IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Richard Lee Brown, et al.,	:	
	:	No. 20-14210-H
	:	
Plaintiffs-Appellants,	:	
	:	
v.	:	
	:	
Sec. Xavier Becerra, et al.,	:	
	:	
	:	
Defendants-Appellees.	:	

RESPONSE TO DEFENDANTS-APPELLEES' MOTION TO DISMISS AND SUGGESTION OF MOOTNESS

INTERLOCUTORY APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1:20-cv-03702-JPB
THE HONORABLE J.P. BOULEE
DISTRICT JUDGE

Oral Argument Is Requested

September 9, 2021

New Civil Liberties Alliance
Caleb Kruckenberg
Kara Rollins
Litigation Counsel
Mark Chenoweth
General Counsel
Counsel for Plaintiffs-Appellants

CERTIFICATE OF INTERESTED PERSONS

Plaintiffs-Appellants certify that the following is a complete list of interested persons as required by Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1:

1. American Medical Association, *Amicus Curiae*
2. Atlanta Legal Aid Society, Inc., *Amicus Curiae*
3. Azar, Alex, *Defendant-Appellee*
4. Becerra, Xavier, *Defendant-Appellee*
5. Benfer, Emily A. (J.D., LL.M.), *Amicus Curiae* and *Counsel for Amici Curiae*
6. Bliss, Charles Richardson, *Counsel for Amici Curiae*
7. Boulee, J.P., U.S.D.J., *United States District Court Judge*
8. Brown, Richard Lee, *Plaintiff-Appellant*
9. Chenoweth, Mark, *Counsel for Plaintiffs-Appellants*
10. Children's Healthwatch, *Amicus Curiae*
11. Desmond, Matthew (Ph.D.), *Amicus Curiae*
12. Dunn, Eric, *Counsel for Amici Curiae*
13. Fulmer, Jennifer Ann, *Counsel for Amici Curiae*
14. Gainey, John Owen, *Counsel for Amici Curiae*

15. Georgia Chapter, American Academy of Pediatrics, *Amicus Curiae*
16. GLMA: Healthcare Professionals Advancing LGBTQ Equality, *Amicus Curiae*
17. Gonsalves, Gregg (Ph.D.), *Amicus Curiae*
18. Hawkins, James W., *Attorney for Plaintiffs-Appellants*
19. James W. Hawkins, LLC, *Law Firm for Plaintiffs-Appellants*
20. Jones, Sonya, *Plaintiff-Appellant*
21. Keene, Danya A. (Ph.D.), *Amicus Curiae*
22. Klein, Alissa, *Attorney for Defendants-Appellees*
23. Krausz, David, *Plaintiff-Appellant*
24. Kruckenberg, Caleb, *Attorney for Plaintiffs-Appellants*
25. Jerome N. Frank Legal Services Organization, Yale Law School, J.L. Pottenger, Jr., *Legal Organization for Amici Curiae*
26. Legal Services of Northern Virginia, *Amicus Curiae*
27. Leifheit, Kathryn M. (Ph.D.), *Amicus Curiae*
28. Levy, Michael Z. (Ph.D.), *Amicus Curiae*
29. Linton, Sabriya A. (Ph.D.), *Amicus Curiae*
30. Myers, Steven A., *Attorney for Defendants-Appellees*

31. National Apartment Association, *Plaintiff-Appellant*

32. National Hispanic Medical Association, *Amicus Curiae*

33. National Housing Law Project, *Amicus Curiae*

34. National Medical Association, *Amicus Curiae*

35. New Civil Liberties Alliance, *Legal Organization for Plaintiffs-Appellants*

36. North Carolina Pediatric Society, State Chapter of the American Academy of Pediatrics, *Amicus Curiae*

37. Pidikiti-Smith, Dipti, *Counsel for Amici Curiae*

38. Pollack, Craig E. (M.D., MHS), *Amicus Curiae*

39. Pottenger, Jr., J.L., *Counsel for Amici Curiae*

40. Public Health Law Watch, *Amicus Curiae*

41. Raifman, Julia (Sc.D.), *Amicus Curiae*

42. Rollins, Kara, *Counsel for Plaintiffs-Appellants*

43. Rondeau, Jeffrey, *Plaintiff-Appellant*

44. Salvador, Flor, *Counsel for Amici Curiae*

45. Schwartz, Gabriel L. (Ph.D.), *Amicus Curiae*

46. Siegel, Lindsey Meredith, *Counsel for Amici Curiae*

47. Smith, Wingo, *Counsel for Amici Curiae*

60. Witkofsky, Nina B., *Defendant-Appellee*.

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLEES' MOTION TO DISMISS APPEAL

A year into the litigation, after winning a district court decision blessing the agency's claim to virtually unlimited power, Defendants-Appellees Secretary Xavier Becerra, Department of Health and Human Services Acting Chief of Staff Nina B. Witkofsky, and the Centers for Disease Control and Prevention (collectively "CDC"), now claim that this case is moot because they have lost a separate challenge to CDC's nationwide eviction moratorium order in a different jurisdiction. They ask this Court to therefore dismiss the pending petition for rehearing *en banc* filed by Plaintiffs-Appellants Richard Brown, Sonya Jones, Richard Krausz, and the more than 85,000 members of the National Apartment Association (collectively "Property Owners").

This case is not moot, however, because the district court decision in *this case* has not been repudiated, reversed or vacated, and it expressly concluded that CDC has the power to not only issue a nationwide eviction moratorium, but also take any action CDC deems necessary to control disease. Far from distancing itself from its prior actions, CDC still maintains that it *could* issue another moratorium, including one in the

future, or other breathtakingly broad actions that would implicate the issues raised in this case. CDC's decision to forgo an appeal in a separate decision is nothing more than an attempt to manipulate this Court's jurisdiction to evade review and entry of a negative judgment. CDC's motion should be denied.

FACTS AND PROCEDURAL HISTORY

The Property Owners are individuals and a national trade association whose members CDC's Order has harmed. On September 1, 2020, CDC issued an order entitled "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*." 85 Fed. Reg. 55292 (Sept. 4, 2020). The Order prohibited evictions for tenants "of a residential property" who attested, in relevant part, that they are "unable to pay the full rent." *Id.* at 55293. The initial Order was effective until December 31, 2020, "unless extended." *Id.* at 55297.

The Order was premised on 42 U.S.C. § 264, which authorizes CDC "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases … the [Secretary] may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or

articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a).

The Property Owners are entitled to retake possession of their properties under state law but are suffering significant economic damages because of the Order. *See* App. A144-53, A245-46. Since their tenants have attested to their inability to pay any rent, the Property Owners will also be unlikely to recoup any of those losses. *See id.*

Mr. Brown filed a Complaint on September 9, 2020, and the remaining Plaintiffs-Appellants joined by Amended Complaint on September 18. Appellants also moved for a preliminary injunction. The district court denied the injunction on October 29, and the Property Owners appealed on November 9.

In its order, the district court held, unambiguously, that CDC had the statutory authority to enact the eviction moratorium. *Brown v. Azar*, 497 F. Supp. 3d 1270, 1283 (N.D. Ga. 2020). As the Court said, "[T]he clear and broad delegation of authority in the first sentence of § 264(a); the context provided by the subsequent subsections; the parroting language of § 70.2, which specifically uses the term including—a term of

enlargement; and persuasive authority from [another] court all point to the same conclusion: the Order has statutory and regulatory authority, and the CDC may take those measures that it deems reasonably necessary to prevent the spread of disease, so long as it determines that the measures taken by any state or local government are insufficient to prevent the spread of the disease." *Id.*

The district court also held, as a matter of law, that the Property Owners had not suffered irreparable harm because they were "wrongly deprived of access to their unique property." *Id.* at 1297. The Court said, "After review, this Court is unpersuaded that the loss of real property, without some other unique factor attributed to the property, is a per se irreparable injury." *Id.* (citation omitted).

The Property Owners then appealed to this Court.

In January 2021, the Halt Order was extended until March 31, 2021. *See Order* https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-01292021.pdf. Then extended again through June 30. *See Order* https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC-Eviction-Moratorium-03292021.pdf

Separately, several other plaintiffs also challenged the Halt Order. *See Ala. Ass'n of Realtors v. HHS*, No. 20-cv-3377, 2021 WL 1779282 (D.D.C. May 5, 2021). That court concluded that the relevant statute "authorizes the Department to combat the spread of disease through a range of measures, but these measures plainly do not encompass the nationwide eviction moratorium set forth in the CDC Order." *Id.* at *8.

That court stayed its decision pending appeal, which a panel of the D.C. Circuit declined to vacate. *See Ala. Ass'n of Realtors v. HHS*, No. 21-5093, 2021 WL 2221646, at *1 (D.C. Cir. June 2, 2021).

On June 3, those plaintiffs filed a request with the Supreme Court to vacate the stay.

While that application was pending, CDC extended the Order until July 31. *See Order* https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/CDC_Eviction_Extension_Order_Final_06242021.pdf.

On June 29, the Court denied the DC application without opinion. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2320 (2021). However, *five* members of the Court espoused the view that the Order was unlawful. Justices Thomas, Alito, Gorsuch and Barrett would have granted the

application. *See id.* Justice Kavanaugh concurred in the denial of temporary relief, but explained (with citations omitted):

> 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. 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, I vote at this time to deny the application to vacate the District Court's stay of its order. In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.

Id. at 2320-21.

On July 14, a divided panel of this Court affirmed the district court opinion in this case. *Brown v. HHS*, 4 F.4th 1220 (11th Cir. 2021). Writing for herself and Judge Tjoflat, Judge Grant first wrote, "We have doubts about the district court's ruling on … whether the plaintiffs are likely to succeed on the merits." *Id.* at 1224. After noting that "the government was unwilling to articulate any limits to the CDC's regulatory power at oral argument," the majority wrote that Congress had specified limits "in the very next sentence," which did not encompass the power to regulate nationwide housing policy. *See id.*

Nevertheless, the majority wrote, "despite our doubts, we need not consider or resolve the scope of the CDC's statutory authority." *Id.* at 1225. While recognizing that this Court's precedents clearly establish that "[s]ome interferences with real property interests undoubtedly constitute irreparable injuries," the panel nevertheless said that "we fail to see how the temporary inability to reclaim rental properties constitutes an irreparable injury." *Id.* at 1226 (citing *Johnson v. U.S. Dept. of Agric.*, 734 F.2d 774, 789 (11th Cir. 1984)).

Judge Branch dissented in a 60-page opinion. *Id.* at 1238. First, Judge Branch concluded that the "district court abused its discretion in finding that the landlords failed to establish a substantial likelihood of success on the merits of their claim that the CDC Order exceeds statutory authority." *Id.* In reaching this conclusion Judge Branch cited Justice Kavanaugh's concurring statement in *Ala. Ass'n of Realtors*, writing, "Thus, five justices appear to agree that the CDC Order likely exceeds the statutory authority set out in § 264(a)." *Id.* at 1254.

Judge Branch also disagreed on the irreparable harm point, noting that the Property Owners had "demonstrated that their tenants are insolvent and that a future money judgment is not likely to be

collectable." *Id.* at 1264. Judge Branch further recognized that "CDC has unlawfully interfered with the landlords' property rights[.]" *Id.* at 1258 n. 33.

With the Order expiring in two days, on July 29 the Biden administration recognized that it lacked authority to issue any order, much less a new one. According to the White House,

> President Biden would have strongly supported a decision by the CDC to further extend this eviction moratorium … . Unfortunately, the Supreme Court has made clear that this option is no longer available.

Statement by Press Secretary Jen Psaki (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/.

On August 3 President Biden again spoke to the issue, saying, "Well, look, the courts made it clear that the existing moratorium was not constitutional; it wouldn't stand." *Remarks by President Biden* (August 3, 2021) https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/. He continued, "The bulk of the constitutional scholarship says that [a new Order is] not likely to pass constitutional muster. … But

the present—you could not—the Court has already ruled on the present eviction moratorium." *Id.* Nevertheless, the President suggested CDC might issue a new order, but "[w]hether that option will pass constitutional measure with this administration, I can't tell you. I don't know. … But, at a minimum, by the time it gets litigated, it will probably give some additional time[.]" *Id.*

Later that same day, CDC issued a new extension of the Order, yet again invoking Section 264, remaining in effect until October 3, 2021. *See Order available at* https://www.cdc.gov/coronavirus/2019-ncov/communication/Signed-CDC-Eviction-Order.pdf.

On August 5, the President explained his reasoning in issuing the dubious Order saying "And I went ahead and did it, but here's the deal: I can't guarantee you the Court won't rule if we don't have that authority, but at least we'll have the ability, if we have to appeal, to keep this going for a month at least—I hope longer than that." *Remarks by President Biden* (August 5, 2021) https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/05/remarks-by-president-biden-on-strengthening-american-leadership-on-clean-cars-and-trucks/

The Property Owners filed a petition for rehearing *en banc* in this case on August 13, 2021.

Meanwhile, the *Alabama Association* plaintiffs again sought intervention from the Supreme Court. This time, the Court vacated the stay of the district court's original opinion. *Ala. Ass'n of Realtors v. HHS*, No. 21A23, 2021 WL 3783142, at *3 (U.S. Aug. 26, 2021). On the merits, the Court said, "The applicants not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing." *Id.* Indeed, the Court warned that a contrary determination "would give the CDC a breathtaking amount of authority" and "[i]t is hard to see what measures this interpretation would place outside the CDC's reach[.]" *Id.*

Turning to irreparable harm, the Court said, "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. … 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." *Id.* at *7.

CDC then dismissed its merits appeal in the *Alabama Association* litigation.

ARGUMENT

This Court has jurisdiction to review only "cases and controversies," and will not consider "moot" issues. However, "[t]he doctrine of voluntary cessation provides an important exception to the general rule that a case is mooted by the end of the offending behavior." *Troiano v. Supervisor of Elec. in Palm Beach, Cty., Fla.*, 382 F.3d 1276, 1282 (11th Cir. 2004). "[M]ere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways," the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *Id.* at 1283 (cleaned up); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[T]o say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.").

"[T]he standard [] for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of*

the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000). Importantly, the party asserting mootness bears the "formidable," "heavy burden of persuading the court" that "the challenged cannot reasonably be expected to start up again." *Id.* at 190. "A defendant's assertion that it has no intention of reinstating the challenged practice does not suffice to make a case moot and is but one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007) (citation omitted).

To determine if a case is moot because of a defendant's voluntary conduct, this Court looks to "at least the following three factors: (1) whether the challenged conduct was isolated or unintentional, as opposed to a continuing and deliberate practice; (2) whether the defendant's cessation of the offending conduct was motivated by a genuine change of heart or timed to anticipate suit; and (3) whether, in ceasing the conduct, the defendant has acknowledged liability." *Id.* Only if this Court can say with "absolute clarity" that the defendants' actions were not meant "simply to deprive the court of jurisdiction" will a case be deemed moot

when the defendant has ended the challenged practice. *Id.* at 1188 (citation omitted).

But even before it must weigh these factors, the Court must determine that the cessation "unambiguously terminated" the challenged policy. *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1268 (11th Cir. 2010). Thus, in *Harrell* this Court rejected a mootness challenge to a state bar's conclusion that an attorney's slogan was impermissible advertising when the bar eventually approved the slogan, because this Court could not say that the change was a change in policy instead of just a decision not to enforce an unlawful policy "against [the attorney] in this case." *Id.* at 1267-68 (citation omitted). Similarly, in *Rich v. Sec., Fla. Dept. of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013), when the state changed its policy concerning the denial of kosher meals at the prison at which the plaintiff was incarcerated, "and only at that prison, less than two weeks before the oral argument scheduled in this Court," this Court "conclude[d] that Florida has not unambiguously terminated its policy" and the case was not moot. Indeed, even in the context of a *legislative repeal*, "[w]here a superseding statute leaves objectionable features of the prior law

substantially undisturbed, the case is not moot." *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir.1992).

As a threshold, CDC has not demonstrated that a decision entered by a district court in a separate jurisdiction involving litigation with different plaintiffs, which CDC has chosen not to appeal, "unambiguously terminated" the issues presented in this case. *See Harrell*, 608 F.3d at 1268. To date, there has only been one decision from *any court* on the merits of the Plaintiffs-Appellants' challenge to CDC's order based on the statutory authority provided by Section 264(a)—the district court's opinion holding that the CDC moratorium was *lawful*. *See Brown*, 497 F. Supp. 3d at 1283. While the district court was ruling on the likelihood of success, its legal conclusions were not hesitant or conditional. Indeed, that decision, which has not been reversed or vacated, concluded that "the Order has statutory and regulatory authority, and the CDC may take those measures that it deems reasonably necessary to prevent the spread of disease, so long as it determines that the measures taken by any state or local government are insufficient to prevent the spread of the disease." *Id.* The decision of *another* district court, in a completely different circuit, does nothing to alter the justiciability of this case. Even

though CDC has begrudgingly (or perhaps strategically) decided not to challenge its loss in the *Alabama Association* litigation, that says nothing about the propriety of the district court's opinion here. The D.C. district court's ruling does not vacate the decisions issued in this litigation, nor does it unambiguously terminate the legal issues presented in this case.

CDC's halting statements about the impact of the *Alabama Association* litigation bear this conclusion out. CDC says, "In light of the Supreme Court's ruling, the CDC moved unopposed to voluntarily dismiss its D.C. Circuit appeal. The D.C. Circuit granted the government's motion, dismissed the appeal, and issued the mandate. Thus, the district court's judgment in *AAR* is final and binding on the CDC." (CDC Motion to Dismiss, ¶ 2) (citations omitted). That is not, of course, acceptance by CDC that it acted unlawfully *here*, much less assurance that it agrees with the court's decision or that it will refrain from future mischief. Instead, CDC has merely conceded that a different court ruled against it, in a different case, brought by different litigants.

Importantly, the underlying statute, 42 U.S.C. § 264, is still in effect, unchanged, and CDC could always use that provision in a manner consistent with the district court's opinion here. Indeed, we know

precisely how CDC interprets this law, as it has always asserted that its interpretation in this case is correct. Moreover, the district court blessed the agency with authority to take *any* "measures that it deems reasonably necessary to prevent the spread of disease, so long as it determines that the measures taken by any state or local government are insufficient to prevent the spread of the disease." *See Brown*, 497 F. Supp. 3d at 1283. Perhaps CDC would issue a reinvigorated eviction moratorium, or, as the Supreme Court warned, "mandate free grocery delivery to the homes of the sick or vulnerable," "[r]equire manufacturers to provide free computers to enable people to work from home," or "[o]rder telecommunications companies to provide free high-speed Internet service to facilitate remote work." *Ala. Ass'n of Realtors*, 2021 WL 3783142, at *3. After all, as the panel majority recognized in this very case, "the government was unwilling to articulate any limits to the CDC's regulatory power at oral argument[.]" *Brown*, 4 F.4th at 1224. The realistic threat that CDC would take new action remains absent any formal repudiation by the agency or vacatur of the decisions issued thus far in this case.

Furthermore, the panel decision in this litigation has not been vacated and remains binding precedent in this jurisdiction on the issue of irreparable harm, even though it too has been called into question by the Court's decision in *Alabama Association of Realtors*. Both the district court and the panel concluded that, as a matter of law, the Property Owners had not suffered irreparable harm because they were deprived of the right to exclude their tenants from their property and had not proven that they would never recover lost rent. *See Brown*, 4 F.4th at 1226; *Brown*, 497 F. Supp. 3d at 1297. That conclusion is impossible to square with the Supreme Court's later statement that the "moratorium has put … millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery. … 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." *Ala. Ass'n of Realtors*, 2021 WL 3783142, at *7.

The Supreme Court has recognized that the "flexible character of the Art. III mootness doctrine," can allow, for instance, review of legal determinations that implicate moot claims concerning an individual

when they affect the legal status of others. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400, 404 (1980) (class representative with moot claim may still appeal legal determination concerning denial of class certification). The same is true here. The district court and the panel's incorrect statements of law nevertheless remain, potentially binding litigants in future cases. And CDC has, of course, *never* suggested that the panel was incorrect in its assessment of irreparable harm. CDC's dismissal of its appeal in a different jurisdiction does nothing to address these lingering legal issues.

Even if CDC's decision to withdraw its appeal in a separate case *could* be viewed as unambiguously foreclosing the issues presented in this case, it is merely the voluntary cessation of challenged conduct, which does not moot the case unless CDC carries its "formidable" burden of making it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *See Laidlaw*, 528 U.S. at 189-90. CDC cannot meet that burden because its strategic extension of the policy to buy time with further litigation, its apparent last-minute acceptance of another court's decision, coupled with its remaining insistence that it has the power to reenact the moratorium, and its long history of

deliberately avoiding court jurisdiction in this and related challenges, cannot give this Court confidence that CDC's challenged misconduct will not recur in the future.

First, CDC is hardly contrite and has never repudiated its decision to issue the unlawful moratorium and violate the rights of thousands upon thousands of housing providers nationwide. CDC now says only that it has dropped its appeal of a different decision. (*See* CDC Motion to Dismiss, ¶ 2.) That's not a "change of heart;" it's merely acceptance of another court's order vacating its once "continuing and deliberate practice," which counsels against a finding of mootness. *See Sheely*, 505 F.3d at 1184. In fact, undersigned counsel asked CDC's counsel if it would stipulate that the agency lacked the statutory authority to enter an eviction moratorium, and CDC responded with its motion to dismiss. CDC has "never promised not to resume the prior practice[.]" *See Rich*, 716 F.3d at 532; *accord Sheely*, 505 F.3d at 1187 ("defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains"). The issues presented here therefore remain in controversy.

CDC's actions demonstrate instead that its latest tactic in the *Alabama Association* case is "an attempt to manipulate jurisdiction" in this case. *See Nat'l Ass'n of Bds. of Pharmacy*, 633 F.3d at 1310. After fighting this case for more than a year and defending the district court decision in its entirety on appeal before this Court, CDC withdrew its appeal in a different case on September 3, 2021, which was *after* the Property Owners sought *en banc* rehearing. This late switch of positions is just an attempt to avoid an adverse ruling here, and thus "manipulate jurisdiction" through cessation. *See id.*

In fact, this Court has unique evidence demonstrating that CDC has been actively manipulating this and other courts' jurisdiction all along. The challenged eviction moratorium order has never been in effect for more than a few months at a time, even though it was cumulatively in effect for nearly a year. CDC habitually issued last-minute extensions of what were otherwise limited-duration orders—four times in all. These limited periods of effectiveness allowed CDC to avoid a ruling against it on the merits. Justice Kavanaugh, for instance, cast the deciding vote to *not* intervene in June in express reliance on CDC's "plans to end the moratorium in only a few weeks, on July 31[.]" *Ala. Ass'n of Realtors*, 141

S. Ct. at 2320. Only this Court knows whether the Supreme Court's June 29 decision then affected the ultimate outcome of the panel's decision, but it certainly seems like a distinct possibility.

As the President later revealed, CDC duped the Court. Even though an extension after July was "not likely to pass constitutional muster," he nevertheless directed CDC to extend it again until October, because even if CDC lost its argument, "if we have to appeal, to keep this going for a month at least—I hope longer than that." *Remarks by President Biden* (August 5, 2021) https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/05/remarks-by-president-biden-on-strengthening-american-leadership-on-clean-cars-and-trucks/.

In other words, the President, directing CDC's actions at issue here, sought to keep intact an unlawful order by avoiding review of CDC's moratorium through taking advantage of the delay associated with litigation. And that tactic has *worked* so far. The federal courts have been unable to keep up with the speed at which the administrative state has issued its unlawful orders. Despite issuing *two* decisions, the Supreme Court has yet to issue a final judgment on the merits. By dismissing its appeals once it became pellucidly clear that CDC would ultimately lose,

CDC then made sure that the Court would never have that opportunity in the *Alabama Association* litigation. No wonder CDC now wants this case to be dismissed. It wants to avoid a final judgment in this case that might tie its hands in the future. This case is not moot.

The cases cited by CDC do not compel a different conclusion. For instance, in *Gagliardi v. TCJV Land Trust*, 889 F.3d 728, 733-34 (11th Cir. 2018) (emphasis in original), this Court dismissed an appeal as moot when the plaintiffs had "asked the district court to stop this project and prevent the land-use decisions that made this project possible," but "a Florida court ha[d] since invalidated the planned construction" of that very project. Further, turning to the need for declaratory relief, this Court said that there was insufficient "immediacy and reality" of recurrence to warrant a declaration—instead there was "nothing but the fear that the challenged conduct may recur in some unstated form at an unknown time and place." *Id.* at 735.

In this case, however, the Property Owners have never gotten any relief in their litigation, and the only binding precedent in this jurisdiction on the merits of their challenge is the district court's opinion holding that CDC likely has the power to do anything it can imagine as

long as it unilaterally declares it is for the purpose of disease control. *See Brown*, 497 F. Supp. 3d at 1283. Moreover, as discussed, there is a significant danger of recurrence here and ample evidence that CDC will once again exercise what it continues to believe to be its authority.

The decision in *Hisp. Int. Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1242 (11th Cir. 2012), does not assist CDC's argument at all. There, the plaintiffs had challenged a sentence in an Alabama statute as being unlawful, and, in response to the challenge, "the Alabama legislature has amended [the statute] to remove the second sentence entirely." *Id.* This revision mooted that specific challenge, but only because the unlawful statute had been *removed* from the books. *See id.* In other words, there was no danger of future efforts to use the unlawful statute as it no longer existed. Here, of course, there is a danger of future use—the decision interpreting the statute in this case *allows* CDC to do whatever it wants. *See Brown*, 497 F. Supp. 3d at 1283.

Finally, to the extent that CDC suggests that this Court's decision in *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1478 (11th Cir. 1997), stands for a broader proposition that a preliminary injunction appeal will always be moot once the defendant ceases its challenged conduct, that

case actually suggests otherwise. (*See* CDC Motion to Dismiss ¶ 3.) While this Court in *Adler* concluded an equitable challenge was moot, it did so only after determining that no relevant exception to mootness applied. *See* 112 F.3d at 1477. Here, the voluntary cessation exception applies, and CDC has not proven that its conduct will not recur. As a result, the issues presented in this appeal are not moot.

Even if this Court determines this case moot, it must, at a minimum, vacate both the panel decision and district court opinion. Courts of Appeals normally "vacate the lower court judgment in a moot case because doing so clears the path for future relitigation of the issues between the parties, preserving the rights of all parties, while prejudicing none by a decision which was only preliminary." *Alvarez v. Smith*, 558 U.S. 87, 94 (2009) (cleaned up); *see also* 28 U.S.C. § 2106 (setting out this Court's flexible authority to order appropriate relief). "The equitable remedy of vacating prior opinions in cases that become moot is driven by the principle that a 'party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.'" *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 794

(11th Cir. 2020) (quoting *U.S. Bancorp v. Bonner Mall*, 513 U.S. 18, 25 (1994)).

In certain contexts this Court has declined to vacate opinions concerning stays in moot cases, but only because such opinions are not precedential and do not "have[] an effect outside th[e] case." *Id.* at 795. However, "where a party could identify any ruling within a stay-panel opinion that would have precedential effect beyond the preliminary decision on the stay, then vacatur may be warranted if the case were to become moot." *Id.* at 795 n. 2.

Here, of course, the panel opinion's ruling was published and precedential, and it affirmed the district court's erroneous interpretation of both the scope of CDC's power and expressly adopted a rule that the deprivation of access to rental property is not an irreparable injury. *See Brown*, 4 F.4th at 1224, 1226. If it deems this case to be moot, this Court should at least vacate the prior opinions.

CONCLUSION

This Court should deny CDC's motion to dismiss this appeal. It must maintain jurisdiction over this case at least long enough to vacate the district court decision and the panel decision already issued. But it

should go further, rehear the appeal, and grant the declaratory and injunctive relief sought.

September 9, 2021

Respectfully,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because this motion contains 5012 words, excluding accompanying documents authorized by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionately spaced typefaces using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

September 9, 2021

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system which sent notification of such filing to all counsel of record.

September 9, 2021 Respectfully,

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