

## JONES DAY

51 LOUISIANA AVENUE, N.W. • WASHINGTON, D.C. 20001.2113  
TELEPHONE: +1.202.879.3939 • FACSIMILE: +1.202.626.1700

DIRECT NUMBER: (202) 879-3835  
BSHUMATE@JONESDAY.COM

May 17, 2021

VIA CM/ECF

Hon. Dabney L. Friedrich  
U.S. District Court for the District of Columbia  
333 Constitution Ave., NW  
Washington, DC 20001

**Re: Alabama Ass'n of Realtors et al. v. HHS et al., No. 1:20-cv-03377-DLF**

Dear Judge Friedrich:

Plaintiffs respectfully notify the Court that they intend to move the D.C. Circuit to vacate the order granting Defendants' motion for a stay pending appeal and also intend to file an application to vacate the stay in the Supreme Court of the United States.

In granting a stay, this Court credited Defendants' representations on May 11 that the public-health situation is so grave that Americans would die if they gather together in shared living settings after being evicted. *See* Reply, ECF 59, at 2 (harm “would flow from evictions and the concomitant spread of COVID-19”), *id.* at 3 (the “undisputed scientific evidence shows that evictions exacerbate the spread of COVID-19”), *id.* (“maintaining COVID-19 precautions ‘remains critical’ if the country is ‘to avoid further rises in transmission’ and prevent ‘yet another increase in the rates of new infections’”), *id.* (“the public interest favors maintenance of public health orders that are critical to fighting the worst pandemic in a century”), *id.* at 4 (eviction ban prevents “avoidable deaths,” and evictions lead to “increased COVID-19 mortality”), *id.* at 6 (“the progress that has occurred happened because millions of Americans followed the direction of public health experts to wear face masks, practice social distancing, and limit interstate travel”), *id.* (“public health experts remain adamant that lifting the eviction moratorium would be premature”).

Yet on May 10, the day *before* Defendants made those representations, CDC Director Walensky had already decided that the public-health situation was so improved that it is now safe for vaccinated Americans to gather together indoors without masks or social distancing. *See* Lena H. Sun et al., *The right decision wrongly handled: Inside the Biden administration's abrupt reversal on masks*, Wash. Post (May 15, 2021), <https://wapo.st/3yfHCZp>. On Thursday, May 13, the CDC publicly announced new guidance to that effect. *See Press Briefing by White House COVID-19 Response Team and Public Health Officials*, White House (May 13, 2021), <https://bit.ly/3w68HMC>; CDC, *Interim Public Health Recommendations for Fully Vaccinated People* (updated May 13, 2021) (“fully vaccinated people no longer need to wear a mask or physically distance *in any setting*, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance” (emphasis added)), <https://bit.ly/3fhLEHO>. And later that afternoon, President Biden declared in the Rose Garden that

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this “milestone” was “made possible by the extraordinary success we’ve had in vaccinating so many Americans so quickly.” *Remarks by President Biden on the COVID-19 Response and the Vaccination Program*, White House (May 13, 2021), <https://bit.ly/2RqmKxN>. He noted that “[c]ases are down in 49 of the 50 states,” that “hospitalizations are the lowest they’ve been since April of 2020,” that “[d]eaths are down 80 percent and also at their lowest levels since April of 2020,” and that “nearly 60%” of adults have received at least one dose of the vaccine. *Id.*

In the five days immediately after Defendants’ May 11 filing, the CDC Director repeatedly and publicly emphasized that the science now shows that vaccinated Americans can safely gather together indoors without masks or social distancing:

- “Anyone who is fully vaccinated can participate in indoor and outdoor activities, large or small, without wearing a mask or physical distancing. If you are fully vaccinated, you can start doing the things that you had stopped doing because of the pandemic. We have all longed for this moment when we can get back to some sense of normalcy.” *Press Briefing by White House COVID-19 Response Team and Public Health Officials*.
- “And we now have science that has really just evolved even in the last two weeks that demonstrates that these vaccines are safe, they are effective, they are working in the population, just as they did in the clinical trials, that they are working against our variants that we have here circulating in the United States, and that, if you were to develop an infection, while—even if you got vaccinated, that you can’t transmit that infection to other people.” *This Week*, ABC News (May 16, 2021), <https://abcn.ws/2S12umi>.
- “If you are vaccinated, we are saying you are safe, you can take off your mask, and you are not at risk of severe disease or hospitalization from COVID-19.” *Fox News Sunday*, Fox News (May 16, 2021), <https://fxn.ws/3tTh394>.
- “[W]e see cases coming down, just even over the last two weeks, and really even since Tuesday by a third of cases over the last two weeks, deaths at rates that we haven’t seen this low since April of 2020, and now we have science that has really evolved. Just even in the last weekend, a paper that was published as recently as Friday that demonstrates that people who are vaccinated are protected, . . . that this vaccine is working in the real world just as it did in the clinical trials, that it’s working against the variants, and that if you get an asymptomatic infection after you’ve had the vaccine, that you really can’t give it to somebody else. So really, just in the last two weeks, we’ve had a lot of evolving science.” *Meet the Press*, NBC News (May 16, 2021), <https://nbcnews.to/3uUBKCx>.

The CDC Director’s shift in position was supported by data showing that the COVID-19 vaccines are safe, effective, and widely available:

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- Vaccines have been available to all adults free of charge in all states for four weeks. Erin Schumaker, *All US adults now eligible for COVID-19 vaccines*, ABC News (Apr. 19, 2021), <https://abcn.ws/3onto44>.
- Almost 60% (and counting) of adults have received at least one shot of the vaccine, and over 84% of the most at-risk elderly Americans have received at least one shot. CDC, *COVID-19 Vaccinations in the United States*, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last visited May 17, 2021).
- And the CDC's own forecast shows case and death rates continuing to decline below where they were in September 2020, when the CDC issued its first nationwide eviction ban. CDC, *United States Forecasting*, [https://covid.cdc.gov/covid-data-tracker/#forecasting\\_weeklydeaths](https://covid.cdc.gov/covid-data-tracker/#forecasting_weeklydeaths) (last visited May 17, 2021).

Although Defendants widely broadcast this improving public-health situation through the media in the days after submitting their reply brief, they neglected to inform this Court that the public-health situation had so dramatically improved before the Court ruled on their pending stay motion. The Court thus relied on Defendants' stale representations that "the risks to public health continue" from people gathering together in shared living settings. Memorandum Opinion, ECF 61, at 9. Had Defendants timely informed the Court about the improved public-health situation, the Court likely would have concluded that the equities weigh in Plaintiffs' favor.

As Plaintiffs will explain in their forthcoming D.C. Circuit motion, by the CDC's own admission, the public-health rationale for the nationwide eviction ban no longer exists. Although the CDC once feared that people who gather indoors after being evicted will spread COVID-19, the CDC has concluded that the threat of spreading the disease indoors is so low that vaccinated Americans do not even need to wear masks or socially distance "in any setting."<sup>1</sup> All renters in the United States are eligible for the vaccine—and, according to the CDC's own data, most adults have already received at least one shot. If vaccinated Americans can safely gather together inside without restriction, then there is no longer any basis to credit Defendants' representations on May 11 that Americans will die

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<sup>1</sup> Although the CDC's new guidance goes on to inconsistently say that "[f]ully vaccinated people should also continue to wear a well-fitted mask in ... homeless shelters," *Interim Public Health Recommendations for Fully Vaccinated People*, the CDC's eviction ban broadly covers anyone who certifies that eviction would "force the individual to move into and live in close quarters in a new congregate or shared living setting." 86 Fed. Reg. 16,731, 16,732 (Mar. 31, 2021). The CDC's data showed that only "5-15% of people experiencing homelessness between 2018 and 2020 cited eviction as the primary reason for becoming homeless." *Id.* at 16,735.

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if they gather together in shared living settings after being evicted. Defendants thus can no longer continue arguing with a straight face that a nationwide eviction ban is necessary to prevent the spread of COVID-19. The public-health rationale is now nothing more than a pretext for extending economic relief to the nation's renters.

Especially because the public-health rationale for the nationwide eviction ban no longer exists, the Court should vacate the stay pending appeal or issue other appropriate relief. At a minimum, the Court should issue an order directing Defendants to show cause why the Court should not vacate the stay in light of Defendants' shifting narratives about public health and their failure to timely inform this Court that conditions have so radically improved that even basic COVID-19 precautions are no longer necessary.<sup>2</sup>

Respectfully submitted,

/s/ Brett A. Shumate

Brett A. Shumate  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700  
bshumate@jonesday.com

*Counsel for Plaintiffs*

cc: Leslie Cooper Vigen, Esq.  
Steven A. Myers, Esq.

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<sup>2</sup> To the extent required, this letter should be treated as a motion to vacate the stay pending appeal.