NO. 22-1929

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DARBY DEVELOPMENT COMPANY, INC., *et al.*,
Plaintiffs-Appellants
v.
UNITED STATES,
Defendant-Appellee

On Appeal from the United States
Court of Federal Claims (Bonilla, J.)

CORRECTED *AMICUS CURIAE* BRIEF OF NATIONAL ASSOCIATION OF HOMEBUILDERS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY

The National Association of Homebuilders ("NAHB") represents more than 140,000 builder and associate members throughout the United States. NAHB's membership includes approximately 700 state and local associations around the country, including companies that own and manage multi-family housing units. NAHB has an interest in the outcome of this matter because its members were harmed by the CDC Order (as defined herein). Because of the CDC Order, NAHB's members could not take action to evict non-paying tenants without the risk of incurring criminal liabilities and were unable to reclaim their property or rent their property to paying tenants. Accordingly, NAHB submits this Amicus Brief to show how its members will be harmed if this Court accepts the lower court's untenable stance on the Takings Clause and allows the Government with apparent authority to take property without just compensation.

All parties have consented to the filing of this Amicus Brief. The undersigned counsel for NAHB has authored this Amicus Brief in its entirety and no other person or entity aside from NAHB has funded the preparation of this Amicus Brief.

BACKGROUND

A. The CDC Imposes A Moratorium On Evictions.

On September 4, 2020, the CDC published an agency order (the "CDC Order" or "Order") in the Federal Register entitled "Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19," which imposed a nationwide ban on covered residential evictions until December 31, 2020. *See* 85 Fed. Reg. 55,292 (Sep. 4, 2020). The CDC Order came on the heels of a 120-day eviction moratorium passed by Congress in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020) and an Executive Order from the President entitled "Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners," which directed the CDC to "consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19," 85 Fed. Reg. 49,935, § 3 (Aug. 14, 2020). The CDC Order cited, as legal authority for the eviction moratorium, section 361 of the Public Health Service Act (42 U.S.C. § 264) and related regulations codified at 42 C.F.R. § 70.2. *See* 85 Fed. Reg. 55,293. These provisions authorize the Department of Health and Human Services and the CDC to take all measures "reasonably necessary" to prevent the spread of communicable diseases through such measures as quarantine, inspection, and disinfection, among others. *See* 42

U.S.C. § 264(a); 42 C.F.R. § 70.2. The stated purpose of the Order was to reduce the spread of COVID-19 transmission. *See* 85 Fed. Reg. 55,295. According to the CDC, "[e]viction moratoria facilitate self-isolation by people who become ill or who are at risk for severe illness from COVID-19 due to an underlying medical condition" and will help "State and local authorities to more easily implement stay-at-home and social distancing directives . . . ." *Id.* at 55,292. The Order, according to the CDC, also aimed to reduce homelessness, which can result in congregate living circumstances and unsheltered conditions that raise transmission risks. *See id.*

Although the Order stated that tenants who avail themselves of the eviction moratorium are "still required to pay rent and follow all the other terms of their lease" and may be assessed "fees, penalties, or interest for not paying rent," *id.* at 55,297, the Order deprived landlords of one of the primary means of holding tenants to the obligations of their leases—the right to evict. The CDC Order defined "[e]vict" and "[e]viction" broadly to include "any action by a landlord . . . to remove or cause the removal of a covered person from a residential property." *Id.* at 55,293. The CDC Order did not define "any action." It did, however, impose stiff criminal penalties on landlords who initiate any such (undefined) action "to remove or cause the removal" of a tenant from the landlord's property. *Id.* at 55,293. Individuals who violated the order faced a fine of up to $100,000, up

to a year in jail, or both. *Id.* at 55,296. Organizational landlords faced fines of up to $200,000 per event. *Id*. The CDC Order contained no provision for compensating property owners for the losses they incurred due to their inability to evict delinquent and non-rent-paying individuals, who were continuing to occupy their property over the owners' objection, and re-lease that housing to rent-paying individuals.

As the result of the CDC Order, many jurisdictions ceased proceedings to evict tenants for nonpayment of rent altogether, leaving landlords with no recourse. *See, e.g.*, *In the Matter of Ongoing Provisions for Coronavirus/COVID-19 Impact on Court Services*, *available at* https://www.iowacourts.gov/collections/579/files/1236/embedDocument (Iowa Sup. Ct., Oct. 2, 2020); Office of the Governor, State of Montana, *Directive Implementing Executive Order 2-2021*, *available at* https://covid19.mt.gov/_docs/2-12-2021-Directive.pdf (Feb. 12, 2021); State of North Carolina Governor's Office, Executive Order No. 171, Assisting North Carolinians at Risk of Eviction, *available at* https://governor.nc.gov/media/2161/open (Oct. 28, 2020); State of Maine Judicial Branch Pandemic Management Order, *Emergency Rules from the Supreme Judicial Court for Forcible Entry and Detainer (Eviction) Cases*, *available at* https://www.courts.maine.gov/covid19/pmo-sjc-6.pdf (Maine Sup. Ct., June 1, 2021); *In re: Procedures for Landlord/Tenant Matters*, Administrative Order 2020-1, *available at*

https://courts.delaware.gov/rules/pdf/Justice-of-the-Peace-Court-Administrative-Order-2020-1.pdf (Del. Justice of the Peace Ct., Sept. 11, 2020); Court of Appeals of Maryland, *Administrative Order on Suspension of Foreclosures and Evictions During the COVID-19 Emergency*, *available at* https://mdcourts.gov/sites/default/files/admin-ordersarchive/20200318suspensionofforeclosuresevictions.pdf (Md. Ct. App., Mar. 18, 2020); Supreme Court of New Jersey, Omnibus Order on COVID-19 Issues, *available at* https://www.njcourts.gov/notices/2020/n200327a.pdf?c=BW2 (Sup. Ct. New Jersey, Mar. 27, 2020); *In the Matter of Response by Spokane Superior Court to Public Health Emergency in Washington State*, No. 94-2-06940-8, Emergency Order #9, Unlawful Detainer Actions, *available at* https://www.spokanebar.org/wp-content/uploads/2020/05/Emergency-Order-Re-COVID-9-Unlawful-Detainer-Actions.pdf (Spokane Sup. Ct., April 29, 2020) (collectively, "Examples of State Orders Suspending Evictions").

B. Congress Extends The CDC Order.

On December 27, 2021, four days before the Order was set to expire, by an overwhelming majority, Congress extended the CDC Order until January 31, 2021, through the Consolidated Appropriations Act. Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020). In doing so, Congress acknowledged the CDC's authority for the CDC Order, stating: "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." 134 Stat. 1182, 2078-79 (2020). Congress did not express any misgivings about the CDC's authority to issue the CDC Order and certainly did not expressly prohibit the Order. Rather, by extending the CDC Order, Congress indicated that it supported the Order. *See also Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2492 (2021). (Breyer, J., dissenting) (noting that "the current Congress did not bristle at the Government's [original] reading of the statute" as supporting the CDC Order, but instead "extended" it).

As the Congressional extension lapsed, the CDC then extended the CDC Order through March 31, 2021. *See* 86 Fed. Reg. 8020 (Feb. 3, 2021). In extending the eviction moratorium, the CDC referenced studies that "[p]reliminary modeling projections and observational data" from States that lifted eviction moratoria "indicate that evictions substantially contribute to COVID-19 transmission." *Id.* at 8022. Further, the CDC postulated, based on "statistics on interstate moves," that "mass evictions would likely increase the interstate spread of COVID-19." *Id.* at 8023. The CDC then again extended the CDC Order through June 30, 2021, 86 Fed. Reg. 16,731 (Mar. 31, 2021), and then July 31,

2021. 86 Fed. Reg. 34,010 (June 28, 2021). Finally, the CDC further extended the CDC Order, in part, through October 3, 2021. 86 Fed. Reg. 43,244 (Aug. 6, 2021).

C. The Government Defends The CDC Order.

Following its issuance, numerous interested parties challenged the CDC Order on a variety of legal and constitutional grounds, including arguing that it exceeded the CDC's statutory authority. Courts split on the question of whether the CDC had authority to issue the Order. *Compare, e.g.*, *Ala. Ass'n of Realtors v. HHS*, No. 21-5093, 2021 U.S. App. LEXIS 16630, at *3 (D.C. Cir. June 2, 2021) (nonprecedential) (holding that the Government had "made a strong showing that it [was] likely to succeed on the merits" of its argument that the CDC Order was legal); *Chambless Enters., LLC v. Redfield*, 508 F. Supp. 3d 101, 112 (W.D. La. 2020) (holding that the Government was likely to succeed in arguing that the CDC Order was legally effective); *Brown v. Azar*, 497 F. Supp. 3d 1270, 1281 (N.D. Ga. 2020) (same) *with, e.g., Ala. Ass'n of Realtors*, 141 S. Ct. at 2486 (vacating stay and indicating that plaintiffs were likely to succeed on the merits of their argument challenging the legality of the CDC Order); *Tiger Lily, LLC v. United States HUD*, 5 F.4th 666, 669-73 (6th Cir. 2021) (concluding that the CDC Order was not legally issued). In all these cases, the Government vehemently defended the legality of the CDC Order and its authority to enter such an order. *See, e.g.*, *Ala. Ass'n of Realtors*, No. 20-cv-3377 (D.D.C) at ECF 26, at 8-9 (Government arguing

that the "CDC acted within its statutory and regulatory authority in issuing the [CDC] Order."); *see id.* at ECF 38, at 1 ("By extending the [CDC's] temporary eviction moratorium Order through January 2021, Congress ratified the agency's action, confirming that it fell within CDC's statutory authority, was not arbitrary or capricious, and did not violate the nondelegation doctrine."); *Skyworks, Ltd. v. Centers for Disease Control and Prevention*, No. 5:20-cv-2407 (N.D. Ohio) at ECF 23, at 15-19 ("The Order falls within CDC's broad authority under the PHSA to prevent the spread of disease."); *Tiger Lily LLC v. United States HUD*, No. 2:20-cv-2692 at ECF 82-1, at 12 (W.D. Tenn.) ("As a matter of law, CDC acted within its statutory and regulatory authority when issuing the Order."). In one of these cases, a district court found that the CDC had exceeded its authority and vacated the CDC Order, but stayed its judgment pending the Government's appeal. *See Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. at 2487-88. The Supreme Court subsequently vacated that stay. *Id.* at 2486. Thereafter, the Government abandoned its longstanding legal support for the CDC Order, voluntarily dismissed its appeal, and allowed final judgment to be entered. As a result, the nationwide eviction moratorium under the CDC Order ended in late August 2021, almost one year after it became effective. *Id.*

To date, Congress has not expressly prohibited or otherwise denounced the CDC Order.

D. NAHB Members Suffered Significant Harm From The Moratorium On Evictions.

The right of eviction, and the related right to replace a tenant who is not paying rent with one who will, is the principal mechanism for property owners to avoid economic losses resulting from a tenant's failure to pay. The CDC Order, by compelling occupation of owners' properties, prohibited owners from exercising those rights. While the CDC Order technically did not relieve tenants from their obligation to pay rent, as a practical matter, landlords had limited ability to recover past-due rent from non-rent-paying tenants. Indeed, many courts suspended landlord and tenant proceedings during the course of the pandemic. *See supra* at 4-5, Examples of State Orders Suspending Evictions.

Because of the CDC Order, NAHB members suffered injury when non-paying tenants availed themselves of the eviction moratorium because they could not take action to evict such tenants without the risk of incurring criminal liabilities. During the dates the Order was in effect, NAHB members were unable to exercise their legal right to evict non-paying tenants or reclaim their property or rent their property to other tenants who were just as deserving of housing as the non-paying tenants. Without eviction as a recourse, NAHB members incurred substantial losses and suffered significant harm when tenants refused to pay rent. NAHB members typically reinvest and use this money, to maintain their units, buildings, common areas, and grounds of their communities. NAHB members also

use rent proceeds to pay taxes and mortgage payments, and to pay employee salaries.

PROCEDURAL HISTORY

Plaintiffs-Appellants ("Plaintiffs") are 38 owners of apartments and other residential rental properties. Because of the CDC Order, Plaintiffs' rental units were occupied, over their objection, by tenants who were not paying all rent due in breach of their leases. Plaintiffs filed the underlying action on the basis that the CDC Order appropriated their right to remove and exclude non-rent-paying tenants and replace them with rent-paying tenants and sought to recover the rent tenants failed to pay while continuing the occupy the residences as a consequence of the CDC Order. *See generally* Appx032-037 (Complaint). In their Complaint, Plaintiffs alleged that (1) CDC Order constituted a compensable taking of their property and property rights without just compensation, in violation of the Fifth Amendment of the United States Constitution; and (2), in the alternative, the CDC Order resulted in an illegal exaction of Plaintiffs' private property, for which Plaintiffs are entitled to recover. Appx023, Appx037-040 (Complaint, ¶¶ 3-4, 32-44). The lower court held that there was no Taking because of the dicta regarding the CDC's authority in *Alabama Association of Relators*.

SUMMARY OF THE ARGUMENT

The Court of Federal Claims' ruling should be reversed because the CDC, in placing a moratorium on evictions during the COVID-19 pandemic, acted with apparent authority imbued upon it by Congress, and residential landlords, including Plaintiffs, relied upon that authority to their detriment. Congress manifested that the CDC was authorized to implement an eviction moratorium by (1) enacting the Public Health Service Act (42 U.S.C. § 264) and 42 C.F.R. 70.2, which placed the CDC in a position to enact measures necessary to prevent the introduction, transmission, or spread of communicable diseases from state to state; (2) enacting the initial COVID-19 eviction moratorium through the CARES Act; (3) extending the CDC Order through the Consolidated Appropriations Act, citing the CDC's statutory authority under the Public Health Service Act; and (4) failing to disapprove or prohibit the CDC Order. Notably, the Government zealously defended the CDC's actions, arguing in numerous lawsuits challenging the CDC Order that the CDC was authorized to issue the Order. In essence, the landlords' property was used as part of a Government-sponsored plan to keep tenants from being evicted. Residential landlords across the nation reasonably relied upon the CDC's apparent authority to issue the Order, understanding they had two choices: comply with the CDC Order that Congress had expressly extended or face steep penalties, including jail time. In the face of several lawsuits brought by residential

landlords seeking just compensation, including the present case, the Government has now done a full 180, arguing that the CDC never had the authority to issue the CDC Order. This Court should not permit the Government to escape liability for actions undertaken by agents it has imbued with apparent authority, and instead should apply well-established Takings law to award Plaintiffs the just compensation they deserve.

A contrary outcome will lead to absurd results. Denying compensation for a Taking made based on apparent authority unfairly penalizes acquiescence with the law and encourages resistance to Government regulations. Moreover, allowing the lower court's ruling to stand may serve to embolden the Government agencies to attempt to avoid their obligation to provide just compensation by deliberately overstepping their authority. The Court should avoid such an outcome and instead apply the Takings Clause in manner consistent with the United States Constitution, public policy, and concerns for fundamental fairness.

ARGUMENT

A. Legal Standard For Takings Under The Fifth Amendment Of The Constitution.

Private property shall not be taken for "public use, without just compensation." U.S. Const. amend. V, cl. 4. The purpose of the Just Compensation Clause is to prevent the federal government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be

borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This Court has observed that whether a constitutional Taking has occurred is a question of law based on "factual underpinnings." *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003). To assist the court in conducting the required Takings analysis, a two-part test has been established: 1) "a court must evaluate whether the claimant has established a 'property interest' for the purposes of the Fifth Amendment;" and 2) the court "must determine whether a taking occurred." *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003). Once a property right is identified, the court must next decide the nature of the Taking, i.e., whether the case presents a '"classi[c] taking"' in which the Government '"directly appropriates private property for its own use."' *E. Enters. v. Apfel*, 524 U.S. 498, 532 (1998) (quoting *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982)) or whether the "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good," knowing as a "regulatory" Taking. *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978). Importantly, it is the impact on the owner that matters in a Takings claim. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528-29 (2005). As this Court has held, a Takings claim lies "as long as the government's action was authorized, even if the government's action was subject to legal challenge on

some other ground." *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001).

B. Legal Standard For Apparent Authority.

It is hornbook law that authority can take a variety of forms, including actual, implied, or apparent authority. *See generally* Restatement (Third) Of Agency (2006). The term "apparent authority" has well-known connotations in the law of agency. As defined in Restatement (Third) Of Agency § 2.03 (2006), "[a]pparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party ***reasonably believes*** the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." (Emphasis added); *Distribution Postal Consultants, Inc. v. United States*, 90 Fed. Cl. 569, 573 (2009) ("Apparent authority . . . occurs when a principal makes others believe that she has conferred authority upon an agent by holding them out to the public or a third-party as the principal's agent.").

An agent is said to have "apparent authority" (as distinguished from actual authority) if the principal has represented or manifested in some other way to a third party that the agent is authorized to act on behalf of, and bind, the principal in dealings with the third party, and the third party reasonably believes the actor to be authorized as a result. *See* Restatement (Third) of Agency § 3.03 (2006). The

principal's manifestations need not be conveyed through words or actions. Rather, "[s]ilence may constitute a manifestation when, in light of all the circumstances, a reasonable person would express dissent to the inference that other persons will draw from silence. ***Failure then to express dissent will be taken as a manifestation of affirmance***." *Id.* § 1.03 cmt. b (emphasis added). Indeed, "[a] principal's inaction creates apparent authority when it provides a basis for a third party reasonably to believe the principal intentionally acquiesces in the agent's representations or actions." *Id.* § 3.03 cmt. b; *see Scientific Holding Co. v. Plessey, Inc.*, 510 F.2d 15, 25 (2d Cir. 1974) (holding that apparent authority was created when a principal "remained silent when he had the opportunity of speaking and when he knew or ought to have known that his silence would be relied upon, and that action would be taken or omitted which his statement of the truth would prevent, and that injury of some nature or in some degree would result."). For example, in *Trustees of the American Federation of Musicians & Employers' Pension Fund v. Steven Scott Enterprises, Inc.*, 40 F. Supp. 2d 503, 511 (S.D.N.Y.1999), the court held that apparent authority existed where the principal cashed fifteen settlement checks while failing to repudiate the agent's unauthorized actions despite receiving notice of at least seven settlement agreements, noting that the principal's silence could be construed as an affirmation of the agent's exercise of apparent authority.

"A principal may also make a manifestation by ***placing an agent in a defined position in an organization or by placing an agent in charge of a transaction or situation***." Restatement (Third) of Agency § 3.03 cmt. b (emphasis added). According to the Restatement, in this situation, "third parties who interact with the principal through the agent will naturally and reasonably assume that the agent ha[d] authority to do acts consistent with the agent's position or role" except when the third party has "notice of facts suggesting that this may not be so." *Id.* For example, in *Farm & Ranch Servs., Ltd. v. LT Farm & Ranch, LLC*, 779 F. Supp. 2d 949, 963 (S.D. Iowa 2011), a co-manager of a limited liability company sold the LLC's interests to a bank in return for a lump-sum payment without actual authority to do so, which would have required the other co-manager's consent. The court held that the co-manager had apparent authority to bind the LLC since the transaction with plaintiff was not in itself so extraordinary as to reasonably call the co-manager's apparent authority into question, and someone in plaintiff's position could have reasonably believed that the co-manager had the right to sell the LLC's interests. *Id.*

Ultimately, as a matter of agency law and consistent with our notions of fairness, a principal will incur liability for the acts of an "agent" if the principal "held the agent out to third parties as possessing sufficient authority to commit the particular act in question, and there was reliance upon the apparent authority."

Jones v. Federated Fin. Reserve Corp., 144 F.3d 961, 965 (6th Cir. 1998); *Asher v. Chase Bank USA, N.A.*, 310 F. App'x 912, 920 (7th Cir. 2009) ("The principal may not then deny the agent's authority to a third party who has relied upon it.").

C. The CDC Acted With Apparent Authority Imbued By Congress In Imposing A Moratorium On Evictions, And Landlords Reasonably Relied On Such Authority To Their Detriment.

Here, Congress imbued the CDC with apparent authority in several ways. First, Congress enacted the Public Health Service Act (42 U.S.C. § 264) and 42 C.F.R. 70.2, which placed the CDC in a position to enact measures necessary to prevent the introduction, transmission, or spread of communicable diseases from state to state. Second, Congress enacted the initial COVID-19 eviction moratorium through the CARES Act. *See* Pub. L. No. 116-136, 134 Stat. 281 (2020). Third, Congress extended the CDC Order through the Consolidated Appropriations Act. *See* Pub. L. No. 116-260, div. N, tit. V, § 502, 134 Stat. 1182 (2020). Finally, as the CDC repeatedly extended the CDC Order, Congress failed to disavow or express disapproval of the CDC Order or the CDC's exercise of its authority under the Public Health Service Act. Thus, the CDC was effectively placed in a position and put "in charge of" the efforts to combat COVID-19, including the eviction moratorium, leading thousands of landlords and other third parties to reasonably and fairly assume that the CDC had authority to act. *See* Restatement (Third) of

Agency § 3.03 cmt. b. The CDC, in turn, acted within the scope of its duties to implement the CDC Order, acting under the authority provided by Congress.

Even after the Congressional extension of the CDC Order lapsed, Congress remained silent and did nothing to alert third parties to any concerns regarding the CDC's acts and the scope of its authority. Rather, the Government doubled down on the CDC Order in numerous court cases, repeatedly and zealously defending the Order and emphasizing the CDC's authority to issue the Order. *See, e.g.*, *Ala. Ass'n of Realtors*, No. 20-cv-3377 (D.D.C) at ECF 26, at 8-9 (Government arguing that the "CDC acted within its statutory and regulatory authority in issuing the [CDC] Order."); *see id.* at ECF 38 at 1 ("By extending the [CDC's] temporary eviction moratorium Order through January 2021, Congress ratified the agency's action, confirming that it fell within CDC's statutory authority"). That is, until it became inconvenient for the Government to continue to do so and when an about-face could potentially help the Government avoid its obligation to pay just compensation.

This is a much stronger case for apparent authority than other situations, such as the circumstances in the *Trustees* case, where the principal merely remained silent. *See* 40 F. Supp. 2d at 511. Here, there was not silence but rather affirmation on the part of Congress, followed by persistent statements from Government lawyers, that the CDC had the authority to place a moratorium on

evictions to combat the ongoing pandemic. Faced with extreme penalties if they failed to comply, residential landlords reasonably relied upon the apparent authority of the CDC to issue the CDC Order as the result of Congress' extension of the eviction moratorium and the Government's fervent and consistent defense of the CDC's actions as being authorized. Particularly given the conclusion of multiple courts that the CDC had authority to issue the Order, there was nothing so extraordinary here, during the course of the ongoing pandemic, that would cause laymen to reasonably question the apparent authority of the CDC. Accordingly, residential landlords withheld from exercising their right to evict non-paying tenants and suffered the costs of maintaining non-rent-paying tenants. That is, residential landlords acted in reasonable reliance on Congress' manifestations of the authority of the CDC to issue the CDC Order and suffered great harm as a result. That the CDC Order was apparently the result of an improper exercise of statutory authority or a mistake on behalf of the Government is of no moment. Congress manifested and represented that the CDC Order was an authorized exercise of the CDC's powers, and the landlords, if they are denied the ability to state a Takings claim, will have been unfairly penalized by relying on the Government's mistake.

A finding that the CDC acted with apparent authority is supported by this Court's opinion in *Del–Rio Drilling Programs Inc. v. United States*, 146 F.3d

1358, 1362 (Fed. Cir. 1998). In *Del-Rio*, Interior Department officials required owners of mining leases to obtain special permits from a tribal nation before drilling or surveying their land, which resulted in the owners being unable to use the land. *See id*. at 1358-61. The officials had apparently erred in interpreting the law and had no legal authority to impose this requirement. *Id.* However, the Federal Circuit held that the apparent illegality of the action did *not* preclude a Takings claim. *Id.* at 1363. Although the officials may have misinterpreted the law under which they acted, their action was not unauthorized for Takings purposes (*i.e.*, *ultra vires*), but rather was undertaken within the scope of their normal job responsibilities. *Id.*; *cf. Bailey v. United States*, 78 Fed. Cl. 239, 254 (2007) ("It was, after all, the Army Corps asserting authority over purported wetlands and not, say, the Secretary of Education."). Thus, this Court held that a compensable Taking can occur even in the face of mistaken, imprudent, wrongful, or legally erroneous conduct by Government agents, provided such actions are a "natural consequence of Congressionally approved measures, or are pursuant to the good faith implementation of a Congressional Act." *Del-Rio*, 146 F.3d at 1362-63 (internal citations and quotation marks omitted) (citing *NBH Land Co. v. United States*, 217 Ct. Cl. 41, 576 F.2d 317, 319 (1978); *S. Cal. Fin. Corp. v. United States*, 225 Ct. Cl. 104, 634 F.2d 521, 525 (1980)); *see Eyherabide v. United States*, 170 Ct. Cl. 598, 345 F.2d 70 (1965).

While it is true that a compensable Taking cannot occur where the Government agent's actions were *ultra vires*, the Supreme Court has repeatedly made clear, "a state officer may be said to act *ultra vires* only when he acts 'without any authority whatever,"' that is, without even a colorable claim of legality. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 n.11 (1984) (quoting *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982)). This is a quintessential case of authorized, but illegal conduct by the Government, where an agency acts with apparent authority, giving rise to a compensable Takings claim. The CDC Order was the result of an Executive Order by the President; was issued pursuant to a statute enacted by Congress authorizing the CDC "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" (42 U. S. C. § 264(a)); and was extended by Congress. As in *Del-Rio*, there is "no reason to suppose" that the CDC Order "reflected anything but a good faith effort to apply the statutes and regulations as [the CDC] understood them." *Del-Rio*, 146 F.3d at 1363; *see also Ala. Ass'n of Realtors*, 141 S. Ct. at 2492 (Breyer, J., dissenting) ("Given the split among the Circuits, it is at least hard to say that the Government's reading of the statute is demonstrably wrong.") (quotations omitted). The Government must be held responsible for the "foreseeable consequences" of the apparent authority lent to the CDC. *See id.*; *Barnes v. United*

States, 210 Ct. Cl. 467, 538 F.2d 865, 873 (1976) (finding that taking of a flowage easement was a natural consequence of the Government's release of dam waters where "defendant anticipated the creation of a delta and a rise in the groundwater elevations in the areas"); *Baird v. United States*, 5 Cl. Ct. 324, 330 (1984) (stating that "the probability and foreseeability of the damage is a primary determinative element in whether a taking or a tort occurred").[1]

The concept that Congress may instill in an agency apparent authority to act stands on all fours with the Supreme Court's seminal ruling in *United States v.*

[1] This Court's holdings that a Government agent must have actual authority to bind the Government to a contract, *see, e.g.*, *CACI, Inc. v. Stone*, 990 F.2d 1233, 1236 (Fed. Cir. 1993) (internal citations omitted); *Hall v. United States*, 918 F.2d 187 (Fed. Cir. 1990), are inapplicable to the present case, which does not involve or implicate contractual obligations on behalf of the Government. In *CACI*, this Court held that a contracting officer only has the authority conferred upon him by statute and if he exceeds his actual authority, the Government is not estopped to deny the limitations on his authority. The Court reached this conclusion because "the contractor is charged with notice of all statutory and regulatory limitations." *Id.* at 1236. Such holdings have been motivated by the Court's concerns that "[i]f all Government employees could, of their own volition, enter into contracts obligating the Government, then federal expenditures would be wholly uncontrollable." *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1360 (Fed. Cir. 2001). Such concerns are not present here. This is not a case involving a rogue contracting officer entering into unauthorized agreements on behalf of the Government. This is a case involving Congress' review and adoption by extension of the CDC Order, which imbued the CDC with the apparent authority to re-issue the Order as the pandemic continued to rage. Moreover, a lay-landlord is not the same as a sophisticated contractor operating in the government contracts sphere and cannot be charged with notice of statutory and regulatory limitations of the CDC, especially when Congress implicitly approved the CDC Order by extending it.

Mead Corp., 533 U.S. 218, 229 (2001), in which the Court held that while Congress may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap . . . it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it . . . fills a space in the enacted law, even one about which Congress did not actually have an intent as to a particular result." *Id.* (internal quotations omitted). Accordingly, this Court should find that Plaintiffs suffered a compensable Taking under the Fifth Amendment as the result of the CDC Order, which constitutes authorized Government action under the doctrine of apparent authority.

D. The United States Constitution Requires Just Compensation For The Extensive Takings That Occurred Pursuant To The CDC's Apparent Authority.

The United States Constitution and well-settled interpretations thereof dictate for just compensation, where, as here, the Government may have overreached, but did so with apparent authority. The Supreme Court has held time and time again that fundamental to ownership of private property is the right to possess, use, and dispose of such property, to the exclusion of others. *See, e.g.*, *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 435-36 (1982) (explaining that the "power to exclude" is "one of the most treasured strands in an owner's bundle of property rights"); *Kaiser Aetna v. United States*, 444 U.S. 164,

176 (1979) (explaining that the "right to exclude" others from private property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (same). Infringement on these fundamental property rights "falls within th[e] category of interests that the Government cannot take without compensation." *Kaiser*, 444 U.S. at 179-80.

Here, Plaintiffs lost use of their property "not because their property vanished into thin air," but because the Government essentially required them to turn it over "for [the public] advantage." *Armstrong*, 364 U.S. at 48. The CDC, acting with the apparent authority imbued upon it by Congress, affirmatively acted to protect one class of citizen by casting upon another class of citizen the financial obligations that, if borne at all, should be borne by the Government itself. *See id.* at 49. By prohibiting landlords from asserting their contractual and statutory rights to evict non-rent-paying tenants during the CDC Order, the CDC effectively created a Government-sponsored occupancy of the landlords' buildings and real property. In fact, the Supreme Court recognized in *Alabama Association* that the eviction moratorium placed

> 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 [Government]'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.

Ala. Ass'n of Realtors, 141 S. Ct. at 2489. By imposing restrictions on property rights in this way, "the government d[id] not simply take a single 'strand' from the [Plaintiffs] 'bundle' of property rights: it chop[ped] through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435. As such, the occupancy of non-paying tenants under the CDC's Order should be attributed to the Government as fully as though the Government had used the landlords' property itself. After all, the Government always maintained the option of covering the costs to house evicted tenants, but chose instead to place the onus of that societal burden upon the landlords. This Court should give effect to well-established Takings law that there is a duty to pay just compensation in such circumstances. *See Armstrong*, 364 U.S. at 49 ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Any other outcome is inconsistent with the Takings rule and would introduce unnecessary confusion into an area of law where "clearly articulated, formal" rules are far "superior to open-ended" legal tests that depend on minute distinctions which property owners cannot predict. Susan Rose-Ackerman, AGAINST AD HOCERY: A COMMENT ON MICHELMAN, 88 Colum. L. Rev. 1697 (1988). The lower court's ruling if permitted to stand, would

muddy the Takings rule further and would encourage and allow the Government to benefit and not have to pay compensation when it exceeds its authority. Two wrongs do not make a right.

E. Public Policy And Concerns For Fundamental Fairness Strongly Weigh In Favor Of Compensating Landowners When The Government Acts With Apparent Authority.

Public policy and concerns for fundamental fairness require just compensation under these circumstances. The practical effect of the lower court's ruling, should it be permitted to stand, cannot be overlooked. The Takings rule allows property owners to make investments based on concrete expectations about the risk of Government interference. Owners are secure in the knowledge that physical occupation or appropriation of their property by the Government is a compensable Taking and can therefore "confidently . . . commit resources to capital projects," assured that the fruits of their investments will not be subject to uncompensated appropriation by the Government. Rose-Ackerman, 88 Colum. L. Rev. at 1700. Protecting the coherence and vitality of the Takings rule is crucial to ensuring that Takings jurisprudence retains a predictable core that protects investment-backed expectations and allows private enterprise to flourish. United States citizens should be able to rely on those within the Government who appear to have authority from Congress and agency orders that third parties reasonably believe carry the force of law. Denying compensation for a Taking when the

Government acts with apparent authority unfairly penalizes laymen, specifically here landlords, for following the law and complying with Government orders. Indeed, a ruling that denies just compensation here would encourage property owners to resort to self-help and ignore similar governmental orders in the future. The lower court's ruling suggests that property owners who suspect a Government agency's interpretation of its authority is mistaken or erroneous are not only legally entitled to resist with force, but might be wise to do so or else risk losing their property without recourse or compensation. "Penalizing acquiescence" and encouraging resistance to Government regulations "is, to put it mildly, a very bad idea." *See* THE SOLID WASTE AGENCY DECISION AND EXTRAJURISDICTIONAL WETLAND TAKINGS, SF64 ALI-ABA 417, 434 n.11 (2001).

Likewise, allowing the lower court's ruling to stand would encourage the Government to routinely and deliberately exceed its authority in the Takings context, knowing that doing so could eliminate the need to pay just compensation. This is an absurd result. "Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'" *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012) (citation omitted). To allow the Government to avoid paying landowners under the circumstances here, would turn this precedent on its head and encourage Government overreach.

Moreover, the Government should be estopped from arguing that apparent authority does not apply here, as the Government uses and relies upon the doctrine of apparent authority to its benefit in other contexts, such as for searches and seizures. *See Ill. v. Rodriguez*, 497 U.S. 177, 188–89 (1990) ("[D]etermination of consent to enter must 'be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises? . . . [I]f so, the search is valid.") (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)); *United States v. Rodriguez*, 888 F.2d 519, 523 (7th Cir. 1989) (estranged wife who possessed key to locked closet that was actually the property of her estranged husband had apparent authority to authorize search); *United States v. Gillis*, 358 F.3d 386 (6th Cir. 2004) (police reasonably relied on girlfriend's apparent authority based on her representations and her detailed description of the interior of her boyfriend's home, even though police knew she had her own residence in public housing and she did not have a key to the boyfriend's home).

In sum, the Government should not be allowed to profit from its own illegal actions and avoid the consequences of taking private property to further the public good. To allow the eviction moratorium to take place without the attendant necessary compensation would benefit the wrongdoers, i.e., the Government, while unfairly harming those property owners who reasonably relied on the CDC's

authority and refrained from evicting non-paying tenants to help stem a deadly pandemic. The United States Constitution, public policy, and concerns of fundamental fairness all dictate for just compensation under these circumstances where the Government may have overreached, but did so with apparent authority.

CONCLUSION

Wherefore, for the foregoing reasons, this Court should reverse the judgement of the lower court and remand the case for further proceedings on Plaintiffs' Takings claims.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Federal Circuit Rule 32(a) in that the brief contains 6,833 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) in that the brief has been prepared in a proportionally spaced typeface using Microsoft 365 – Microsoft Word in a 14-point Times New Roman font.

/s/ Lela M. Ames
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2023, I electronically filed the foregoing CORRECTED *AMICUS CURIAE* BRIEF OF NATIONAL ASSOCIATION OF HOMEBUILDERS IN SUPPORT OF PLAINTIFFS-APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit using the CM/ECF system, which automatically served counsel of record in this case.

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