

No. 21-30037

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

v.

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

On Appeal from the United States District Court
for the Western District of Louisiana

**CONSENT MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF, IN SUPPORT OF DEFENDANTS-APPELLEES AND
AFFIRMANCE OF DISTRICT COURT**

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1.

Pursuant to Fed. R. App. P. 29(a)(3) *Amici Curiae* respectfully move for leave to file an *amici curiae* brief in support of Defendants-Appellees and in support of affirmance of the district court.

2.

All parties to the litigation have consented to the filing of this brief.

3.

Movants' interest in the case is:

- a. *Amici* include the two free civil legal aid agencies serving Louisiana, and two national non-profit organizations involved with national and regional housing rights advocacy.
- b. *Amici* have a strong interest in this litigation because they advise and represent hundreds of tenants in Louisiana courts. Those tenants will be subject to immediate eviction should the district court decision be reversed, and the CDC Order halting certain residential evictions be enjoined.

4.

Briefing from the *Amici* is desirable because:

- a. This case comes before this Honorable Court at a critical moment in the pandemic when states and local jurisdictions are rushing to disburse over 45 billion dollars in federal emergency rental assistance, but have barely started doing so. Injunction of the CDC Order now would result in mass eviction before this desperately needed money can get out the door to satisfactorily resolve the needs of both tenants and financially pressed landlords.
- c. The proposed brief recounts situations of representative legal services clients who depend on the protection of the CDC Order until the federal emergency rental assistance is disbursed. The harm they face forms part of the consideration in weighing the balance of hardships and public interest with respect to the preliminary injunction appellants seek.
- d. The proposed brief gives additional background and context for one of the most salient issues raised in the brief of the United States: that Congressional action that extended the CDC Order

ratified the CDC authority to issue the Order, which undermines all challenges raised by the plaintiff-appellants.

- e. *Amici* seek clear direction from this Court regarding the validity of the CDC Order in order to effectively defend their clients in eviction court across the state.

Accordingly, *amici* respectfully request that this Court grant leave to file the accompanying *amici curiae* brief for consideration.

Respectfully Submitted:

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* Filed with the consent of Danielle Davis.

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2021, I electronically filed the Motion for Leave and attached Brief for Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the Court's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. I am also myself serving by email a copy of the corrected motion (with Certificate of Compliance with Type-Volume Limit) on all who were counsel to the case as of 9 a.m. April 29, 2021.

s/ David Williams
David Holman Williams

CERTIFICATE OF CONSULTATION WITH PARTIES

The undersigned counsel certifies that Southeast Louisiana Legal Services contacted Brian J. Springer, attorney for the Defendants/Appellees, and Luke Wake, Attorney for the Plaintiffs/Appellants, on April 26, 2021, and received consent to file this amicus brief from both parties.

s/ David Williams
David Holman Williams

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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s/ David Williams
David Holman Williams

Date: April 29, 2021.

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s/ David Williams
David Holman Williams

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for the Western District of Louisiana

**AMICUS BRIEF IN SUPPORT OF DEFENDANTS/APPELLEES AND
AFFIRMANCE OF DISTRICT COURT DECISION
ON BEHALF OF SOUTHEAST LOUISIANA LEGAL SERVICES,
ACADIANA LEGAL SERVICE CORPORATION, SOUTHERN
POVERTY LAW CENTER, AND NATIONAL HOUSING LAW
PROJECT**

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CERTIFICATE OF INTERESTED PERSONS

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

The undersigned counsel of record certifies that—in addition to the persons and entities listed in the appellants and appellees Certificate of Interested Persons—the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

Amici Curiae

Southeast Louisiana Legal Services (listed by the parties)
Acadiana Legal Service Corporation (listed by the parties)
Southern Poverty Law Center
National Housing Law Project

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David Holman Williams
Danielle E. Davis

Referenced clients of Amici Curiae

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Cheryl Bananno, Orleans Parish
Jamyra Brown, St. Charles Parish
Robbie Grandison, Jefferson Parish
Sha'ron Jackson, St. Tammany Parish
Jihrelle King, St. Bernard Parish
Tyronika Leblanc, Ascension Parish
Tiffany Sauls, Orleans Parish
Carlisha Singleton, Lafourche Parish
Paige Smith, Jefferson Parish

The *amici curiae* on this brief are non-profit corporations. None of them has a parent corporation or a publicly held company owning more than 10% of stock in it.

s/ David Williams
David Williams

TABLE OF CONTENTS

Certificate of Interested Persons	2
Table of Contents	4
Table of Authorities	6
Statement of Interests of <i>Amici Curiae</i>	9
Argument	11
A. Louisiana renters continue to struggle with high unemployment and rent arrearages.	11
B. The distribution of Emergency Rental Assistance funds to landlords has only just begun in Louisiana.	14
C. Were the CDC Order to be enjoined, tenants protected by the order would suffer severe harm far in excess of any claimed loss to landlords.	16
D. Legal services attorneys and Louisiana courts need affirmation that the CDC Order still applies.	24
1. The legal uncertainty and unpredictability around the CDC halt Order has reached a dysfunctional level.	24
2. The inability of covered tenants to rely on the CDC halt Order and to count on courts to enforce it is unjustified and harmful.	30
a. In context, the Congressional extension of the CDC halt Order without change shows ratification of the CDC’s authority to issue that order.	30

b. *Skyworks* correctly discerned the Congressional intent for extending the CDC Order, but reached a conclusion inconsistent with its reasoning. 34

c. Nothing in the Appropriations Act or surrounding context suggests Congress intended to extend the CDC Order to January 31, 2021, but withhold validation of CDC’s authority to issue it. 36

3. A clear and resolute opinion upholding the CDC Order will best serve landlords, tenants, courts, and the public. 39

Conclusion 40

Certificate of Service 41

Rule 29(a)(4)(G) Certificate of Compliance 42

Certificate of ECF Compliance 43

TABLE OF AUTHORITIES

Cases	
<i>Brown v. Azar</i> , No. 1:20-CV-03702, — F.Supp.3d —, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020)	31, 33
<i>Collins v. Mnuchin</i> , 938 F.3d. 553 (5th Cir. 2019)	32
<i>D.J. v. Columbia at Sylvan Hills, L.P.</i> , No. 1:19-cv-02232, 2019 U.S. Dist. LEXIS 234412 (N.D. Ga. July 25, 2019)	22
<i>Forest Grove School Dist. V. T.A.</i> , 557 U.S. 230 (2009)	33
<i>Isbrandtsen–Moller Co. v. United States</i> , 300 U.S. 139 (1937)	32, 37
<i>Jackson v. Jacobs</i> , 971 F. Supp. 560 (N.D. Ga. 1997)	23
<i>KC Tenants v. Byrn</i> , No. 20-000784-CV-W-HFS, -- F.Supp.3d --, 2020 WL 7063361 (W.D. Mo. Nov. 30, 2020)	26
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978)	33, 36, 38
<i>Mitchell v. United States Dep’t of Hous. & Urban Dev.</i> , 569 F. Supp. 701 (N.D. Cal. 1983)	23
<i>Schism v. United States</i> , 316 F.3d 1259 (Fed. Cir. 2002)	32, 37
<i>Shell Oil Co. v. Sec’y, Revenue & Taxation</i> , 96-0929 (La. 11/25/96), 683 So.2d 1204	30
<i>Sinisgallo v. Town of Islip Hous. Auth.</i> , 865 F. Supp. 2d 307 (E.D.N.Y. 2012)	23
<i>Skyworks, Ltd. v. CDC</i> , No. 5:20-CV-2407, --- F.Supp.3d ---, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021)	24, 34- 35, 38- 39
<i>Solid Waste Agency v. U.S. Army Corps of Engineers</i> , 531	32

U.S. 159 (2001)	
<i>Swayne & Hoyt v. U.S.</i> , 300 U.S. 297 (1937)	32
<i>Rousse v. United Tugs, Inc.</i> , 2017-0585 (La. App. 4 Cir. 12/20/17); 234 So. 3d 1179	28, 30
<i>Tenants for Justice v. Hills</i> , 413 F. Supp. 389 (E.D. Pa. 1975)	23
<i>Tiger Lily LLC v. United States Dep't of Hous. & Urb. Dev.</i> , No. 2:20-CV-2692-MSN-ATC, 2020 WL 7658076 (W.D. Tenn. Oct. 21, 2020)	29, 33
<i>Tiger Lily LLC v. HUD</i> , No. 220CV02692MSNATC, -- F.Supp.3d --, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021)	24
<i>Tiger Lily, LLC v. HUD</i> , No. 21-5256, -- F.3d --, 2021 WL 1165170 (6th Cir. Mar. 29, 2021)	24, 36-38
<i>Terkel v. CDC</i> , No. 6:20-CV-00564, -- F.Supp.3d --, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021)	24
Statutes	
15 U.S.C. § 9058(b-c)	12
42 U.S.C. § 264	32
42 U.S.C. §§ 2996 – 2996l	9
La. Code Civ. P. art. 927	27
La. Code Civ. P. art. 934	27
La. R.S. §13:2582	29
La. R.S. §49:251.1	29
Pub. L. 116-136, § 2104(e)	12
Pub. L. 116-260, § 501-502	13, 15, 23
Pub. L. 117-2, §3201	14

Regulations	
85 Fed. Reg. 55292 (Sept. 4, 2020)	13, 23
86 Fed. Reg. 8020 (Jan. 29, 2021)	13, 23
86 Fed. Reg. 16731 (March 31, 2021)	13, 23
Executive Orders	
30 JBE 2020	12
75 JBE 2020	12
117 JBE 2020	12
Secondary Sources	
36A C.J.S., Forcible Entry & Detainer (Sept. 2020)	26

STATEMENT OF INTERESTS OF *AMICI CURIAE*¹

Southeast Louisiana Legal Services (“SLLS”) is the free civil legal aid agency serving low-income families in twenty-two parishes across Southeast Louisiana. It is one of two Louisiana recipients of funds from the Legal Services Corporation established under 42 U.S.C. 2996-2996l. SLLS’s services include eviction defense. Since September 4, 2020, the effective date of the CDC Order, SLLS has represented approximately 1,000 household in evictions across its service area, containing over 2,300 individuals. The majority of those households include children, family members with disabilities, or both. Many of SLLS’s clients are tenants of companies that are members of Plaintiff Apartment Association of Louisiana, Inc. Many of these clients have qualified for and used CDC declarations to prevent their eviction during the nationwide moratorium. SLLS has authority to file this amicus brief under Fed. R. App. P. 29(a).

Acadiana Legal Service Corporation (“Acadiana”), the other Louisiana recipient of Legal Services Corporation funds, is the free civil

¹ This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Pursuant to Rule 29(a)(4)(E), undersigned counsel for *amici curiae* certify that this brief was not authored in whole or part by counsel for any of the parties; no party or party’s counsel contributed money for the brief; and no one other than amici and their counsel have contributed money for this brief.

legal aid agency serving low-income families in Louisiana's remaining forty-two parishes. Acadiana's services include eviction defense, with many of Acadiana's clients also being tenants of companies that belong to the Apartment Association of Louisiana. Many of these clients have qualified for and used CDC declarations to prevent being evicted during the nationwide moratorium. Acadiana has authority to file this amicus brief under Fed. R. App. P. 29(a).

The **Southern Poverty Law Center** ("SPLC") has provided pro bono civil rights representation to low-income persons in the Southeast since 1971, with particular focus on combating unlawful discrimination and ending poverty. Since the start of the COVID-19 pandemic, SPLC has been working with community partners to defend against evictions in several states, including Louisiana. Much of this work has involved disseminating information and advocating for application of the CDC Order to protect communities hardest hit by the pandemic and resulting economic crisis. SPLC has authority to file this amicus brief under Fed. R. App. P. 29(a).

The **National Housing Law Project** (NHLP) is a nonprofit organization that works to advance tenants' rights, increase housing

opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes. NHLP pursues these goals primarily through technical assistance and support to legal aid attorneys and other housing advocates. For over 40 years, NHLP has coordinated the Housing Justice Network, which now includes more than 1,600 housing advocates throughout the U.S. Its members advise tenants facing eviction proceedings, represent tenants in unlawful detainer cases, and advocate for tenants in many other settings. NHLP has authority to file this amicus brief under Fed. R. App. P. 29(a).

ARGUMENT

A. Louisiana renters continue to struggle with high unemployment and rent arrearages.

At the end of August 2020, the families *amici curiae* work with faced an economic cliff. Many service and hospitality industry workers had been out of work since the beginning of the pandemic, and federal Pandemic Unemployment Compensation—a program that added \$600.00 per week to unemployment compensation for workers laid off

during the pandemic—expired near the end of July.² Louisiana was still in “Phase 2” of reopening, and few people were back to work.³

Others had experienced income loss due to illness, quarantine or lack of childcare. A protection against eviction for non-payment of rent in federally related properties also expired in July, but still required 30 days’ notice before evictions could commence.⁴ A state eviction moratorium covering other properties had also expired on June 15, and a statewide rental assistance program had shut its doors after just four days due to a crushing volume of applications.⁵ A crisis of evictions and homelessness was imminent, and families had nowhere left to turn.

In this most desperate hour, it was the Centers for Disease Control and Prevention (“CDC”) that came through. The CDC’s Order temporarily halting certain residential evictions, effective September 4, 2020, was a godsend for the families that SLLS, Acadiana, SPLC, and

² See Pub. L. 116-136, §2104(e).

³ See 117 JBE 2020 (Louisiana moved into Phase 3 on September 11).

⁴ See 15 U.S.C. § 9058(b-c).

⁵ See 30 JBE 2020 § 5 A & D (initial suspension); 75 JBE 2020 § 3 at H. 1 & 6 (last extension, running through June 15); see *Louisiana COVID-19 Rent Help Stopped After 40,000 Apply*, ASSOCIATED PRESS, Jul. 19, 2020, <https://apnews.com/article/b50c1e96f9c51406606b643e16f6279b>.

NHLP serve. *See* 85 Fed. Reg. 55292 (Sept. 4, 2020).⁶ The order prevented the evictions of millions—including untold numbers of children right at the beginning of the school year—and curbed an epidemic of homelessness and displacement that threatened to spread COVID-19 in congregate shelters and doubled-up family settings.

Eight months later, Louisiana families are still struggling. The most recently available seasonally adjusted data shows a statewide unemployment rate of 7.3% (compared to 6% nationally) for March 2021.⁷ Louisiana has the eighth highest unemployment rate in the nation.⁸ Tenants who are back to work still carry enormous balances from their periods of unemployment. Despite stimulus checks and expanded unemployment, at least 18% of renters nationally were in arrears at the beginning of January,⁹ more than 19% in Louisiana.¹⁰

⁶ Original order in effect until December 31, 2021; *see also* Pub. L. 116-260 §502 (Dec. 27, 2020) (extending to January 31, 2021); 86 Fed. Reg. 8020 (Jan. 29, 2021) (extending to March 31, 2021); 86 Fed. Reg. 16731 (March 31, 2021) (extending to June 30, 2021).

⁷ *Unemployment Rates for States*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/web/laus/laumstrk.htm> (last visited Apr. 26, 2021); *The Employment Situation – March, 2021*, U.S. BUREAU OF LABOR STATISTICS 1 (Apr. 2, 2021), <https://www.bls.gov/news.release/pdf/empsit.pdf>

⁸ *Id.*

⁹ Michelle Leurer, Study: *Rent debt concentrated among minority tenants*, WASHINGTON POST (FEB. 18, 2021, 4:30 AM), <https://www.washingtonpost.com/business/2021/02/18/study-rent-debt-concentrated-among-minority-renters/>; *see also* Rob Warnock, *Rent Debt & Racial Inequality in*

Rental arrears disproportionately impact Black Americans, 53% of whom reported a rent debt at the beginning of 2021, compared to 21% of white renters.¹¹

B. The distribution of Emergency Rental Assistance funds to landlords has only just begun in Louisiana.

The Consolidated Appropriations Act of 2021, which Congress passed in December 2020, allocated \$25 billion in Emergency Rental Assistance (“ERA”) to the states. Pub. L. 116-260, § 501. Louisiana received just over \$300 million in ERA funds.¹² The American Rescue Plan, passed in March 2021, allocated \$21.5 billion more to the ERA program. Pub. L. 117-2, §3201. ERA funds can pay up to twelve months of rent arrears and up to three months of prospective rent. *Id.* at

2021, APARTMENT LIST (Jan. 14, 2021), <https://www.apartmentlist.com/research/rent-debt-2021> (estimating that twenty-eight percent of renters owed rent arrears going into January, 2021).

¹⁰ Jim Parrott and Mark Zandi, *Averting an Eviction Crisis*, MOODY’S ANALYTICS 2 (January, 2021), <https://www.moodyanalytics.com/-/media/article/2021/averting-an-eviction-crisis.pdf>.

¹¹ Rob Warnock, *Rent Debt & Racial Inequality in 2021*, APARTMENT LIST (Jan. 14, 2021), <https://www.apartmentlist.com/research/rent-debt-2021>.

¹² *U.S. Department of the Treasury Emergency Rental Assistance Program*, TREASURY.GOV 6 (Jan. 26, 2021), <https://home.treasury.gov/system/files/136/Emergency-Rental-Assistance-Payments-to-States-and-Eligible-Units-of-Local-Government.pdf>.

§501(c)(2)(A). The program thus promises both to make landlords whole – even those whose tenants owe large balances – and prevent eviction.¹³

The state and local programs distributing the funds to landlords and tenants, however, have only just gotten off the ground. Orleans Parish launched the first local program in Louisiana on February 15, 2021,¹⁴ followed by Jefferson Parish on March 1.¹⁵ The Louisiana Housing Corporation, which administers ERA in Louisiana’s smallest 57 parishes, launched on March 5.¹⁶ East Baton Rouge and Calcasieu Parishes launched on March 15.¹⁷ The remaining three parishes (St.

¹³ To be eligible for assistance a household must be “obligated to pay rent on a residential dwelling.” Pub. L. 116-260, § 501(k)(3)(A). The Treasury Department’s Frequently Asked Questions document clarifies that the applicant must be in a current lease “where the applicant resides.” *Emergency Rental Assistance Frequently Asked Questions*, TREASURY.GOV 3 (Rev. March 26, 2021), https://home.treasury.gov/system/files/136/ERA-Frequently-Asked-Questions_Pub-3-16-21.pdf. Therefore if the landlord terminates the lease agreement he loses eligibility for payment through the program.

¹⁴ *City of New Orleans COVID-19 Rental Assistance Program*, NOLA.GOV, <https://ready.nola.gov> (last visited Apr. 26, 2021).

¹⁵ *News Release: Jefferson Parish Government Launches COVID Emergency Rental Assistance Program*, JEFFPARISH.NET (March 1, 2021) <https://www.jeffparish.net/press-releases/jefferson-parish-government-launches-covid-emergency-rental-assistance-program/03-01-yyyy>.

¹⁶ *Gov. Edwards Announces New Program to Assist Renters and Landlords Impacted by COVID-19*, OFFICE OF THE GOVERNOR (MARCH 5, 2021), <https://gov.louisiana.gov/index.cfm/newsroom/detail/2993>.

¹⁷ *City-parish launches EBR emergency solutions site for rental assistance program*, WAFB.COM (March 15, 2021, 11:02 PM), <https://www.wafb.com/2021/03/16/city-parish-launches-eb-r-emergency-solutions-site-rental-assistance-program/>; *Emergency Rental Assistance (ERA) Program*, CALCASIEUPARISH.GOV,

Tammany, Lafayette, and Caddo) did not launch until earlier this month.¹⁸

These ERA programs are seeing thousands of applications; the Orleans Parish program received four thousand applications in the first week alone.¹⁹ Lifting the CDC eviction moratorium at this critical juncture would result in the eviction of thousands of Louisiana families whose applications are currently in the pipeline to receive full payment of their rent arrears.

C. Were the CDC Order to be enjoined, tenants would suffer severe harm far in excess of any claimed loss to landlords.

SLLS and Acadiana clients will face eviction, homelessness, and virus exposure if the CDC Order is enjoined. The following are examples of SLLS and Acadiana clients who have temporarily avoided or delayed eviction and all of its adverse impacts because of the CDC moratorium. Each of these clients has applied for Emergency Rental

<https://www.calcasieuparish.gov/services/human-services/human-services-programs/emergency-rental-assistance-era-program> (last visited Apr. 26, 2021).

¹⁸ *Caddo Parish COVID Emergency Rental Assistance Program Launches April 1*, CADDO.ORG (March 31, 2021), <http://www.caddo.org/CivicAlerts.aspx?AID=269>; *Lafayette Emergency Assistance Program*, LAFAYETTELA.GOV (March 31, 2021, 14:40 PM), <https://lafayettela.gov/news-releases/news/2021/03/30/lafayette-emergency-assistance-program>; *St. Tammany Rental Assistance Program*, STPGOV.ORG, <http://www.stpgov.org/departments/grants> (last visited Apr. 26, 2021).

¹⁹ Chad Calder, *Rental aid program in New Orleans sees 4K applicants in 1 week: 'People are Desperate'*, NOLA.COM (Feb. 23, 2021, 3:04 PM), https://www.nola.com/news/article_e3adf83a-722c-11eb-b393-aba29bccba1f.html.

Assistance which will cover their entire balance, but are still waiting on funds to be disbursed. Injunction of the CDC moratorium at this time would cause their eviction, and stop their landlords from receiving rental assistance funds that are in process.

Erica Allen lives in Caddo Parish with her three minor children. She was laid off due to COVID-19 and fell behind on her rent. She applied for legal services after receiving an eviction judgment due to non-payment of rent. She provided the CDC declaration and the eviction was stopped. Now, she has had the opportunity to apply for Caddo Parish's Emergency Rental Assistance program, which launched on April 1, 2021. She applied the day it opened, but her funds have yet to be distributed. Without the CDC Order in effect she would likely be evicted before rental assistance could be disbursed.

Carlisha Singleton lives in Lafourche Parish with her three-year-old son. Her work hours were reduced due to COVID-19, and she cannot catch up on her rent arrears or move without assistance. In addition, she contracted COVID-19 and missed about two weeks of work due to illness and quarantine. She applied for emergency rental assistance through Louisiana Housing Corporation, which opened its

program on March 5, 2021, but is still waiting for her assistance to be distributed. Her landlord filed an eviction against her for nonpayment, but it was dismissed after she provided the CDC declaration. Were the CDC Order not in effect she would likely be evicted before her rental assistance could be disbursed.

Paige Smith lives in Jefferson Parish with her boyfriend and five-year-old child. She worked at a diner prior to COVID-19 but was laid off due to the pandemic. She owes eight months of rent. Though she is now back to work and able to make payments toward rent, she cannot catch up on her arrears without assistance. She applied to the Jefferson Parish Emergency Rental Assistance Program which launched on March 1, 2021. She has been consistently following up with the program but her funds have not yet been disbursed. Ms. Smith's landlord tried to evict her for nonpayment of rent but the eviction was dismissed due to the CDC Order. Were the CDC Order not in effect she would likely be evicted before her rental assistance could be disbursed.

Robbie Grandison lives in Jefferson Parish. She worked at a convenience store distribution company prior to the pandemic, but was laid off in the fall of 2020 due to COVID-19. She is able to pay her rent

moving forward but owes about six months of rent arrears. She applied for the Jefferson Parish Emergency Rental Assistance program when it opened on March 1, 2021, but her funds have yet to be distributed. Her landlord filed an eviction against her for nonpayment of rent but it was dismissed due to the CDC Order. Were the CDC Order were not in effect she would likely be evicted before her rental assistance could be disbursed.

Jihrelle King lives in St. Bernard Parish with her boyfriend and three children under the age of 5. She is also pregnant. She worked as a tax preparer before the pandemic but had to stop working because her children were home doing remote schooling due to COVID-19 and she did not have childcare. She owes twelve months of rent arrears. She applied to the Louisiana Housing Corporation Rental Assistance program which launched on March 5, 2021, but her funds have yet to be disbursed. Ms. King's landlord tried to evict her for nonpayment of rent but the eviction was dismissed due to the CDC Order. Were the CDC Order not in effect she would likely be evicted before her rental assistance could be disbursed.

Cheryl Bananno lives in Orleans Parish with her daughters and six-year-old grandson. Before the pandemic she worked as a concierge at a downtown New Orleans hotel. She was laid off due to the pandemic. She has now returned to work but can only get hours on the weekends and makes less money than pre-pandemic because tourism has not fully recovered. She applied for rental assistance through New Orleans' Emergency Rental Assistance program, which launched on February 15, 2021, but her funds have yet to be distributed. She has avoided eviction due to the CDC Order. Were the CDC Order not in effect she would likely be evicted before her rental assistance could be disbursed.

Tiffany Sauls lives in Orleans Parish with sister and mother, for whom she is a caregiver. Before the pandemic she worked at a restaurant in New Orleans' French Quarter. She was laid off due to the pandemic and has not been able to find work since. She is now receiving unemployment benefits, but cannot catch up on her arrears without assistance. She applied for rental assistance through New Orleans' Emergency Rental Assistance program, which launched on February 15, 2021, and her landlord agreed to accept the funds. However, her

funds have not been distributed yet. She has avoided eviction due to the CDC Order. Were the CDC Order not in effect she would likely be evicted before her rental assistance could be disbursed.

Sha'ron Jackson lives in St. Tammany Parish with her six-year old son. She was working at the post office before the pandemic, but her hours were severely cut due to COVID-19 so she got behind on rent. She owes approximately four months of rent. She applied for rental assistance through St. Tammany Parish's rental assistance program, which opened on April 5, 2021, and is waiting on her landlord to complete his portion of the application. Her landlord filed an eviction, but due to the CDC Order it has not moved forward. Were the CDC Order not in effect she would likely be evicted before her rental assistance could be disbursed.

Jamyra Brown lives in St. Charles Parish with her two-year-old daughter. Before COVID-19 she was working in medical billing, but lost her job due to COVID-19. She started working again in January, 2021, but owes nine months of rent arrears. She applied for emergency rental assistance through Louisiana Housing Corporation and is waiting for her funding to be disbursed. Her landlord tried to evict her for

nonpayment of rent but was unsuccessful due to the CDC Order. Were the CDC Order not in effect she would likely be evicted before her rental assistance could be disbursed.

Tyronika Leblanc lives in Ascension Parish with her three children, ages 9, 3, and 9 months. Ms. Leblanc worked as a security officer before COVID-19, but her workplace shut down from March, 2020 through July, 2020 due to the pandemic and she fell behind on rent. She got back to work in August, but was only able to get reduced hours. Her workplace shut down a second time due to the pandemic in December, and now she is struggling to appeal a denial of Unemployment Insurance benefits. Ms. Leblanc applied for assistance through Louisiana Housing Corporation, whose program opened on March 5, 2021, but her landlord has not yet received payment. Were the CDC Order not in effect she would likely be evicted before her rental assistance could be disbursed.

As federal courts have repeatedly recognized, the danger of homelessness presents immediate and severe harm even under normal circumstances. *See e.g., D.J. v. Columbia at Sylvan Hills, L.P.*, No. 1:19-cv-02232, 2019 U.S. Dist. LEXIS 234412, 14-15 (N.D. Ga. July 25, 2019)

“Courts have found that the ‘threat of eviction and the realistic prospect of homelessness constitute a threat of irreparable harm”); *Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307, 328 (E.D.N.Y. 2012) (the “threat of eviction and the realistic prospect of homelessness constitute a threat of irreparable harm[.]”); *Mitchell v. United States Dep’t of Hous. & Urban Dev.*, 569 F. Supp. 701 (N.D. Cal. 1983) (becoming homeless would be irreparable harm); *Jackson v. Jacobs*, 971 F. Supp. 560, 565 (N.D. Ga. 1997) (irreparable injury of homelessness “can hardly be gainsaid.”); *Tenants for Justice v. Hills*, 413 F. Supp. 389, 393 (E.D. Pa. 1975) (holding that homelessness is a great and irreparable harm).

As detailed in the amicus brief submitted by the American Academy of Pediatrics *et al* in this case, being homeless carries an even greater risks and burdens during the COVID-19 pandemic. Indeed, the well-documented public health consequences of eviction form the basis for the CDC Order.²⁰ Unless residential evictions are restricted,

²⁰ See public health data cited by the CDC. 85 Fed. Reg. 55,292 (Sept. 4, 2020) (in effect until December 31, 2021); Pub. L. 116-260 §502 (Dec. 27, 2020) (extending to January 31, 2021); 86 Fed. Reg. 8020 (Jan. 29, 2021) (extending to March 31, 2021); 86 Fed. Reg. 16731 (March 31, 2021) (extending to June 30, 2021).

extreme injuries, including illness and death, will affect both displaced tenants and others they come into contact with.

D. Legal services attorneys and Louisiana courts need affirmation that the CDC Order still applies.

Though Congress has authorized the CDC to restrain evictions when necessary to control the interstate transmission of infectious disease, recent U.S. District Court decisions have created uncertainty around the legality of the CDC Order.²¹ The tenuous state of the law encumbers negotiations between landlords and tenants, frustrates advocates trying to advise clients in housing cases, and undermines the CDC's public health objectives.

1. The legal uncertainty and unpredictability around the CDC halt Order has reached a dysfunctional level.

Procedural difficulties and questions about the CDC Order's interpretation and interplay with state laws have hampered its effectiveness from the very beginning. For example, as a government study found, "there are indications that some renters facing eviction

²¹ These cases are: *Skyworks, Ltd. v. CDC*, No. 5:20-CV-2407, --- F.Supp.3d ---, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021); *Tiger Lily LLC v. HUD*, No. 220CV02692MSNATC, -- F.Supp.3d --, 2021 WL 1171887 (W.D. Tenn. Mar. 15, 2021); *Tiger Lily, LLC v. HUD*, No. 21-5256, -- F.3d --, 2021 WL 1165170 (6th Cir. Mar. 29, 2021); and *Terkel v. CDC*, No. 6:20-CV-00564, -- F.Supp.3d --, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021).

may be unaware of and unable to exercise the moratorium, and therefore unnecessarily evicted.”²² The Consumer Financial Protection Bureau has observed that some tenants may be deterred from invoking the CDC Order due to misinformation. *See* 86 Fed.Reg. 21163, 21167 (Apr. 22, 2021) (“even when renters are aware of the CDC Order and attempt to exercise their rights under the Order to halt evictions, they may be falsely informed that they are ineligible ... or otherwise may be discouraged from submitting a declaration.”). Other tenants have been evicted because some courts fail to deny evictions of covered tenants that are motivated by non-payment of rent so long as the landlord relies on a pretextual reason, or even gives no reason (such as using a “no cause” eviction notice or the unexplained nonrenewal of a term lease).²³

Still other tenants have declined to seek protection under the CDC Order to avoid getting an eviction record, which drastically reduces

²² U.S. Gov’t Accountability Office, *COVID-19 Housing Protections: Moratoriums Have Helped Limit Evictions, but Further Outreach Is Needed* (March 2021), <https://www.gao.gov/assets/gao-21-370.pdf>

²³ *See, e.g.,* Emily Benfer, *How Policymakers (and Courts) Sabotaged Eviction Moratoria*, THE APPEAL (Apr. 2, 2021), <https://theappeal.org/the-lab/explainers/explainer-how-policymakers-and-courts-sabotaged-eviction-moratoria/>; *see* HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, Frequently Asked Questions at 6 <https://www.cdc.gov/coronavirus/2019-ncov/downloads/Eviction-Moratoria-Order-FAQs-02012021-508.pdf>.

future access to housing. *See* 86 Fed.Reg. at 21166 (“Tenants may preemptively move out of rental housing to avoid an eviction filing . . . because subsequent landlords may refuse to rent to tenants with an eviction history.”). This is a rational concern for two reasons. One is because the CDC Order itself does not prohibit landlords bringing eviction suits against covered tenants, only physical removal. *See KC Tenants v. Byrn*, No. 20-000784-CV-W-HFS, -- F.Supp.3d --, 2020 WL 7063361, at *3 (W.D. Mo. Nov. 30, 2020).²⁴ The other is that many courts have chosen only to delay summary proceedings against covered tenants (usually to the expiration of the CDC Order) rather than dismiss them.²⁵ The latter point is especially frustrating to tenants because summary eviction lawsuits are generally proper under state law only when a landlord has the immediate right to possession, *see* 36A C.J.S., Forcible Entry & Detainer, § 7 (Sept. 2020), and the lack of authority to evict normally results in dismissal, not a stay or continuance. *See* La. Code Civ. P. art. 927(6); 934 (sustained

²⁴ *See, Id.* at 8 (“The Order does not preclude a landlord from challenging the truthfulness of a tenant’s declaration in state or municipal court.”)

²⁵ *See, e.g.*, Kyle Swenson, *Renters thought a CDC order protected them from eviction. Then landlords found loopholes*, WASHINGTON POST (Oct. 27, 2020), <https://www.washingtonpost.com/dc-md-va/2020/10/27/trump-cdc-eviction-moratorium-loopholes/>.

peremptory exception of no right of action should result in dismissal if the grounds of the objection cannot be removed). Some courts have even granted landlords judgments against covered tenants and merely stayed enforcement—somehow concluding simultaneously that the landlord is entitled to possession despite the tenant being entitled to possession.²⁶

Interpretive issues such as these have been surprising and harmful to many tenants, and have frankly shaken public confidence in the expectation that courts will apply the law fairly and objectively. But the recent series of federal court opinions finding the CDC Order to have been issued without authority²⁷ is even more disruptive, making highly precarious even the fundamental legal task of helping tenants evaluate their circumstances and reach wise decisions about their housing and protecting their families' health.

As the federal court decisions examining the CDC Order are not binding on state courts, the question of whether the CDC Order is, or is not, of any legal effect falls to every individual state court judge hearing an eviction case everywhere the CDC Order is in effect. *See Rouse v.*

²⁶ *See Id.*

²⁷ *See supra* note 21.

United Tugs, Inc., 2017-0585, p. 6 (La. App. 4 Cir. 12/20/17); 234 So. 3d 1179, 1184. Such court-by-court, judge-by-judge unpredictability will produce extreme variation and inconsistency in outcomes: a tenant who delivers a signed CDC declaration to a landlord cannot now be confident that a pending eviction will actually be stopped—that will not be known until the specific judge hearing that case decides whether the CDC Order is, or is not, effective. Media reports of the federal decisions, and the likely inconsistent results within state court systems, may stoke confusion even further.

Although the CDC Order protects not only individual tenants but also the public health, few (if any) housing courts will hear from the CDC or another public health agency before ruling on the Order's legality. Most will hear from only the landlords and tenants involved. Only about 3% of tenants are represented by counsel, and hardly any can realistically be expected to articulate sophisticated administrative law arguments on their own.²⁸ Landlords, about 81% of whom have counsel, will enjoy a tremendous advantage in persuading courts to find

²⁸ See National Coalition for a Civil Right to Counsel, *Eviction representation statistics for landlords and tenants absent special intervention* (Apr. 21, 2021), http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats__NCCRC_.pdf.

the CDC Order unlawful.²⁹ And, as ironically, no tenants have been joined to the instant suit or any of the others cited that have created uncertainty about the effect of the CDC Order. *See also Tiger Lily LLC v. HUD*, No. 2:20-CV-2692-MSN-ATC, 2020 WL 7658076 at *4 (W.D. Tenn. Oct. 21, 2020) (denying intervention to tenant advocacy organization).

Louisiana eviction courts are especially vulnerable to these concerns. The majority of Louisiana evictions, especially in non-urban areas, occur in Justice of the Peace courts. Many Justices of the Peace are not attorneys and have no formal legal training—the only educational requirements for the position being a high school diploma and attendance at an annual training session run by the Attorney General’s office. La. R.S. §13:2582(a)(1); La. R.S. §49:251.1 At least one Justice of the Peace in SLLS’s service area has publicly declared the CDC Order unconstitutional based on recent federal court decisions in other jurisdictions. This, even though those decisions are not binding on Louisiana courts.³⁰ *See Rouse v. United Tugs, Inc.*, 2017-0585, p. 6 (La.

²⁹ *See Id.*

³⁰ *Department of Justice Issues Statement Announcing Decision to Appeal Terkel v. CDC*, U.S. DEPT. OF JUSTICE (Feb. 27, 2021),

App. 4 Cir. 12/20/17); 234 So. 3d 1179, 1184 (“In matters involving federal law, state courts are bound only by decisions of the United States Supreme Court. Federal appellate court decisions are persuasive only.”), *citing Shell Oil Co. v. Sec’y, Revenue & Taxation*, 96-0929, p. 9, n. 11 (La. 11/25/96), 683 So.2d 1204, 1210).

2. The inability of covered tenants to rely on the CDC halt Order and to count on courts to enforce it is unjustified and harmful.

That legal uncertainty deters qualified tenants from relying upon the CDC Order, invites state court judges to independently reject it based on one-sided legal arguments between landlord attorneys and *pro se* tenants, and ultimately frustrates its public health objectives, is all the more unfortunate given the clear legality of the CDC Order and the unsound reasoning of the cases concluding otherwise.

a. In context, the Congressional extension of the CDC Order without change shows ratification of the CDC’s authority to issue that order.

As multiple courts have found, including the trial court below, the CDC’s eviction halt Order fell within the authority Congress conveyed through the Public Health Services Act to entrust public health experts

<https://www.justice.gov/opa/pr/department-justice-issues-statement-announcing-decision-appeal-terkel-v-cdc>.

with taking urgent, and sometimes far-reaching, measures to control the spread of infectious diseases when outbreaks occur. *See Chambless Enterprises, LLC v. Redfield*, __ F.Supp.3d __; No. 3:20-CV-01455, 2020 WL 7588849, at *5 (W.D. La. Dec. 22, 2020) (provision authorizing Secretary of Health & Human Services “to make and enforce such regulations as in his judgment are necessary to prevent the [interstate] introduction, transmission, or spread of communicable diseases” reflected a “legislative determination to defer to the ‘judgment’ of public health authorities about what measures they deem ‘necessary’ to prevent contagion”); *see also Brown v. Azar*, No. 1:20-CV-03702, — F.Supp.3d —, 2020 WL 6364310, at *7, (N.D. Ga. Oct. 29, 2020). The PHSA did not constrain such public health orders qualitatively, but instead relied on the judgment of medical and scientific experts to impose only those measures made necessary by public health conditions and in the absence of adequate state or local action. *See Chambless Enterprises* at *5, quoting *Louisiana v. Mathews*, 427 F. Supp. 174, 176 (E.D. La. 1977) (in 42 U.S.C. § 264, “Congress has granted broad, flexible powers to federal health authorities who must use their judgment in attempting to protect the public against the spread of

communicable disease.”). Congress left no doubt of this authority when it referenced and extended the CDC Order in the Consolidated Appropriations Act of 2021. *See* Pub.L. 116-260, § 502. *See generally* *Isbrandtsen–Moller Co. v. United States*, 300 U.S. 139, 147–48 (1937) (Congressional ratification may give effect to executive action even if taken without authorization); *see also* *Schism v. United States*, 316 F.3d 1259, 1289 (Fed. Cir. 2002) (“Congress may ratify agency conduct, ‘giv[ing] the force of law to official action unauthorized when taken.’”), *quoting* *Swayne & Hoyt v. U.S.*, 300 U.S. 297, 302 (1937).

Congressional ratification may be shown through evidence that Congress recognized, adopted, or acquiesced in an agency’s action. *See* *Collins v. Mnuchin*, 938 F.3d. 553, 572 (5th Cir. 2019), *citing* *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170-171 (2001). The ratification of the CDC Order is clear from both the action taken and its surrounding context. At the time the Appropriations Act was passed, only two courts had considered whether CDC had authority under the PHSA to restrict residential evictions, and both concluded

that it did (or very likely did).³¹ *See Chambless Enterprises* at *7 (“CDC’s determination that a ‘temporary halt in evictions’ is a ‘reasonably necessary measure ... to prevent the further spread of COVID–19 throughout the United States’ is well supported and falls firmly within the scope of its authority”) (internal citations omitted); *see Brown v. Azar*, at *10. Not a single court had even expressed doubt as to the legality of the CDC Order as of then, let alone declared the Order unlawful.

“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Forest Grove School Dist. V. T.A.*, 557 U.S. 230, 239-40 (2009), quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Hence, in explicitly extending the CDC Order, entirely unchanged except as to its expiration date, Congress adopted the view of the *Chambless Enterprises & Brown* courts—that the PHSA authorized the CDC to halt evictions as necessary under to control the spread of COVID-19.

³¹ In the only other another reported case as of that time, a court had denied a motion to preliminarily enjoin the CDC halt order without reaching the merits. *See Tiger Lily LLC v. HUD*, No. 2:20-CV-2692-MSN-ATC, -- F.Supp.3d --, 2020 WL 7658126, at *10 (W.D. Tenn. Nov. 6, 2020).

b. *Skyworks* correctly discerned the Congressional intent for extending the CDC Order, but reached a conclusion inconsistent with its reasoning.

The court in *Skyworks, Ltd. v. CDC* found that Congress had extended the CDC Order so as to “facilitate[] the transition between presidential administrations and, effectively, gave the incoming administration the opportunity to determine its own policies for responding to the pandemic.” No. 5:20-CV-2407, --- F.Supp.3d ---, 2021 WL 911720, at *12 (N.D. Ohio Mar. 10, 2021). This Congressional purpose for extending the order was undoubtedly correct; COVID-19 caseloads were then at their highest U.S. peak ever, few vaccines had yet been administered, and public health officials were certainly not suggesting the pandemic could foreseeably be brought under control by January 31.³² Hence, the full context indeed shows Congress intended to preserve the *status quo* through January 2021, after which the new administration could decide whether to extend the CDC halt Order further, modify the terms, replace it with something else, or simply allow it to expire.

³² On the same day as the Appropriations Act, CDD stated publicly: “As 2020 draws to a close, COVID-19 cases and deaths continue to rise across the United States” and that the “U.S. is entering a pivotal phase of the COVID-19 response.” *CDC 2020 in Review*, CDC (Dec. 29, 2020), <https://www.cdc.gov/media/releases/2020/p1229-cdc-2020-review.html>.

Extending the CDC Order to January 31 would not have actually enabled the new administration to make such choices, however, unless Congress viewed the CDC as already having the authority to impose (or extend) an eviction ban. Otherwise, Congress would have needed either to amend the PHSA or enact substantive new language empowering CDC to restrict evictions. *C.f. Skyworks* at *12. Since Congress did not do so, the only way to reconcile its purpose (of enabling the incoming administration to establish its own pandemic response policies) with the brief, bare extension of the CDC Order it enacted is as a ratification of the view that CDC already had authority to restrain evictions under the preexisting PHSA.

And yet, the *Skyworks* court concluded for these very same reasons that Congress had not ratified the CDC's order. *See Skyworks* at *12. This conclusion simply does not square with that court's own reasoning; *Skyworks* should have held that ratification did occur, because in extending the CDC Order unchanged Congress signaled approval and agreement with the court decisions holding that the eviction restrictions were already authorized. *See Lorillard* at 580 ("where, as here, Congress adopts a new law incorporating sections of a

prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”).

c. Nothing in the Appropriations Act or surrounding context suggests Congress intended to extend the CDC Order to January 31, 2021, but withhold validation of CDC’s authority to extend it.

In *Tiger Lily*, the Sixth Circuit suggested Congress did not ratify CDC’s authority to restrict evictions in the Appropriations Act because nothing in that Act expressly granted CDC that power. *See Tiger Lily LLC v. HUD*, No. 21-5256, -- F.3d --, 2021 WL 1165170, at *4 (6th Cir. Mar. 29, 2021) (“[N]othing in § 502 expressly approved the agency’s interpretation. All § 502 did was congressionally extend the agency’s action until January 31, 2021.”). Yet this reasoning turns the entire concept of ratification on its head; Congress did not need to enact new statutory text empowering the CDC to restrict evictions because, at the time Congress extended the CDC Order, the only courts to have analyzed whether CDC already had that power concluded that it did. *See Lorillard* at 580. Ratification thus required only that Congress approve the already-prevailing interpretation of CDC’s authority—not grant CDC new powers to do something it had already done. Congress

did so by extending the CDC's Order, necessarily implying that the order being extended was valid and in effect.

The Sixth Circuit also mischaracterized the Appropriations Act extension as “mere acquiescence” in the CDC's issuance of the eviction restriction. *See Tiger Lily*, 2021 WL 1165170, at *4. But Congressional acquiescence occurs when Congress fails (or chooses not) to overturn an agency action of which it is aware. *Schism v. U.S.*, 316 F.3d 1259, 1294 (Fed. Cir. 2002) (“The doctrine of acquiescence is premised upon Congress' failure to act in response to an action it might view as previously unauthorized, unlike the ratification context where Congress affirmatively acted to demonstrate its approval of an agency action.”). Here, Congress did not simply refrain from overruling the CDC—or, for that matter, the multiple federal court decisions affirming the CDC's action; on the contrary, Congress passed an affirmative act approving the CDC's determination that it could halt evictions to control the spread of COVID-19. *See Isbrandtsen–Moller*, 300 U.S. at 149.

Unlike *Skyworks*, the courts in *Tiger Lily* did not even examine the context or purpose for which Congress extended the CDC Order, and dismissed without analysis the lingering significance of that

extension beyond its expiration. *See, e.g., Tiger Lily*, 2021 WL 1165170 at *4. Neither the District Court nor the Sixth Circuit offered any rationale for why Congress extended the CDC Order (or any explanation for why Congress would do so only until January 31, 2021, and not permit further extensions thereafter), and neither attempted to reconcile its conclusions with the rule that Congress is presumed to be aware of and adopt existing the pre-existing legal interpretations of the PHSA to authorize an eviction moratorium. *See Tiger Lily*, 2021 WL 1171887 at *10; *Tiger Lily*, 2021 WL 1165170, at *4; *see also Lorillard* at 580.

In the absence of context, the *Tiger Lily* courts viewed the Congressional extension as simply a wild, unexplained, and temporary legislative whim: “All § 502 did was congressionally extend the agency’s action until January 31, 2021. After that date, Congress withdrew its support[.]” *Tiger Lily*, 2021 WL 1165170, at *4. But, as discussed above, the Congressional extension was intended to preserve the *status quo* through January 2021, and then return further decisions about pandemic-related eviction restrictions back to public health experts in the new presidential administration. *See Skyworks* at *12.

The CDC Order, by its very text and structure, was designed to be extended in short increments tied to the status of the pandemic—as is fully consistent with Congress’ original intent, in the PHSA, for medical and scientific experts determine and take those steps reasonably necessary to control the spread of infectious diseases. *See* 85 Fed.Reg. at 55296 (temporary halt on evictions “subject to further extension, modification, or rescission, is appropriate.”). By extending the order, Congress not only signaled approval of the CDC’s authority to restrict evictions, but also of the specific Order CDC had issued—which itself made clear the possibility of being further extended if consistent with the needs of the pandemic.

3. A clear and resolute opinion upholding the CDC Order will best serve landlords, tenants, courts, and the public.

The inescapable conclusion is that CDC had authority to issue the eviction halt Order—either from the beginning or at least after Congress ratified CDC’s assertion of such authority in the Appropriations Act. Yet tenants who should be protected by the CDC Order are nonetheless being evicted or foregoing protection due to a lack of confidence in the Order or in their local courts. Tenants face these evictions even as billions of dollars in federal rental assistance

funds finally comes available. *Amici* urge this Court not only to affirm the denial of a preliminary injunction below, but to also do what it can to minimize the destructive legal uncertainty surrounding the eviction moratorium: declare that the CDC Order is valid and within the agency's authority, and clearly delineate the flaws in the reasoning of the cases concluding otherwise.

CONCLUSION

For the foregoing reasons, the decision below (denying the motion for preliminary injunction) should be affirmed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2021, I electronically filed the Motion for Leave and attached Memorandum of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the Court's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ David Williams
David Holman Williams

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