium. ‘But what was clear from the legal analysis was that we had already litigated this issue all the way to the Supreme Court,’ he said.”).

<sup>71</sup> See Andrew Ackerman & Siobhan Hughes, *House Adjourns Without Extending Covid-19 Eviction Moratorium*, WALL ST. J., July 30, 2021, <https://www.wsj.com/articles/house-adjourns-without-extending-covid-19-eviction-moratorium-11627684248> [https://perma.cc/AB5B-LZWF].

<sup>72</sup> See, e.g., Lauren Egan et al., *CDC Announced Targeted Eviction Moratorium After Days of Pressure*, NBC NEWS, Aug. 3, 2021, <https://www.nbcnews.com/politics/white-house/cdc-expected-announce-new-eviction-moratorium-after-days-pressure-n1275860> [https://perma.cc/QB5R-W7S7]; Editorial Board, *The Rental Evictions Fiasco*, WALL ST. J., Aug. 2, 2021, <https://www.wsj.com/articles/rental-evictions-moratorium-covid-19-biden-supreme-court-11627838612> [https://perma.cc/7KVC-H38R] (“Cue the political panic. On Thursday, two days before July 31, the

issue a new moratorium while acknowledging that it likely would not pass legal muster.<sup>73</sup> Being a good soldier, CDC Director Rochelle Walensky that day issued a new order effective through October 31.<sup>74</sup> The new order has a slightly narrower scope than the recently

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White House issued a statement essentially blaming the Supreme Court for the moratorium's end and urged Congress to extend it. House Speaker Nancy Pelosi declared a five-alarm fire, but her attempt to rush an extension through the House failed. Too many Democrats balked."); Michael D. Shear et al., *As Democrats Seethed, White House Struggled to Contain Eviction Fallout*, N.Y. TIMES, Aug. 7, 2021, <https://www.nytimes.com/2021/08/07/us/politics/biden-congress-eviction-moratorium.html> [<https://perma.cc/X9HH-ZEN3>] ("Progressive Democrats were publicly assailing the administration for allowing an eviction ban to expire that past Saturday and House Speaker Nancy Pelosi, unable to secure the votes to approve an extension, was demanding Mr. Biden find a different solution. . . . Mr. Biden and his aides claimed their hands were legally tied by a recent Supreme Court ruling that strongly suggested — but did not explicitly say — that the nationwide evictions moratorium exceeded the government's emergency powers under a public health law. But Ms. Pelosi did not accept that explanation. [¶] 'Get better lawyers,' Ms. Pelosi replied, according to a person familiar with the conversation."); Thrush & Goldstein, *supra* note 66 ("[M]any Democrats, including Speaker Nancy Pelosi, have called on Mr. Biden to reconsider his decision not to act unilaterally, and have expressed anger that the White House gave lawmakers only two days to try to ram through legislation to extend the freeze last week.").

<sup>73</sup> See Remarks by President Biden on Fighting the COVID-19 Pandemic, Aug. 3, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/> [<https://perma.cc/H89R-T7Y7>] ("THE PRESIDENT: Any call for a moratorium based on the Supreme Court recent decision is likely to face obstacles. I've indicated to the CDC I'd like them to look at other alternatives than the one that is in pow—in existence, which the Court has declared they're not going to allow to continue. And the CDC will have something to announce to you in the next hour to two hours."); *Notable & Quotable: Biden on Evictions and Passing Constitutional Muster*, WALL ST. J., Aug. 4, 2021, <https://www.wsj.com/articles/constitutional-biden-cdc-eviction-ban-moratorium-covid-11628102695> [<https://perma.cc/64GW-SALG>] ("Q: We're learning that your administration is about to announce a new partial eviction moratorium, Covid-related. Can you tell us any more about that? And are you sure it's going to pass Supreme Court muster? [¶] The president: The answer is twofold. One, I've sought out constitutional scholars to determine what is the best possibility that would come from executive action, or the CDC's judgment, what could they do that was most likely to pass muster, constitutionally. [¶] The bulk of the constitutional scholarship says that it's not likely to pass constitutional muster. Number one. But there are several key scholars who think that it may and it's worth the effort. But . . . the court has already ruled on the present eviction moratorium. . . ."); *WSJ Editorial*, *supra* note 5 ("The bulk of the constitutional scholarship says that it's not likely to pass constitutional muster," Mr. Biden admitted Tuesday. That was only hours before the Centers for Disease Control and Prevention issued its renewed eviction ban. 'But at a minimum,' Mr. Biden said, 'by the time it gets litigated, it will probably give some additional time while we're getting that \$45 billion out to people who are, in fact, behind in the rent and don't have the money.'").

<sup>74</sup> Temporary Halt in Residential Evictions in Communities with Substantial or High Levels of Transmission of COVID-19 to Prevent Further Transmission of COVID-19, 86 Fed. Reg. 43,244 (Aug. 6, 2021); see *Alabama Realtors*, No. 20-cv-3377, 2021 WL 3577367, at \*3 ("finding only 'minor differences' between the CDC earlier and August 3 orders: "First, the current moratorium is effective through October 3, 2021, and covers all evictions initiated but not finalized before the order's promulgation on August 3, 2021. . . . Second, the current moratorium applies only in U.S. counties experiencing substantial and high levels of community transmission levels of SARS-CoV-2 as defined by CDC—a category that presently includes roughly ninety-one percent of U.S. counties . . . . In contrast, the previous moratorium applied in all U.S. counties. Apart from these differences, the moratoria are virtually identical—the remainder of their definitions are the same, their exceptions are the same, their applicability provisions are the same, and the criminal penalties for violating those provisions are the same. And the CDC designed the current moratorium to be continuous with its antecedents, insofar as it exempts persons covered under those antecedents from filing new declarations of eligibility.") (citations, footnote, and internal punctuation omitted); Doina Chiacu, *CDC Extends Federal Eviction Moratorium for 60 Days—Schumer*, REUTERS, Aug. 4, 2021, <https://www.reuters.com/world/us/cdc-extends-federal-eviction-moratorium-60-days-schumer-2021-08-03/> [<https://perma.cc/HYZ8-A5Q2>] ("The U.S. Centers for Disease Control and Prevention extended a federal

expired order, but the August 3 order “includes roughly ninety-one percent of U.S. counties.”<sup>75</sup>

Never saying die, the *Alabama Realtors* plaintiffs returned to the District of Columbia district court and once again urged the judge to lift the stay pending appeal in light of the Supreme Court’s order and the Biden Administration’s confession that its new rule was likely unlawful. The judge declined the request, ruling that her hands were tied by the D.C. Circuit’s earlier order and the law-of-the-case doctrine.<sup>76</sup> The plaintiffs renewed their motion in the D.C. Circuit, which denied the request for interim relief in a one-paragraph opinion that offered no reason for its ruling and did not discuss the meaning of Supreme Court’s earlier order.<sup>77</sup> The plaintiffs then returned to the Supreme Court, where they finally obtained their sought-after relief by a 6-3 vote.<sup>78</sup>

In a brief per curiam opinion, the Supreme Court vacated the district court’s stay pending appeal, enabling the plaintiffs to secure relief against nonpaying tenants. The majority reasoned that the plaintiffs “are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority.”<sup>79</sup> Put simply, “[t]he applicants not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing.”<sup>80</sup> In terms deriding the government for even relying on Section 264 of the Public Health Service Act, the majority concluded that “[i]t strains credulity to believe that this statute,” which empowers the CDC “to implement measures like fumigation and pest

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moratorium on evictions affecting 90 percent of the country for 60 days, Senate Majority Leader Chuck Schumer said on Tuesday.”); Sean-Michael Pigeon, *So . . . What Happens After This New Moratorium Ends?*, NAT’L REV., Aug. 4, 2021, <https://www.nationalreview.com/corner/so-what-happens-after-this-new-moratorium-ends/> [https://perma.cc/7D9E-U7BE] (“The CDC is framing its eviction policy as a ‘targeted’ one. The CDC’s ploy is to argue that it is only looking at ‘hotspots’ of COVID-19 and that the order is primarily about public health. Given that 90 percent of renters are covered by the order, though, the order isn’t narrow at all.”). Interestingly, it appears that the Justice Department and Biden disagreed about the legality of the new order. Neither Biden nor White House Press Secretary Jen Psaki said that the Justice Department believed that the CDC had authority for the new moratorium, which one or the other surely would have said if it were true. In addition, when Attorney General Merrick Garland was asked by a reporter “whether the department signed off on the eviction moratorium, Garland did not answer the question.” Alan Z. Rozenshtein, *Did the Justice Department Give President Biden Legal Advice on the CDC Eviction Moratorium?*, LAWFARE, Aug. 9, 2021, <https://www.lawfareblog.com/did-justice-department-give-president-biden-legal-advice-cdc-eviction-moratorium> [https://perma.cc/7ZWF-QXC5]. That silence is telling. See *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (citing Arthur Conan Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 335 (1927)).

<sup>75</sup> *Alabama Realtors*, No. 20-cv-3377, 2021 WL 3577367, at \*3.

<sup>76</sup> See *id.* at \*4 (“Rather than address any of these factors on the merits, the government argues that the law-of-the-case doctrine requires the Court to maintain the stay as a matter of law. Defs.’s Br. at 6–8, Dkt. 69. This Court agrees. Because the D.C. Circuit’s judgment affirming the stay binds this Court and the Supreme Court did not overrule that judgment, the Court will deny the plaintiffs’ motion.”).

<sup>77</sup> *Alabama Realtors*, No. 21-5093, 2021 WL 3721431 (D.C. Cir. Aug. 20, 2021).

<sup>78</sup> *Alabama Realtors 2*, 141 S. Ct. 2485 (2021).

<sup>79</sup> *Id.* at 2486.

<sup>80</sup> *Id.* at 2488.

extermination,” nonetheless “grants the CDC the sweeping authority that it asserts.”<sup>81</sup> The reason is that the first and second sentences of Section 264 must be read together, which makes it clear that “the kinds of measures” that the CDC may employ—“inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles”—“directly relate to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself.”<sup>82</sup> But “[e]ven if the text were ambiguous,” the Court added, “the sheer scope of the CDC’s claimed authority” under the statute “would counsel against the Government’s interpretation.”<sup>83</sup> Citing its 2014 *Utility Air Regulatory Group* decision,<sup>84</sup> the one on which Justice Kavanaugh had previously relied,<sup>85</sup> the Court noted that “[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”<sup>86</sup> Aside from granting the CDC “a breathtaking amount of authority,” the Court wrote, “[i]t is hard to see what measures this interpretation would place outside the CDC’s reach.”<sup>87</sup> And that is without considering, the Court added, the “unprecedented” nature of the government’s interpretation of the act, along with the possibility of imposing criminal penalties for its violation.<sup>88</sup> In conclusion, the text invoked by the government “is a wafer-thin reed on which to rest such sweeping power.”<sup>89</sup> The balance of equities also came out in the plaintiffs’ favor.<sup>90</sup> While “[i]t is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant,” the Court concluded, “our system does not

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<sup>81</sup> *Id.* at 2486.

<sup>82</sup> *Id.* at 2488.

<sup>83</sup> *Id.* at 2489.

<sup>84</sup> *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

<sup>85</sup> See *supra* text accompanying notes 64–65.

<sup>86</sup> *Alabama Realtors 2*, 141 S. Ct. at 2489 (internal punctuation omitted).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 2489 (“The equities do not justify depriving the applicants of the District Court’s judgment in their favor. The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery. Despite the CDC’s determination that landlords should bear a significant financial cost of the pandemic, many landlords have modest means. And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude. . . . [¶] As harm to the applicants has increased, the Government’s interests have decreased. Since the District Court entered its stay, the Government has had three additional months to distribute rental-assistance funds to help ease the transition away from the moratorium. Whatever interest the Government had in maintaining the moratorium’s original end date to ensure the orderly administration of those programs has since diminished. And Congress was on notice that a further extension would almost surely require new legislation, yet it failed to act in the several weeks leading up to the moratorium’s expiration.”) (citation omitted).

permit agencies to act unlawfully even in pursuit of desirable ends.”<sup>91</sup> It is for “Congress, not the CDC, to decide” in the first instance whether rental payments are to be postponed nationwide.<sup>92</sup>

Joined by Justices Sotomayor and Kagan, Justice Breyer dissented.<sup>93</sup> He found it “far from ‘demonstrably’ clear that the CDC lacks the power to issue its modified moratorium order.”<sup>94</sup> In part, that was because, as Justice Breyer concluded, quarantines, which the CDC may impose, “arguably impose greater restrictions” than the eviction moratorium.<sup>95</sup> In part that was because “the lower courts have split on this question,” which means that, “[a]t a minimum, there are arguments on both sides.”<sup>96</sup> He also concluded that the equities balanced in favor of leaving the stay in place pending appeal and that “the public interest is not favored by the spread of disease or a court’s second-guessing of the CDC’s judgment.”<sup>97</sup>

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The Supreme Court’s *Alabama Realtors 2* order did not resolve the merits of the appeal. That order only allowed the district court’s judgment to take effect pending appeal.<sup>98</sup> The government technically could have pursued its appeal, and, in theory, the D.C. Circuit could have decided that, despite the Supreme Court’s order in *Alabama Realtors 2*, the interpretation of the act that it adopted previously remained the correct one.<sup>99</sup> The

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<sup>91</sup> *Id.* at 2490 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585 (1952), and stating that “even the Government’s belief that its action ‘was necessary to avert a national catastrophe’ could not overcome a lack of congressional authorization”).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2490 (Breyer, J., dissenting).

<sup>94</sup> *Id.* (Breyer, J., dissenting).

<sup>95</sup> *Id.* at 2492 (Breyer, J., dissenting).

<sup>96</sup> *Id.* (Breyer, J., dissenting).

<sup>97</sup> *Id.* at 2493 (Breyer, J., dissenting); *id.* at 2494 (Breyer, J., dissenting) (“Applicants raise contested legal questions about an important federal statute on which the lower courts are split and on which this Court has never actually spoken. These questions call for considered decisionmaking, informed by full briefing and argument. Their answers impact the health of millions. We should not set aside the CDC’s eviction moratorium in this summary proceeding. The criteria for granting the emergency application are not met. I respectfully dissent.”).

<sup>98</sup> *See id.* at 2488 (“The District Court concluded that its stay is no longer justified under the governing four-factor test. . . . We agree.”), 2490 (“If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it. The application to vacate stay presented to THE CHIEF JUSTICE and by him referred to the Court is granted.”).

<sup>99</sup> Of course, that would take *grande cojones*, but we have seen comebacks like that happen before. *See* Super Bowl LI (NFL Feb. 5, 2017) (down 28-3 with 8:31 left in the third quarter, Tom Brady brought the Patriots back to win 34-28 in overtime, thereby establishing himself as the GOAT). For a discussion of the effect of a Supreme Court order entered in its so-called “Shadow Docket” dealing with interim relief pending entry of a final judgment, see *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 229-30 (4th Cir. 2020); Trevor

government, however, moved voluntarily to dismiss its appeal, and the D.C. Circuit granted the motion.<sup>100</sup> Accordingly, the district court’s judgment in *Alabama Realtors* is now final. The issue, however, remains a live one, given the lack of a Supreme Court ruling. The next section, therefore, will discuss the merits of the government’s position.

### III. THE CDC’S OVERREACH

The Constitution contemplates the existence of federal agencies, like the CDC, because it refers to “Departments” of the federal government.<sup>101</sup> But the Constitution does not itself flesh out that skeleton by creating any such “Departments”; it leaves that job to Congress and the President. Congress must create a “Department” by statute,<sup>102</sup> and the President must fill it by appointing “Officers of the United States,”<sup>103</sup> who ultimately report to him.<sup>104</sup> The result is that, unlike the President, who enjoys certain inherent powers,<sup>105</sup> agencies possess only the authority that Congress has vested in them by law.<sup>106</sup> Here, that law is the Public Health Service Act, specifically Section 264 of Title 42.

Among other things, Section 264 authorizes the CDC to promulgate regulations that the Director deems necessary to prevent the introduction of communicable diseases from foreign nations into this one or across state lines.<sup>107</sup> To do so, the CDC Director may adopt rules governing inspection, fumigation, disinfection, sanitation, and, when necessary to prevent human infection, the destruction of pests, animals, or articles found to be so

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N. McFadden & Vetan Kapoor, *The Precedential Effect of the Supreme Court’s Emergency Stays*, 44 HARV. J.L. & PUB. POL’Y 827 (2021).

<sup>100</sup> *Alabama Realtors*, No. 21-5093, 2021 WL 4057718 (D.C. Cir. Sept. 3, 2021) (order granting government’s unopposed motion to dismiss its appeal).

<sup>101</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>102</sup> The Article I Necessary and Proper Clause empowers Congress to create whatever agencies are necessary to implement federal law. *See* U.S. CONST. art. I, § 8, cl. 18.

<sup>103</sup> Article II creates the office of “President of the United States of America.” U.S. CONST. art. II, § 1, cl. 1. It also grants the President the ability—sometimes with the assent of the Senate, sometimes without it—to appoint and commission “Officers of the United States” to staff the “Departments” Congress has established. *Id.* art. II, § 2, cls. 2 & 3.

<sup>104</sup> *See, e.g., Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2198–99 (2020).

<sup>105</sup> For example, Article II empowers the President to grant clemency, U.S. Const. art. II, § 2, cl. 1, and he or she can do so without any need for congressional authorization. *See, e.g., Schick v. Reed*, 419 U.S. 256, 266 (1974) (“[T]he power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress.”).

<sup>106</sup> *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

<sup>107</sup> 42 U.S.C. 264(a) (quoted *supra* note 27).

infected or contaminated as to be sources of “dangerous infection to human beings,” as well as “other measures, as in his judgment may be necessary.”<sup>108</sup>

The government’s argument is simple and straightforward: The Public Health Service Act authorizes CDC Director Walensky<sup>109</sup> to issue whatever rules she deems medically necessary to prevent the interstate transmission of the SARS-CoV-2 virus. The August 3 eviction moratorium is a far more modest step than a nationwide, across-the-board, exceptionless home quarantine order and therefore easily fits under the Director’s Section 264(a) power. The emergence of the highly infectious “Delta variant” of the SARS-CoV-2 virus, along with the recent rise in the number of infected parties, principally unvaccinated individuals, makes it sensible to issue what is effectively a 60-day “shelter in place” order to reduce the number of new Delta-variant caused COVID-19 cases.<sup>110</sup>

The flaw in the government’s argument is the tunnel-vision like approach it takes to one small part of a much larger statute.<sup>111</sup> The government’s approach to statutory interpretation resembles the actions taken by someone who, hoping to understand what a painter has created on a canvas, stands only a few inches in front of it and looks entirely straight ahead without moving his head or eyes. All that person could see is a very small portion of the painting, certainly not a forest, perhaps not even a tree or a branch, maybe only a leaf. Following that approach, someone looking up at the Sistine Chapel ceiling would see only two fingertips in close proximity, not God touching the hand of Man. No one would recommend viewing art that way, at least not if someone wanted to understand the image that the painter sought to convey to the world. Nor would anyone recommend judging the merits of a symphony by any one of its movements or by listening to only the string section, brass, woodwind, or percussion instruments. Finally, the same is true for the written word. Stop reading or watching “*The Witness for the Prosecution*” before the novelette, play, or movie ends and you will miss a critical part of the story. Whether or not the whole is greater than the sum of its parts, it is critical to consider the whole of a painting, symphony, play, or film to understand its message.

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<sup>108</sup> *Id.*

<sup>109</sup> The Secretary has delegated all Section 264 powers to the CDC. 42 C.F.R. § 70.2 (2020).

<sup>110</sup> *See Brown v. Azar*, 497 F. Supp. 3d 1270, 1281 (N.D. Ga. 2020).

<sup>111</sup> The D.C. Circuit made the same mistake. In the court’s view, the clause allowing the Director to inspect, fumigate, disinfect, sanitize or destroy infected, dangerous animals or articles was a sufficient “intelligible principle” to defeat any argument that Congress acted improperly when it had turned the Director loose to prevent transmission in any way that she saw fit. *See Alabama Realtors*, No. 21-5093, 2021 WL 2221646, at \*2 (D.C. Cir. June 2, 2021). But that conclusion makes little sense unless that sentence modifies the catch-all provision in the immediately preceding sentence. If it does, however, it must have that effect by giving content to the type of “other measures” that the Director may take. Otherwise, the list is superfluous. Accordingly, the D.C. Circuit cannot have it both ways. If the list gives content to the “other measures” catchall term, it does so only by limiting the “other measures” the CDC Director can take. And if the list performs that function, an eviction moratorium is not an authorized response to a virus, because it shares no “family resemblance” (the term that Wittgenstein used to describe the *ejusdem generis* rule of statutory interpretation, *see* LUDWIG WITTMENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. trans 3d ed. 1973) (1953)) to the inspection, fumigation, chemical cleaning, sanitization, or destruction of animals or articles.

Legal experts would tell you to interpret a statute in the same manner. As Justice Elena Kagan explained two years ago, “statutory interpretation” is “a holistic endeavor which determines meaning by looking not to isolated words, but to text in context, along with purpose and history.”<sup>112</sup> Words should be read, not “in a vacuum,” but “in their context and with a view to their place in the overall statutory scheme.”<sup>113</sup> The reason is that statutes are more than individual nouns, verbs, articles, adjectives, adverbs, and conjunctions. They are directions to the government or to private parties about what one or the other may or may not do. Fixating on a word, phrase, or clause to the exclusion of the remainder of a law is not just an unsophisticated way to learn what a statute means. It also disregards the law-drafting process, which, particularly in long bills, can have several different components that address a common subject, as well as the lawmaking process itself, in which Senators and Representatives vote on the entirety of a bill, not piece-by-piece. Logic dictates that we should follow the same approach to understanding law that we do in the case of art, music, and literature. The Supreme Court must agree because, in its order in *Alabama Realtors 2*, the majority did just that.<sup>114</sup>

The Public Health Service Act consists of six titles that take up 39 pages in the Statutes at Large.<sup>115</sup> Most of the act’s titles speak to matters unrelated to the moratorium issue, such as the provisions dealing with the CDC’s responsibilities to conduct disease-related research, to collect and publish health-related information, or to assist and fund state agencies with a common disease-control mission. Title III, however, deals with the general powers and responsibilities of the CDC.<sup>116</sup> According to then-Surgeon General Thomas

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<sup>112</sup> Gundy v. United States, 139 S. Ct. 2116, 2126 (2019) (citation and internal punctuation omitted).

<sup>113</sup> *Id.* (citation and internal punctuation omitted); see also, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (“[R]easonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole.”) (internal punctuation omitted).

<sup>114</sup> See *Alabama Realtors 2*, 141 S. Ct. 2485, 2488 (2021) (“Reading both sentences together, rather than the first in isolation, it is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium.”).

<sup>115</sup> See Ch. 373 58 Stat. 682, 682–720 (codified as amended at 42 U.S.C. Ch. 6A (2018)). Title I contains the act’s title and definitions. Title II deals with administration. It creates the Public Health Service, to be headed by the U.S. Surgeon General, a presidential appointee. Sections 1–2, 58 Stat. 682, 682–83. Title II goes on to identify other supporting personnel, their selection process, pay and benefits, promotions, uniform allowances, and retirement. It also creates the National Cancer Council. Sections 201–17, 58 Stat. 682, 683–91. Title IV deals with the National Cancer Institute. Sections 401–06, 58 Stat. 682, 707–08. Title V is a list of miscellaneous items, such as gifts, the care of patients at St. Elizabeth’s hospital, the settlement of claims, and the transportation of the remains of commissioned officers. Title VI contains temporary and emergency provisions.

<sup>116</sup> Part A deals with research and investigations. It directs the CDC Director to conduct, coordinate, assist in, and fund “investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man,” as well as publish the result of that research. Section 301, 58 Stat. 682, 692 (codified as amended at 42 U.S.C. §§ 241, 242, 242k). Part B deals with federal-state cooperation. Sections 301–15, 58 Stat. 682, 691–95. It directs the CDC Director to provide to and accept from “State and local authorities” whatever “assistance in the enforcement of quarantine regulations” issued under the authority of the Public Health Service Act state or local governments can provide. Section 311, 58 Stat. 682, 693. Part F empowers the CDC Director to regulate the importation and interstate movement of “biological products” — viz., “any virus, therapeutic serum, toxin, antitoxin, or analogous product, or arsphenamine or its derivatives (or any

Parran, that title “is in the main a reenactment into law of present widely scattered authority, some of which is very ancient.”<sup>117</sup> Even most of Title III, however, is only indirectly pertinent. Particularly relevant, however, are Parts B through E and G.

Part B is captioned “Federal-State cooperation.” It directs the CDC to assist the states with regard to “the enforcement of quarantine regulations made pursuant to this act,” as well as state quarantine orders.<sup>118</sup> Part C is entitled “Hospitals, Medical Examinations, and Medical Care.”<sup>119</sup> The CDC must “[c]ontrol, manage, and operate” all hospitals and facilities that Congress created for “the care, treatment and hospitalization of patients” covered by the act,<sup>120</sup> such as American merchant seamen and Public Health Service employees.<sup>121</sup> In an emergency, the CDC may also treat parties not covered by the act.<sup>122</sup> The CDC is responsible for “making such physical and mental examinations of aliens” as required by the federal immigration laws<sup>123</sup> and may treat any person held under the “quarantine laws” or by federal immigration authorities.<sup>124</sup> At the request of a foreign vessel seeking to enter the United States, the CDC may provide necessary medical treatment “at hospitals and other stations.”<sup>125</sup> The CDC may provide medical and psychiatric treatment, along with “related technical and scientific services,” to prisoners in federal custody.<sup>126</sup> Plus, the CDC may offer “medical, surgical, and hospital services and supplies” to parties protected by the federal compensation laws, and various other specified federal employees.<sup>127</sup> Parts D and E address the hospitalization and treatment of people in the custody of the immigration service for leprosy, as well as convicts and narcotics addicts.<sup>128</sup>

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other trivalent organic arsenic compound), applicable to the prevention, treatment, or cure of diseases or injuries of man.” Section 351(a), 58 Stat. 682, 702; *see id.* Sections 351–52, 58 Stat. 692, 702–03.

<sup>117</sup> *Public Health Service Code—Hearing Before Subcomm. Of the Comm. on Interstate & Foreign Commerce on H.R. 3379—A Bill to Codify the Laws Relating to the Public Health Service, and for Other Purposes*, 78th Cong., 2d Sess. 43 (1944) [hereafter *1944 House PSHA Hearing*] (Statement of Surgeon Gen’l Thomas Parran).

<sup>118</sup> Section 311, 58 Stat. 682, 693.

<sup>119</sup> 58 Stat. 682, 695; *see* Sections 321–27, 58 Stat. 682, 695–98.

<sup>120</sup> Section 321(a)-(c), 58 Stat. 682, 695–96; *see 1944 House PSHA Hearing, supra* note 87, at 43–44 (Surgeon Gen’l Parran).

<sup>121</sup> Sections 322, 58 Stat. 682, 695–96; *see 1944 House PSHA Hearing, supra* note 87, at 43–45 (Surgeon Gen’l Parran) (describing coverage under prior law).

<sup>122</sup> Section 322(d), 58 Stat. 682, 696.

<sup>123</sup> Section 325, 58 Stat. 682, 697.

<sup>124</sup> Section 322(c), 58 Stat. 682, 696.

<sup>125</sup> Section 322(b), 58 Stat. 682, 696.

<sup>126</sup> Section 323, 58 Stat. 682, 697.

<sup>127</sup> Section 324 & 326, 58 Stat. 682, 697–98.

<sup>128</sup> Sections 331–32 & 341–45, 58 Stat. 682, 698–702.

Now turn to Section 264 of Title 42. Section 264 became law as part of Part G of Title III, which involves “[t]he quarantine activities of the [Public Health] Service,” which was “one of its oldest functions.”<sup>129</sup> Testifying before Congress when Section 264 was being considered, then-Surgeon General Parran described that portion of the bill, “[w]ith minor exceptions,” as being “the same as existing law.”<sup>130</sup> The two new items that he mentioned were the need to account for international “civil air navigation” and “to prevent the war-time introduction into this country of certain diseases not now on the quarantinable disease list.”<sup>131</sup> The Surgeon General did not ask Congress for the power to intrude into landlord-tenant relationships governed by state law.<sup>132</sup>

As noted above, Title III defines the duties and powers of the CDC.<sup>133</sup> To “control communicable diseases,” it empowers the CDC Director to adopt regulations necessary to prevent the transmission of an infectious disease across the nation’s borders or from one state to another. To prevent transmission of a harmful pathogen—that is, “[f]or purposes of carrying out and enforcing” those regulations—the Director may inspect, fumigate, disinfect, sanitize or destroy animals or articles that are “so infected or contaminated” that they are a source of “dangerous infection to human beings,” as well as take “other measures” that he deems necessary.

What “other measures” can a Director deem necessary? One would be to define the steps that the federal, state, and local governments should take to enforce a federal or state quarantine.<sup>134</sup> Regulations could impose reporting requirements on businesses, like airlines and trains, that carry passengers in interstate commerce.<sup>135</sup> Regulations could require travelers from a foreign country with a large number of COVID-19 patients to be quarantined for a certain number of days after entry.<sup>136</sup> And so forth.<sup>137</sup> Those are medical

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<sup>129</sup> 1944 House PSHA Hearing, *supra* note 87, at 45 (Surgeon Gen’l Parran). The Public Health Service is the offspring of a system of marine hospitals that Congress established in 1798. CRS PSHA REPORT, *supra* note 13, at 6.

<sup>130</sup> *Id.*

<sup>131</sup> 1944 House PSHA Hearing, *supra* note 87, at 45–46.

<sup>132</sup> See also 1944 House PSHA Hearing, *supra* note 87, at 66 (Letter from Paul V. McNutt, Adm’r, Fed’l Security Agency, to Rep. Clarence F. Lea, Chair, House Comm. on Interstate and Foreign Commerce (Mar. 1, 1944)).

<sup>133</sup> Sections 301–69, 58 Stat. 682, 691–706.

<sup>134</sup> See CRS PSHA REPORT, *supra* note 13, at 4.

<sup>135</sup> See *id.* at 13; see also 42 C.F.R. §§ 70.4, 70.5, 70.10 & 70.11 (West 2021).

<sup>136</sup> See CRS PSHA REPORT, *supra* note 13, at 13; see also 85 Fed. Reg. 7874, 7874 (2020); CNTRS. FOR DISEASE CONTROL & PREVENTION, *Travelers from China Arriving in the United States* (Feb. 7, 2020), <https://web.archive.org/web/20200220004302/https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-china.html> [<https://perma.cc/T268-J6A9>].

<sup>137</sup> Another measure would be a set of guidelines for deciding whether, when, and how to examine potentially infected people, animals, or articles at an international border, by whatever medical devices are best suited to detect a pathogen, when they have come from a region known to have had a recent widespread dangerous infectious disease, such as happened in 2014–2016 during the Ebola outbreak in Africa. See CNTRS. FOR DISEASE CONTROL &

judgments within the competence of an agency responsible for preventing the interstate transmission of disease. They are also similar to the types of judgments that the preceding Parts of Title III direct and empower the CDC to accomplish. The CDC is even authorized in an emergency itself to care for parties infected with or exposed to SARS-CoV-2, which it can do because the CDC has medical facilities and “quarantine stations” for patient treatment.<sup>138</sup>

What Congress did not empower the CDC to do, was to order third parties to accept parties infected with or exposed to a dangerous pathogen. For example, the CDC cannot order a landlord to house such people in unused apartments, let alone in ones already occupied. The CDC cannot order property owners to allow such parties to live in their suburban backyards or rural fields, let alone build dormitories for them. Yet that is the power the CDC claimed to possess under Section 264: the power to draft private parties into the quarantine business by ordering them to admit onto their land or into their homes people potentially or actually suffering from a highly contagious and potentially fatal disease—in other words, potentially everyone—who cannot meet their rental obligations. The term “other measures” does not remotely authorize the CDC to go that far, yet that is exactly what the Biden Administration has asked the courts to endorse. The District of Columbia district court was correct to reject that extravagant claim.

That conclusion should surprise no one. States and localities have long faced the public health problems caused by the introduction of diseased people, fauna, or flora into their jurisdictions, and each state has addressed that concern through the interdiction or quarantine of disease-bearing people, animals, and items.<sup>139</sup> Congress could have resolved this issue for the nation by exercising its power to regulate international or foreign commerce.<sup>140</sup> Instead, Congress primarily left each state to handle the matter through its own

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PREVENTION, EBOLA (EBOLA VIRUS DISEASE): HISTORY OF EBOLA VIRUS DISEASE (May 27, 2021), <https://www.cdc.gov/vhf/ebola/history/summaries.html> [<https://perma.cc/7UJV-F39Z>].

<sup>138</sup> See Public Health Service Act, Section 364, 58 Stat. 682, 704–705.

<sup>139</sup> See, e.g., *Smith v. Turner*, 48 U.S. 283, 400 (1849) (“Quarantine or health laws have been passed by the States, and regulations of police for their protection and welfare.”); CRS PHSA REPORT, *supra* note 13, at 7–8 (“The use of quarantine to prevent the spread of communicable diseases has a long history in Europe and the United States.”) (footnotes omitted).

<sup>140</sup> See U.S. CONST. art. I, § 8, cl. 3 (“[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

quarantine laws.<sup>141</sup> After passing some quarantine-related legislation beginning in 1878,<sup>142</sup> Congress tasked one agency with responsibility to address this subject. The desire was to create a consolidated and codified body of laws, rather than “a patchwork” of disorganized acts of Congress.<sup>143</sup>

In so doing, Congress directed the CDC *itself* to address this problem, by authorizing the CDC to establish and operate quarantine facilities, or to work with state and local public health authorities for them to care for patients. Nothing in the Public Health Service Act remotely suggests that Congress conscripted private parties into patient care or authorized the CDC to do so, despite the urgency of the need. The archetypical examples of laws with that effect are the ones authorizing a draft of civilians into the armed forces to fight in the nation’s wars.<sup>144</sup> Congress had enacted two such statutes prior to 1944. The Selective Service Act of 1917 expressly empowered the President to draft private parties into the armed forces to fight in World War I,<sup>145</sup> and the Selective Training and Service Act of 1940 explicitly adopted a peacetime conscription.<sup>146</sup> Accordingly, Congress knows how to draft legislation forcing individuals into federal service over their objection. The Public Health Service Act is not such a law. It nowhere empowers the President or the CDC to conscript property owners into the CDC’s service by making them use their property as ersatz battlefield MASH units. To be sure, the size of this pandemic would have overwhelmed the CDC’s existing facilities, forcing Congress to fund the creation of what would be tantamount to new temporary hospitals or “quarantine stations” under the CDC’s control.<sup>147</sup> But the SARS-CoV-2 pandemic was not the first time that the nation had been the victim of a massive potentially fatal viral outbreak. Aside from the yearly influenzas that hit the nation every winter, the Spanish Flu of 1918 told anyone who wanted

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<sup>141</sup> The general rule, developed over more than a century of Supreme Court case law, was the following: Even though “quarantines necessarily affect interstate commerce,” absent “any action taken by Congress on the subject-matter, it is well settled that a state, in the exercise of its police power, may establish quarantines against” infected people, animals, or plants, “the coming in of which may expose” inhabitants, livestock, trees, plants, or crops “to disease, injury, or destruction.” *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87, 93 (1926) (per Taft, C.J.); *see also, e.g., Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of La.*, 186 U.S. 380, 387 (1902); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

<sup>142</sup> Congress passed federal quarantine legislation beginning in 1878 but did not enact a consolidated public health service code until 1944. *See 1944 House PSHA Hearing supra note 87*, at 35 (Statement of Surgeon Gen’l Parran); CRS PSHA REPORT, *supra* note 13, at 8–9.

<sup>143</sup> *1944 House PSHA Hearing, supra note 87*, at 28 (Subcomm. Chair Alfred Bulwinkle); *see id.* (Surgeon Gen’l Parran) (“a patchwork with successive overlapping layers”).

<sup>144</sup> *See Arver v. United States*, 245 U.S. 366 (1918) (*Selective Draft Law Cases*) (upholding the constitutionality of the World War I draft).

<sup>145</sup> Selective Service Act of 1917, ch. 15, § 2, 40 Stat. 76 (Repealed 1935).

<sup>146</sup> Selective Training and Service Act of 1940, ch. 720, § 2, 54 Stat. 885, 885 (1940). It required men between 21 and 36 to register with local draft boards, be available for military training, and, if war broke out, to remain in military service for as long as the President deemed necessary for the national defense. *See id.* §§ 2 & § 3, 54 Stat. at 885–86.

<sup>147</sup> Public Health Service Act, § 364, 58 Stat. 682, 704.

to know what the size and danger of a new pandemic could be. That the CDC itself never claimed to possess such transformative authority prior to 2020 is powerful evidence that Congress never gave it to the agency.<sup>148</sup>

The government also did not sell Section 264 to Congress on that basis. At a House hearing on a bill that (as amended) became the Public Health Service Act,<sup>149</sup> Alanson Wilcox, Assistant General Counsel for the Federal Security Agency, was one of the government’s principal witnesses. His task was to explain the meaning of each provision in the bill. With regard to the proposed Section 361, Wilcox said that it carried forward a provision in a 1893 law authorizing the Treasury Secretary to promulgate port quarantine regulations if the state or local rules were nonexistent, inadequate, or poorly enforced.<sup>150</sup> Section 361 would modify that law by eliminating the need to show that state or local rules or governments were not up to the task of enforcing a quarantine.<sup>151</sup> “The States as I understand it,” Wilcox testified, “have wholly withdrawn from the field of foreign quarantine regulation,” and “Federal regulation has been confined to matters pertaining to the interstate movement of people or things over which the States have both constitutional and practical difficulties in achieving effective control.”<sup>152</sup> “In eliminating the conditions upon the exercise of Federal regulatory power,” Wilcox concluded, “we believe that we have eliminated nothing of substance.”<sup>153</sup> At a Senate hearing on the bill passed by the House, then-Surgeon General Parran said that the House bill “clarified” the Public Health Service’s “interstate quarantine authority” and “somewhat extended” that authority “in

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<sup>148</sup> See *Alabama Realtors 2*, 141 S. Ct. 2485, 2489 (2021) (“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.”) (quoting *United States Forest Service v. Cowpasture River Preservation Assn.*, 140 S. Ct. 1837, 1850 (2020)).

<sup>149</sup> The original bill was H.R. 3379, 78th Cong. (1944). The bill’s managers revised it after the House hearing, and the House unanimously passed the replacement bill, H.R. 4624, 78th Cong. (1944). See *Hearing Before a Subcomm. on Education and Labor on H.R. 4624: An Act to Consolidate and Revise the Laws Relating to the Public Health Service, and for Other Purposes*, 78th Cong., 2d Sess. 2 (1944) [hereafter *Senate PSHA Report*] (testimony of Rep. Bulwinkle). The House sponsor said that the differences between H.R. 3379 and H.R. 4624 were “very little,” “minor,” and designed “to clear up ambiguities.” *Id.* (testimony of Rep. Bulwinkle); *id.* at 3 (Senator Lister Hill) (“We are not doing anything new here, we are not passing new law. What we are doing is codifying existing law. But in some instances we are reconciling what appears to be some little conflict here or there, we are reconciling the statutes to bring them together.”); *id.* (Testimony of Surgeon General Thomas Parran: “As Congressman Bulwinkle has explained, this bill is in the main a codification of existing law. [¶] The public-health law has represented a hodgepodge of overlapping and conflicting provisions, ambiguous references, and obsolete provisions.”).

<sup>150</sup> 1944 House PSHA Hearing, *supra* note 87, at 139; see Act of Feb. 15, 1893, ch. 114, § 3, 27 Stat. 449, 450–51 (“[A]ll such [quarantine] rules and regulations made by the Secretary of the Treasury shall operate . . . at such ports or places within the United States as have no quarantine regulations . . . and at such ports and places . . . where quarantine regulations exist . . . which, in the opinion of the Secretary of the Treasury, are not are not sufficient to prevent the introduction of such diseases into the United States, or into one State or Territory or the District of Columbia . . .”).

<sup>151</sup> 1944 House PSHA Hearing, *supra* note 87, at 139.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

time of war” by virtue of “Presidential order,” a revision that “may be very important” to “protect troops and war workers” given “the possibility that strange diseases may be introduced in the country and become a threat” when those parties return home.<sup>154</sup> “Flexibility in dealing with such contingencies would be very helpful.”<sup>155</sup> Wilcox and Parran did not say anything remotely suggesting that what is now Section 264 empowers the CDC to do anything more than promulgate quarantine enforcement rules.

But there is more. A host of other considerations also demonstrate why the government’s broad interpretation of Section 264 is quite mistaken.

First, because the government offered no limiting principle that would cap the CDC Director’s authority, the government’s interpretation would have allowed the CDC unlimited discretion. In its *Alabama Realtors 2* order, the Supreme Court identified a few “other measures” that the CDC would be allowed to demand, such as ordering grocery stores to provide free food home delivery.<sup>156</sup> Others also readily come to mind. After all, the eviction problem arose because out-of-work tenants could not pay their rent because they could not earn their wages. Why not just have the CDC order the tenants’ employers to continue paying their tenant-employees? That would enable tenants to pay their rent, but could impoverish their employers, many of whom likely were small businesses, such as restaurants, not Fortune 50 companies. To remedy that problem, the CDC could also order a diner’s regular customers to send the owner money so that the eatery would not go under. And so forth. It would be worse than silly to interpret the term “other measures” to turn the CDC into America’s version of the Soviet Union’s Gosplan, its central economic planning agency.

Second, the CDC’s sought-after power would not be limited to COVID-19 or even pandemics. Nothing in the text of the statute requires that a pathogen, though “dangerous,” be potentially fatal to a broad swath of the population, and the influenza viruses that strike America every winter (unfortunately) always prove fatal to some people. Under the government’s interpretation, the CDC Director would have the power to issue not only her August 3 order, but also the authority to forestall evictions on a yearly, if not ongoing, basis, because Americans regularly suffer from communicable diseases other than COVID-19 that are dangerous to some people. Private property would remain private only until the government decided that it could be better used by the government and therefore should be taken by forced occupation of infectious parties. Under no

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<sup>154</sup> *Senate PHSA Report, supra* note 120, at 6 (Testimony of Surgeon General Parran).

<sup>155</sup> *Id.*

<sup>156</sup> *Alabama Realtors 2*, 141 S. Ct. 2485, 2489 (2021) (“Indeed, the Government’s read of § 361(a) would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC’s reach, and the Government has identified no limit in § 361(a) beyond the requirement that the CDC deem a measure ‘necessary.’ . . . Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work?”). Free medicine would be nice too.

circumstances can the terms “necessary” or “other measures” be read to have empowered the CDC to take steps like those without Congress having clearly committed to that course of action.<sup>157</sup>

Third, as recent history proves, the CDC can renew or extend its moratoria repeatedly, or at least it believes it can. The CDC issued its first moratorium in September 2020 and renewed it in January, February, June, and August 2021. There is no guarantee that the agency won’t renew the order again. The text of Section 264 does not limit the number of extensions or new orders the CDC can enter, or the length of any particular one. There is also no guarantee that new variants of the virus will not replace the Delta variant that the CDC cites to justify its August 3 order (there are letters left in the alphabet). Tenants could occupy an owner’s property for a year or more past the year-plus they have already done so. It is unreasonable to read Section 264 as empowering the CDC to tell an owner that he or she must suffer an occupation by tenants unable to pay rent based on the skimpy “necessary” or “other measures” language.

Fourth, if Section 264 truly gave the CDC Director the power to impose whatever order she deemed necessary to prevent the interpersonal transmission of the virus, there is a very serious question whether the statute could survive challenge under the Delegation Doctrine. The Supreme Court recognized that doctrine in two cases decided in the 1930s—*Panama Refining Co. v. Ryan*<sup>158</sup> and *A.L.A. Schechter Poultry Corp. v. United States*<sup>159</sup>—which held unconstitutional acts of Congress that told the government little more than to “fix” the Depression’s adverse effects on the economy. Since then, the Court has regularly upheld statutes over delegation doctrine challenges.<sup>160</sup> Yet, suggesting that the cavalry might be on the way, in 2019 five justices concluded either that the doctrine is still alive and well

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<sup>157</sup> Of course, if Congress had committed (or hereafter will commit) to that course of action, any statute would be subject to constitutional challenge under the doctrines discussed in the text.

<sup>158</sup> 293 U.S. 388 (1935). *Panama Refining* held unconstitutional a provision of the National Industrial Recovery Act (NIRA) empowering the President to prohibit distribution of “hot oil” — viz., oil produced in excess of a production quota. *Id.* at 418, 433.

<sup>159</sup> 295 U.S. 495 (1935). *Schechter Poultry* involved Title I, Section 3 of NIRA, a provision that delegated to trade or industrial groups the authority to define “unfair methods of competition” that would become law only when the President approved it. § 3(a)–(b), 48 Stat. 195, 196; *Schechter Poultry*, 295 U.S. at 521. “This was no small operation.” RICHARD A. EPSTEIN, *THE CLASSIC LIBERAL CONSTITUTION* 270 (2014). “In the eighteen months between August 1933 and February 1935, the frenzied activities of the Roosevelt administration generated some 546 codes, 185 supplemental codes, 685 amendments, and over 11,000 administrative orders.” *Id.*

<sup>160</sup> To be candid, the Court has done more than just uphold every statute over a delegation doctrine challenge. See Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 32, 38 (2021) (“Since 1935, the Court has upheld every judgment that Congress has told an agency to make, even such policy-laden ones as the tradeoff between public health and private profit or the presumptive amount of time that a convicted offender should spend imprisoned. In so doing, the Court has deemed every formulation that Congress has whipped up to be ‘intelligible,’ even ones as vacuous as ‘the public interest’ or ‘excessive profits.’ As long as Congress has written its statutory text in English with some remotely decipherable standard, the Court has upheld delegation of even large-scale lawmaking or policy making authority.”) (footnotes omitted).

or that they are willing to resurrect it.<sup>161</sup> Interpreting the Public Health Service Act to allow the CDC Director a prerogative to decide what “other measures” should be defined at penalty of incarceration might just persuade the Court to roll away the stone.<sup>162</sup>

Fifth, as the Supreme Court noted in *Alabama Realtors 2*, the Public Health Service Act authorizes criminal prosecution, including fines and incarceration up to one year, for a violation of any CDC regulation.<sup>163</sup> To worsen matters, the act makes the violation of any such regulation a strict liability offense because, unlike the offense of leaving a quarantine area, the act does not require the government to prove that a party acted with any culpable mental state at all—not willfully, or even knowingly.<sup>164</sup> It is unreasonable to believe that Congress intended to empower the government to imprison someone for violating any imaginable regulation that the CDC could devise that he or she was wholly unaware of. Indeed, unless the list in Section 264 of actions that the CDC can take to prevent the spread of disease, such as fumigation, limits the “other measures” term, that provision is subject to challenge under the Void-for-Vagueness Doctrine because it literally gives the CDC Director the power to issue any order she deems “necessary” while affording a “person of ordinary intelligence” no notice of what is prohibited.<sup>165</sup>

Sixth, the CDC’s interpretation of Section 264 legally compels a property owner to suffer the presence of a lessee on his or her property without payment of rent. That is an unconstitutional taking of the landowner’s property. As the Supreme Court made clear earlier this year in *Cedar Point Nursery v. Hassid*, “government-authorized physical invasions” of someone else’s property “are physical takings requiring just compensation,” regardless of whether they are “permanent or temporary.”<sup>166</sup> That is precisely what the CDC has ordered here. The order forces an owner to accept a government-imposed squatter for as long as a moratorium is in effect. Unlike a rent control statute, which limits only increases in what can be charged for a particular unit as long as the lessee is current on his or her

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<sup>161</sup> *Id.* at 40 (“In separate opinions involving the same statute—*Gundy v. United States* and *Paul v. United States*—five Justices signaled that they are interested in and willing to reconsider the Court’s Delegation Doctrine caselaw. The upshot is it is unknown whether the Delegation Doctrine should receive long overdue last rites or additional CPR.”) (footnotes omitted).

<sup>162</sup> *Matthew 28:2* (“And, behold, there was a great earthquake: for the angel of the Lord descended from heaven, and came and rolled back the stone from the door, and sat upon it.”) (King James).

<sup>163</sup> Public Health Service Act, § 368, 58 Stat. 682, 706.

<sup>164</sup> *Id.* 368(a) (“Any person who violates any regulation prescribed under sections 361, 362, or 363, or any provision of section 366 or any regulation prescribed thereunder, or who enters or departs from the limits of any quarantine station, ground, or anchorage in disregard of quarantine rules and regulations or without permission of the quarantine officer in charge, shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both.”).

<sup>165</sup> *United States v. Harriss*, 347 U.S. 612, 617 (1954) (footnote omitted); *see also, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”). *See generally* Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335, 340–43 (2018).

<sup>166</sup> 141 S. Ct. 2063, 22073–74 (2021).

rent,<sup>167</sup> the CDC’s order entitles a tenant to reside in property that he or she no longer has a legitimate right to occupy without paying rent.

It pays no disrespect to the CDC or to Congress to say that the former should make only medical judgments and the latter only economic and social policy ones. The CDC can decide how to treat people infected with a communicable disease, or to handle creatures, bedding, clothes, and the like that have become infested with a pathogen and therefore must be sanitized or disposed of, in the same way that hospitals ordinarily treat patients or manage used hypodermics and gauze pads. Those are quintessentially medical judgments. As the Supreme Court acknowledged in *Roman Catholic Diocese of Brooklyn v. Cuomo*,<sup>168</sup> physicians and other public health experts possess “special expertise and responsibility” when it comes to making health-care decisions, not legal or policy judgments.<sup>169</sup> Congress can—and should—decide how to balance the competing interests of both sides—unemployed tenants versus their landlords *and* tenants who *do* pay their rent, both of whom have legitimate interests the administration has ignored<sup>170</sup>—during a pandemic in the same manner that Congress must decide how to treat the unemployed vis-à-vis employers and the employed during a recession. That is paradigmatically an economic or social judgment, and the democratic process selects members of Congress to represent

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<sup>167</sup> See *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Pennell v. San Jose*, 485 U.S. 1 (1988); *Block v. Hirsh*, 256 U.S. 135 (1921).

<sup>168</sup> 141 S. Ct. 63 (2020).

<sup>169</sup> *Id.* at 68; see also *id.* at 79 (Sotomayor, J., dissenting) (“Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.”).

<sup>170</sup> See, e.g., Howard Husock, *Stop Extending the Eviction Moratorium*, CITY J., June 24, 2021, <https://www.city-journal.org/dont-extend-the-eviction-moratorium> [<https://perma.cc/CS57-BVDK>] (“The push to make evictions more difficult, or even to ban them outright, is a misguided effort that threatens the income of rental-property owners of modest means and puts at risk the safety and building maintenance of tenants who do pay their rent. [¶] The push to make evictions more difficult, or even to ban them outright, is a misguided effort that threatens the income of rental-property owners of modest means and puts at risk the safety and building maintenance of tenants who do pay their rent. . . . In many cases, eviction filings are part of a de facto arbitration process in which property owners, many of whom rely on rental income to meet mortgage payments and perform crucial maintenance, use the courts to work out a compromise on back rent. [¶] Extending the eviction moratorium past June 30 would likely have a disproportionate impact on mom-and-pop rental property owners. As Apartment Owners Association CEO Robert Pinnegar notes, the gap between rent and rental income has reached \$10 billion and is growing by about \$5 billion every month. ‘Those are real dollars to real property owners who count on that money to survive and to fund their retirements,’ he says.”); Jillian Jay Melchior, *The Vulnerable Pay the Price for Covid Eviction Moratoriums*, WALL ST. J., Aug. 13, 2021, <https://www.wsj.com/articles/eviction-moratoriums-rentals-small-landlords-covid-19-coronavirus-pandemic-supreme-court-new-york-denver-connecticut-11628875832> [<https://perma.cc/KHP3-5YE2>] (“The U.S. Supreme Court’s Thursday injunction against New York state’s eviction moratorium [*Chrysaifis v. Marks*, 141 S. Ct. 2482 (2021)] didn’t come too soon for Rosanna Morey. She is dying of blood cancer, and her worst enemy lives downstairs. Ms. Morey, 48, lives with her teenage son in Seaford, N.Y., in a high ranch house she bought in 2013, about five years after she was diagnosed with a rare, incurable and unpredictable cancer. Ms. Morey undergoes chemotherapy, and last year her sister offered to move into the ground-floor apartment to help care for her. In June 2020, Ms. Morey told her tenant, Lorrie Santucci, that she wouldn’t renew the lease. Ms. Santucci, who has lived there for about three years, refused to leave. According to Ms. Morey, Ms. Santucci hasn’t paid rent since November.”).

the interests of their constituents. We increase the likelihood that the CDC and the political process will each make the right or best decision if we restrict each one to its lane and don't try to force either one to cross over.

When the Public Health Service Act is read in its entirety, what becomes clear is this: Congress sought to empower the CDC to prevent or provide medical treatment for infectious disease problems that could occur because of a contaminated person, animal, insect, or article, and to assist the states in their efforts to do the same. The text of the act speaks to medical treatment decisions, not landlord-tenant problems, macroeconomic policy judgments, or legal issues, and to reliance on government facilities, federal, state, or local, or the voluntary actions of private parties, to quarantine people or disinfect property, not the conscription of private parties into government service. The conclusion that Section 264 empowers the CDC Director to do whatever he deems necessary to prevent the spread of an infectious disease could be reasonable only if the courts were willing to make the CDC Director into a modern-day Nietzschean Übermensch, if not Überlandlord, empowered to do "whatever it takes" to prevent the spread of an infectious disease, regardless of the decisions of private parties not to assist that endeavor.

#### IV. THE LASTING CONSEQUENCES OF THE CDC'S ORDER

Where does that leave us? Twice Congress gave the CDC the necessary authority to carry out a chief executive's wishes, but the last of those statutes expired months ago. Biden directed the CDC to find a legal justification for a result that even he knew the law does not permit. The CDC faithfully followed orders, once again pinning its hopes on a gauzy phrase in a nearly 80-year-old statute never used before 2020 as an eviction moratorium. A majority of the Supreme Court said that the Public Health Service Act does not remotely authorize such an order. That conclusion was implicit in the Court's *Alabama Realtors 1* order, but the Court's *Alabama Realtors 2* order made the point so clearly that even someone blind could see it. Indeed, given Biden's decision to ignore the message of the Supreme Court's *Alabama Realtors 1* order, the Court likely went out of its way in *Alabama Realtors 2* to say, "And we mean it."

By rights, the CDC's August 3 order should have a very short half-life remaining. Given the Supreme Court's *Alabama Realtors 2* order, any judge who rules that the Public Health Service Act empowers the CDC Director to manage landlord-tenant relations on an ongoing basis has willfully distorted the properly limited judicial role of statutory interpretation and has engaged, quite literally, in statutory *construction*. Even Biden, who directed the CDC to issue its most recent order while simultaneously admitting that it would likely be struck down,<sup>171</sup> has thrown in the towel.<sup>172</sup>

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<sup>171</sup> See *supra* note 72.

<sup>172</sup> See White House, Statement by Press Secretary Jen Psaki on Eviction Moratorium, Aug. 26, 2021 (expressing "disappoint[ment]" that "the Supreme Court has blocked the most recent CDC eviction moratorium"), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/26/statement-by-press-secretary-jen-psaki-on-eviction-moratorium-3/> [<https://perma.cc/7YKC-W9UF>].

Why did Biden order the CDC to effectively defy the Supreme Court? Perhaps he believed that desperate times call for desperate measures.<sup>173</sup> Maybe he felt a need to appease the Trotskyite wing of his party.<sup>174</sup> Or it's possible—most likely, in my view—that he made the political judgment that another moratorium would be all benefit and no cost. If the courts did not strike down the August 3 order before Congress returned from its August recess, he would win, because he successfully played keep-away until Congress returned and, presumably, passes another statutory moratorium. By contrast, if the courts struck down the CDC's order, he could make them take the heat for any evictions. Now that the Supreme Court has done the dirty deed, he can parlay its action into a new justification for expanding the Court's size, thereby appeasing those elements in his party who see the justices Trump appointed as three of the Four Horsemen of the Apocalypse.<sup>175</sup> For Biden, it was a no-lose political decision.

Power grabs like that one, however, have a way or hurting the overly adventurous in the long run.<sup>176</sup> Like several of his predecessors, Biden believes that the President, not Congress, should be the central federal lawmaking and governing body. From his first day in office, Biden has signaled—shouted might even be more accurate—his disdain for the deregulatory measures that his predecessor took over the prior four years. We are, or at least the government is, building back better—and bigger, or so he believes. His Executive Orders direct agencies to use their regulatory authority to be fruitful and multiply the number, size, and intrusiveness of whatever regulations their personnel can dream of. His nominees see the government as a force, not just for good, but for “great”—at least if “great” means greater federal central control of the economy, society, and individuals. With each agency competing to lead the way, there is no telling how far the federal government's regulatory actions will boldly go.<sup>177</sup>

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<sup>173</sup> The phrase is a variation of the statement attributed to the Greek physician Hippocrates, who wrote in his *Aphorisms*, “For extreme diseases, extreme methods of cure, as to restriction, are most suitable.” DEFINITIONS, <https://www.definitions.net/definition/desperate+times+call+for+desperate+measures> [https://perma.cc/5KRS-WLBQ] (last visited Aug. 10, 2021).

<sup>174</sup> See, e.g., Andrew C. McCarthy, *White House Signals that Biden Will Bow to Left's Demand that He Reinstate Eviction Moratorium*, NAT'L REV., Aug. 3, 2021, <https://www.nationalreview.com/corner/white-house-signals-that-biden-will-bow-to-lefts-demand-that-he-reinstate-eviction-moratorium/> [https://perma.cc/KB5D-KQMD]; Jeff Stein et al., *Biden Administration Moves to Block Evictions in Most of U.S. Following Liberal Backlash*, WASH. POST, Aug. 3, 2021, <https://www.washingtonpost.com/us-policy/2021/08/03/white-house-evictions-democrats/> [https://perma.cc/E7L7-V8EM].

<sup>175</sup> See *Revelations* 6:1–8.

<sup>176</sup> The result might also hurt the CDC's future efforts to issue disease-prevention orders. Before the *Alabama Realtors 2* decision, the Supreme Court had never discussed the substance of the CDC's order-issuing authority. Now, the Court has publicly rebuked the government for offering what the Court clearly thought was a flimsy justification for what was a purely political decision. From an agency's perspective every time that a court clips an agency's wings, the agency has an adverse precedent that it must fight through when it later acts in the same field. If Biden's improvident decision to direct the CDC to “carry on” discourages the CDC from later taking justified steps to protect the public health, everyone will be worse off. Playing politics might have serious public health costs.

<sup>177</sup> <https://www.youtube.com/watch?v=hdjL8WXjIGI> [https://perma.cc/RGN4-TEEB].

To succeed, however, the federal government must do more than turn out regulations throughout Biden’s term in office the same way that Krispy Kreme makes donuts: by the bazillion. The Justice Department must be able to defend those rules by persuading federal judges that Congress empowered agencies to govern private conduct and that the agencies followed the dictates of the Administrative Procedure Act in their lawmaking endeavors.<sup>178</sup> That job just got harder. John Locke defined a “prerogative” as “the Power of doing publick [sic] good without a Rule.”<sup>179</sup> After the Court’s *Alabama Realtors 1* order, Biden announced that he can do what he thinks is a “publick good” in defiance of a rule. Article III judges might not be the most important personnel in the U.S. government, but most of them certainly think that they are, and all of them believe that the President must respect their judgments. Telling the federal judiciary “Bafangool!,” even when smiling, isn’t likely to win friends and influence people in black robes. The Biden Administration’s handling of this matter has politely, but accurately, been called a “screw up.”<sup>180</sup>

Consider what the Supreme Court—especially Justice Kavanaugh—will think the next time that the Biden Administration asks the Court to “trust us.” Justice Kavanaugh voted to deny relief to a party whom he said was right on the merits because he thought that the system in place would get money to people in need. That was before he learned that the system in place in New York state allowed each tenant to decide the merits of his or her own application for federal COVID-19 relief, which is tantamount to a new form of rent control in which the amount paid is zero.<sup>181</sup> That was before he learned that the president would channel Admiral David Farragut and order the CDC to issue a new unauthorized moratorium that he confessed the Supreme Court was likely to strike down.<sup>182</sup> So, ask yourself: Just how much will—and *should*—Justice Kavanaugh and the rest of the Court trust representations by the Biden Administration that it respects the rule of law?<sup>183</sup>

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<sup>178</sup> 5 U.S.C. § 501 et seq. (2018).

<sup>179</sup> JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT, § 166, at 425 (Peter Laslett ed., 1960) (1689).

<sup>180</sup> Jack Goldsmith, *The Anatomy of a Screw Up: The Biden Eviction Moratorium Saga*, LAWFARE, Aug. 9, 2021, <https://www.lawfareblog.com/anatomy-screw-biden-eviction-moratorium-saga> [<https://perma.cc/DS4W-N6BF>].

<sup>181</sup> See *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021) (“If a tenant self-certifies financial hardship, Part A of CEEFPA generally precludes a landlord from contesting that certification and denies the landlord a hearing. This scheme violates the Court’s longstanding teaching that ordinarily ‘no man can be a judge in his own case’ consistent with the Due Process Clause. *In re Murchison*, 349 U. S. 133, 136 (1955); see *United States v. James Daniel Good Real Property*, 510 U. S. 43, 53 (1993) (due process generally requires a hearing.)”). Not to be outdone by the rubes in Albany, New York City demanded that, to receive federal tenant relief funds, landlords agree to waive their right to evict a nonpaying tenant for a full year after the federal program expires. See POLICY PULSE: THE EVICTION MORATORIUM, HERITAGE FOUND., Aug. 11, 2021. Now that’s world class hutzpah! Here’s a tip: If you think that something is rotten, don’t look in Denmark. Try the Empire State.

<sup>182</sup> If Justice Kavanaugh believed that Congress would not leave town until it had passed a new statutory moratorium, he obviously never worked on Capitol Hill. God might be dead to many people, but nothing is more sacred to members of Congress than their August recess.

<sup>183</sup> For suggestions in that regard, see *BST Holdings, L.L.C v. OSHA*, No. 21-60845, 2021 WL 5279381 (5th Cir. Nov. 12, 2021) (relying on *Alabama Realtors 2* to stay a vaccination-or-weekly-testing mandate imposed by the

The issue is not whether there is any precedent for Biden’s order to cease evictions. Governments at all levels have taken unprecedented actions in response to the COVID-19 pandemic, shuttering businesses, schools, and churches, imposing mask mandates, and banning evictions for the purpose (at least in part held by some) of saving lives. Nor is the issue whether Biden acted for political gain (although I do have an opinion on that subject). Some of those actions might have curbed some spread of the contagion, others might have been misguided,<sup>184</sup> but some were unlawful. Early on that was understandable. Faced with a rapidly spreading pathogen generating an illness they poorly understood, until recently federal authorities acted without properly examining the legal justifications for their actions.

In August 2021, however, that changed: Fully aware that the Supreme Court had signaled in *Alabama Realtors 1* that he could not halt evictions for rental nonpayment without congressional authorization, Biden nonetheless decided to call an audible, issuing a directive that he even he believed would not pass muster. By that point, if not before, political considerations certainly seemed to entirely govern his decision-making—and that is quite troublesome.

English and American history has venerated the rule of law—viz., the principle that no one is above the law, that we are “a government of laws, and not of men,” as Chief Justice John Marshall wrote in *Marbury v. Madison*.<sup>185</sup> Even though oaths are not much in fashion in this highly secular time, a President must take an oath to uphold the Constitution of the United States<sup>186</sup> and must ensure that the laws are properly carried out.<sup>187</sup> The Supreme Court has also made it clear that the President is not above the laws Congress passes.<sup>188</sup> By telling the Supreme Court that he thinks that he is above the law, Biden has already

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Occupational Safety and Health Administration); Editorial Board, *Brett Kavanaugh’s Eviction Lesson*, WALL ST. J., Aug. 4, 2021, <https://www.wsj.com/articles/brett-kavanaugh-eviction-lesson-centers-for-disease-control-and-prevention-joe-biden-11628110002> [<https://perma.cc/N4NH-N368>]; Editorial Board, *The Supreme Court’s Eviction Docket*, WALL ST. J., Aug. 13, 2021, <https://www.wsj.com/articles/the-supreme-court-eviction-docket-new-york-dc-circuit-court-dabney-friedrich-joe-biden-brett-kavanaugh-11628891594> [<https://perma.cc/EUK7-UP8Q>].

<sup>184</sup> See DOUG BADGER & ROBERT MOFFIT, COVID-19 AND FEDERALISM—PUBLIC OFFICIALS’ ACCOUNTABILITY AND COMPARATIVE PERFORMANCE, BACKGROUND, HERITAGE FOUND., No. 3638 (July 26, 2021), <https://www.heritage.org/sites/default/files/2021-07/BG3638.pdf> [<https://perma.cc/7D6Y-L57V>].

<sup>185</sup> 5 U.S. (1 Cranch) 137, 163 (1803); see also, e.g., A.J. CARLYLE, POLITICAL LIBERTY: A HISTORY OF THE CONCEPTION IN THE MIDDLE AGES AND MODERN TIMES 53 (1941) (“the supreme authority in political society was not that of the ruler, but that of the law.”); JOHN PHILLIP REID, THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES (2004) (discussing the importance of the rule of law to the development of English law and political theory).

<sup>186</sup> U.S. CONST. art. II, § 1, cl. 8 (“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”).

<sup>187</sup> U.S. CONST. art. II, § 3.

<sup>188</sup> See *United States v. Nixon*, 418 U.S. 683 (1974) (so ruling).

used up most, if not all, of the nine legal lives that a President has at the start of his first term—and he's got 38 months to go.

#### CONCLUSION

What lessons can we draw from the *Alabama Realtors* litigation? One is that property owners can now seek to evict nonpaying tenants, a process that likely will take far longer than it has taken the plaintiffs in that case to reach this point in the process. Another one is that the CDC now has a cap on its disease-prevention power that did not previously exist, a cap that might come back to hurt the agency in the long run. A third lesson is that the Supreme Court does not take kindly to parties who try to game the legal system for political purposes or who try to foist on the justices blame for following the law. There might be a fourth lesson, but it will be a while before we know whether it will come to pass: namely, the Biden Administration might have lost its credibility with the Supreme Court.

The administration decided to treat a Supreme Court ruling as only grandfatherly advice: something you must politely listen to, without feeling any obligation to pay it any mind. Biden may prevail on Congress to pass a new statute empowering the CDC to do what the President directed it to do. If so, the *Alabama Realtors* litigation might just wind up being a side show as far as a moratorium is concerned. Over the long-run, however, Biden needs the Supreme Court to uphold his pro-regulatory game plan and instincts. He is likely to find that the costs of his poor judgment and political gamesmanship will exceed his hoped-for short-term benefits by a country mile. No one likes to be taken for a fool, especially the people who wear black robes and work at One First Street.