IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD LEE BROWN, ET AL.	:	
	:	No. 20-14210-H
	:	
Plaintiffs-Appellants,	:	On Appeal from the United States
	:	District Court for the Northern
v.	:	District of Georgia
	:	
SEC. ALEX AZAR, ET AL.,	:	No. 1:20-cv-03702-JPB
	:	
	:	
Defendants-Appellees.	:	

Plaintiffs-Appellants' Motion for Injunction Pending Appeal

Pursuant to F.R.A.P. 8, Appellants Richard Lee (Rick) Brown, Jeffrey Rondeau, David Krausz, Sonya Jones, and the National Apartment Association (NAA) move for an injunction pending interlocutory appeal prohibiting Appellees Secretary Alex Azar, U.S. Department of Health and Human Services, Acting Chief of Staff Nina B. Witkofsky, and U.S. Centers for Disease Control and Prevention (collectively "CDC") from enforcing their September 1, 2020 Order, entitled "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*." 85 Fed. Reg. 55292 (Sept. 4, 2020). Appellees oppose this motion.

When property owners like Mr. Brown, Mr. Rondeau, Mr. Krausz, Ms. Jones, and the members of NAA rented their respective properties they expected that their tenants would uphold their end of the contract and pay rent. Appellants also expected that if their tenants did not pay rent that they could resort to the court system to evict

their tenants so they could regain possession and lease the properties to tenants who would uphold their contractual obligations. The livelihoods of plaintiff-appellant housing providers and NAA members across the country depend on this understanding.

Appellants failed to anticipate, however, that CDC, a federal agency, would issue a sweeping order suspending *state* law under the premise that doing so was "necessary" to control the COVID-19 pandemic. CDC's actions are not authorized by statute or regulation. CDC's effort to seize control of state law on such an insupportable basis must be rejected. At the very least, CDC's unprecedented Order presents a substantial case that this Court must resolve at the earliest opportunity. This Court should therefore issue an injunction pending an interlocutory appeal.

This Court should issue an injunction pending an appeal of Appellants' request for a preliminary injunction. There is, at a minimum, a *substantial question* as to whether the CDC Order may permissibly stop all 50 states from applying their own legal regimes governing real property. And unless this Court acts, Appellants will continue to suffer the irreparable deprivation of their real property, as well as the non-compensable loss of all economic value of their properties. Given these weighty questions and CDC's dubious and scant evidence that its Order will have any effect on COVID-19 infections, the balance of equities weighs heavily in favor of an injunction pending an appeal.

I. FACTS AND PROCEDURAL HISTORY

Appellants are individual housing providers and a national trade association whose members have been harmed by CDC's Order.[1] Mr. Brown, Mr. Krausz, and Ms. Jones rent their properties to tenants who have refused to pay rent for months on end. *See* ECF No. 18-2 at ¶¶ 3-6 (Brown Decl.); ECF No. 18-4 at ¶¶ 3-6 (Krausz Decl.); ECF No. 18-5 at ¶¶ 3-4 (Jones Decl.) (all included in Attachment C).

On September 1, 2020, Defendant-Appellee Acting Chief Witkofsky issued an order entitled, "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*."

CDC said, "Under this Order, a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order." 85 Fed. Reg. 55292 (Sept. 4, 2020). The Order also said, "[A] person violating this Order may be subject to a fine of no more than $100,000 if the violation does not result in a death or one year in jail, or both, or a fine of no more than $250,000 if the violation results in a death or one year in jail, or both[.]" *Id*. at 55296.

[1] Plaintiff-Appellant Jeffrey Rondeau filed suit while unable to access the courts in North Carolina to evict a tenant. That tenant has since left the property. Mr. Rondeau's harms are therefore not addressed in this motion.

It also applied to "covered persons" who are tenants "of a residential property" who attest that they (1) have "used best efforts to obtain all available government assistance for rent or housing;" (2) "either (i) expect[ ] to earn no more than $99,000 in annual income for Calendar Year 2020 … (ii) w[ere] not required to report any income in 2019 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment [under] … the CARES Act;" (3) are "unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses;" (4) they are "using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses;" and (5) "eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options." *Id*. at 55293.

The Order claimed to have been issued pursuant to Section 361 of the Public Health Service Act, 42 U.S.C. § 264, and 42 C.F.R. § 70.2. *Id*. at 55297.

CDC also set out a series of justifications and "findings." *Id*. at 55294-96. Because "[e]victed renters must move," the Order concluded eviction "leads to multiple outcomes that increase the risk of COVID-19 spread." *Id*. at 55294. It then concluded that "mass evictions" and "homelessness" "would likely increase the

interstate spread of COVID-19." *Id*. at 55295. Thus, Acting Chief Witkofsky "determined the temporary halt in evictions in this Order constitutes a reasonably necessary measure under 42 CFR 70.2 to prevent the further spread of COVID-19 throughout the United States. [She] further determined that measures by states, localities, or U.S. territories that do not meet or exceed these minimum protections are insufficient to prevent the interstate spread of COVID-19." *Id*. at 55296.

The Order was effective upon publication until December 31, 2020, "unless extended." *Id*. at 55297.

Mr. Brown, Mr. Krausz, and Ms. Jones are entitled to retake possession of their properties in compliance with state law. *See* Brown Decl. at ¶¶ 7, 9, 10; Krausz Decl. at ¶ 11; Jones Decl. ¶ 7. Yet Mr. Brown has been unable to seek an eviction because his tenant is a "covered person" under the CDC Order who will provide a relevant affidavit if Mr. Brown initiates eviction procedures against her. *See* Brown Decl. at ¶¶ 7, 9, 10. And while Mr. Krausz obtained an eviction order, his tenant provided a declaration consistent with the CDC Order, and the state court immediately stayed execution of the eviction. *See* Krausz Decl. at ¶¶ 11, 12. Ms. Jones also sought an eviction order, but based on representations made at a hearing by the tenant that his challenge to the eviction was related to the COVID-19 pandemic, her court proceedings were stayed until January 2021 in purported compliance with the CDC Order. *See* Jones Decl. ¶ 7.

Appellants are all suffering significant economic damages because of the CDC Order, including thousands of dollars in unpaid rent, as well as monthly maintenance costs, and the lost opportunity to rent or use the property at fair-market value. *See* Brown Decl. at ¶ 14; Krausz Decl. at ¶ 14; Jones Decl. ¶ 10. They also have a good-faith basis to believe their tenants are insolvent, and their only opportunity to mitigate the loss will be by ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant. *See* Brown Decl. at ¶ 14; Krausz Decl. at ¶ 14; Jones Decl. ¶ 10.

NAA is a trade association for owners and managers of rental housing that is comprised of over 85,485 members managing more than 10 million rental units throughout the United States. NAA has members throughout the United States who are entitled to writs of possession and eviction in states without eviction moratoria. Because of the CDC Order, NAA's members have suffered significant economic damages, including unpaid rent and fees, as well as monthly maintenance costs, damages to their property and the lost opportunity to rent or use their properties at fair market value.

Plaintiff-Appellant Brown filed a Complaint for declaratory and injunctive relief on September 9, 2020. *see* ECF No. 1 (Attachment A), followed by an Amended Complaint joined by the remaining Plaintiffs-Appellants on September 18, 2020. *See* ECF No. 12 (Attachment B). Appellants also moved for a preliminary

injunction. *See* ECF No. 18 (Attachment C). The district court denied Appellants' request in a written order on October 29, 2020. *See* ECF No. 48 (Attachment D). Appellants filed a notice of interlocutory appeal on November 9, 2020. That same day, they filed a motion for an injunction pending appeal with the district court.

II. ARGUMENT

Rule 8 allows this Court to issue a stay or an "injunction pending appeal." This Court considers the following factors under Rule 8: "(1) whether the [] applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent [relief], (3) whether the issuance of the [injunction] will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies." *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1176-77 (11th Cir. 2020); *see also Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000) (en banc) (applying same standard for injunction pending appeal).

While there is "substantial overlap" between this standard and that governing preliminary injunctions, they are not identical. *Nken v. Holder*, 556 U.S. 418, 434 (2009). "Ordinarily the first factor is the most important. A finding that the movant demonstrates a probable likelihood of success on the merits on appeal requires that we determine that the trial court below was clearly erroneous. But the movant may also have his motion granted upon a lesser showing of a substantial case on the merits when the balance of the equities identified in factors 2, 3, and 4 weighs heavily in

favor of granting the stay." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (citations omitted).

Rule 8(a)(1) says that a "party must ordinarily move first in the district court" while seeking an injunction pending appeal. An appellant may seek relief in this Court in the first instance, however, if "moving first in the district court would be impracticable." F.R.A.P. 8(a)(2)(A)(i). Appellants have moved for an injunction pending appeal with the district court. This appeal is a time-sensitive matter because, unless extended, the CDC's Order expires on December 31, 2020. Due to the limited duration of the CDC Order and the ongoing harms Appellants face, they have also moved in this Court to avoid any unnecessary delay.

For the following reasons, Appellants have satisfied all four elements of this test, and this Court should grant an injunction pending appeal.

A. Appellants Have Demonstrated a Substantial Case on the Merits, as the CDC Order Is Without a Statutory or Regulatory Basis

"Even before the birth of this country, separation of powers was known to be a defense against tyranny," and "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 756-57 (1996). "[A]n administrative agency's power to regulate … must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

CDC's Order is purportedly authorized by 42 U.S.C. § 264 and 42 C.F.R. § 70.2, but neither provision grants the agency the broad authority to unilaterally void state laws across the country. Section 264(a) says that the Surgeon General may "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from … one State or possession into any other State or possession." And in particular, the statute allows 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." *Id*.

The regulation, in turn, allows the CDC Director to "take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection" when she "determines that the measures taken by health authorities of any State … are insufficient to prevent the spread of any of the communicable diseases from such State [.]" 42 C.F.R. § 70.2.

Neither § 264(a) nor § 70.2 authorizes CDC to issue a nationwide eviction moratorium. At most, those provisions allow limited orders related to certain disease

control measures, but they do not justify a wholly unrelated ban on legal eviction proceedings.

Both the statute and regulation speak in terms of the agency's authorities to take "measures" *like* "inspection, fumigation, disinfection, sanitation, pest extermination, [or] destruction of animals or articles," 42 U.S.C. § 264(a); 42 C.F.R. § 70.2, all of which are far afield from *eviction procedures under state law*. All the powers under the statute deal with actions the CDC may take with respect to infested, infected, or unhealthy places and animals. It does not deal with powers over healthy people in healthy habitats. Furthermore, the powers under the statute do not give CDC the power to take speculative measures.

"The *noscitur a sociis* canon instructs that when a statute contains a list, each word in that list presumptively has a 'similar' meaning." *Yates v. United States*, 574 U.S. 528, 549 (2015) (Alito, J., concurring) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 576 (1995)). "A related canon, *ejusdem generis* teaches that general words following a list of specific words should usually be read in light of those specific words to mean something 'similar.'" *Id*. at 550 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 (2012)). Together, these principles "ensure[] that a general word will not render specific words meaningless," as "Congress would have had no reason to refer specifically" to an enumerated act but then allowed "dissimilar" acts to come along for the ride. *Yates*, 574 U.S. at 546 (plurality op.).

"Had Congress intended [an] all-encompassing meaning" "it is hard to see why it would have needed to include the examples at all." *Id*. (citation omitted). While the text speaks in term of "fumigation," "pest extermination," and "destruction of animals … found to be so infected," 42 U.S.C. § 264(a), rewriting property laws nationwide bears no relationship with the disease-control measures envisioned in the text.

Further, because the Order comes with the threat of *criminal prosecution* for those who attempt to use state law, if this Court concludes that the text empowers CDC's actions, albeit ambiguously, then it must apply the rule of lenity and limit the scope of the Order. "[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. McLemore*, 28 F.3d 1160, 1165 (11th Cir. 1994) (citation omitted). To the extent that there is any ambiguity in the phrasing "inspection, fumigation, disinfection," etc., the language must be construed against CDC given the criminal penalties the Order imposes. *See* 85 Fed. Reg. at 55296. But processing evictions under state law is undoubtedly a lawful exercise of the states' legislative judgment. And it is certainly not *criminal* in the eyes of Congress. Vesting unilateral authority to say otherwise and to imprison citizens for *following state law* based on the thinnest reed of being ostensibly "necessary" for disease control violates lenity. *See Yates*, 574 U.S. at 548. Indeed, just as in *Yates*, where the Court concluded that a fish was not a "tangible object" under the Sarbanes-

Oxley Act, "if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of 'tangible object,' as that term is used in [the statute], we would invoke the rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id*. (citation omitted).

Even if the statutory provisions *could* be read so broadly as to allow the Order, CDC's actions fail the textual limits of being "reasonably necessary" in the face of "insufficient" state action. Section 70.2 requires CDC to first determine state measures "are insufficient to prevent the spread of any of the communicable diseases[.]" But CDC's findings are woefully inadequate. CDC relies on the outlandish logical leap that because "mass evictions" and "homelessness" *might* increase the likelihood of COVID-19 infection, then allowing any number of evictions in any state—mass evictions were not occurring anywhere—is insufficient to prevent the spread of the disease. *See* 85 Fed. Reg. at 55294-96. Such catastrophizing hardly follows basic logic. Why should a single eviction following ordinary process necessarily result in "mass evictions," much less mass homelessness? And why should courts assume that newly evicted individuals will not find less expensive rental (or perhaps fully subsidized government) housing? CDC has not established a factual basis for its assumption that newly evicted individuals might mingle with others in a way more dangerous to public health than dining in restaurants or attending church services. *Id*. at 55293. CDC apparently sees

nothing unreasonable in states allowing in-person dining, indoor worship, and even in-person bar service but has somehow determined that using ordinary property laws to allow evictions are "insufficient."

CDC also hardly bothers to suggest that states have undertaken "insufficient" measures by simply allowing eviction processes, irrespective of other mitigation strategies. CDC just asserts that because a nationwide halt to evictions could help slow spread of the disease, jurisdictions "that do not meet or exceed these minimum protections are insufficient to prevent the interstate spread of COVID-19." 85 Fed. Reg. at 55296. That is a fallacy. Even if an eviction moratorium *could* prevent infections, that hardly means a jurisdiction allowing evictions has had an "insufficient" response to the disease. A state could, for example, permit evictions but then house homeless people in hotels at public expense.

In fact, CDC is careful never to actually say that the moratorium is necessary at all—the closest it comes is saying that "[i]n the context of a pandemic, eviction moratoria—like quarantine, isolation, and social distancing—*can be* an effective public health measure utilized to prevent the spread of communicable disease." 85 Fed. Reg. at 55294 (emphasis added). But even this tepid statement has no real evidentiary support. As discussed, CDC relies on hyperbole—saying that "mass evictions" and "homelessness" might increase the likelihood of COVID-19, and thus that that the *only* appropriate course of action is to halt evictions nationwide. *See* 85

Fed. Reg. at 55294-96. CDC does not explain why other remedial measures are inadequate.

Nevertheless, the district court rejected these arguments because it determined that the statute's "plain language" was "clear" and gave CDC "broad power to issue regulations necessary to prevent the introduction, transmission or spread of communicable diseases." ECF No. 48 at 19. And the court decided that superseding state property laws in all 50 states without even going through notice-and-comment rulemaking was within this "broad power." *See id.* But the district court's conclusion essentially gives CDC free rein to do *anything* it can conceive of, if it merely asserts that it subjectively believes the action helps slow the spread of disease. That reading of the law is not supported by its text.

First, the district court wrongly refused to read the statute and regulation's limiting phrases as having any bearing on the scope of CDC's authority. *Id.* at 20-21. In particular, the district court said that reading the clauses as "limiting" CDC's authority "makes little sense when considering the subsequent subsections of § 264," which allows detention "concerning individuals reasonably believed to be infected with a communicable disease." *Id.* But in Section 264(a) the statute discusses "measures" related to "animals or articles found to be so infected or contaminated as to be sources of dangerous infections to human beings" while in Section 264(b) it simply says that the preceding section "shall not provide for the apprehension,

detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases." Just because Section 264(b) imposes one limit on Section 264(a), it does not follow that there would be *no other* limits at all. Moreover, both sections contemplate actions taken with respect to *infected* articles and people. Clearly that was a limit Congress instituted. CDC's Order, however, applies to every state and every residential lease, regardless of whether any of the parties are infected.

Moreover, the district court wrongly rejected ordinary canons of construction that would have limited the statute in any meaningful way, because it determined that the "[c]anons are not necessarily outcome determinative," and there was "no ambiguity to which they could be applied." *Id.* at 25-26. This analysis renders the statute's list of enumerated actions meaningless—it "would serve no role in the statute" for it to list examples of permitted measures yet contain a catchall provision allowing the agency to take *any act* at all. *See McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016).

While limiting canons of construction do not exist in a vacuum, they apply when, as in *Yates*, 574 U.S. at 547, a statute contains a term that can be interpreted broadly or narrowly. The "tangible object" language at issue in *Yates*, of course, literally encompassed fish and "any and every physical object." *Id*. at 543, 545. Yet the Court had no problem rejecting that expansive reading. *Id*. Likewise, in

Maracich v. Spears, 570 U.S. 48, 59-60 (2013), the Court explained that *noscitur a sociis* applied even though, when "considered in isolation" a statute appeared to support a "broad interpretation," because otherwise there would be "no limits [] placed on the text" and therefore the statute "was essentially indeterminate" and would "stop nowhere." (citation omitted). The district court's ambiguity analysis misses the mark. Even if the proffered broad reading follows clearly from the text, but is "without a limiting principle," then this Court must adopt a limited reading based on the examples provided. *See id.*

B. Appellants Will Suffer Irreparable Harm Without Preliminary Relief

To satisfy the irreparable harm requirement, Appellants need only demonstrate that absent a preliminary injunction, they are "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (citation omitted). Monetary harms can be irreparable when there is no adequate remedy available. *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 1242 (11th Cir. 2005). Often, "[t]hese injuries are in the form of lost opportunities, which are difficult, if not impossible, to quantify." *Id.*; *see also Ferrero v. Assoc. Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) ("loss of customers and goodwill is an 'irreparable' injury"). Harm is also irreparable when "damages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected." *Hughes Network*

Sys., Inc. v. InterDigital Commc'ns Corp., 17 F.3d 691, 694 (4th Cir. 1994) (collecting cases).

Further, courts across the country have recognized that being deprived of your residential property is a *per se* irreparable injury. "Real estate has long been thought unique, and thus, injuries to real estate interests frequently come within the ken of the chancellor." *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989); *see also Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999). "As for the adequacy of potential remedies, it is well-settled that unauthorized interference with a real property interest constitutes irreparable harm as a matter of law, given that a piece of property is considered to be a unique commodity for which a monetary remedy for injury is an inherently inadequate substitute." *Brooklyn Heights Ass'n, Inc. v. National Park Service*, 777 F.Supp.2d 424, 435 (E.D.N.Y. 2011); *see also Watson v. Perdue*, 410 F. Supp. 3d 122, 131 (D.D.C. 2019) (same).

Appellants have suffered and will continue to suffer from irreparable harm in two forms: (1) non-compensable loss of the value of their property; and (2) deprivation of their unique real property.

First, Appellants cannot recover any of the economic damages they continue to incur because tenants covered by the CDC Order, by definition, are insolvent. Indeed, the Order expressly applies only to *insolvent* tenants, who are "unable to pay

the full rent." 85 Fed. Reg. at 55293. Mr. Brown, Mr. Krausz, and Ms. Jones are all owed thousands of dollars in unpaid rent, yet have incurred the costs of maintaining the of the property and lost revenue that they could generate were they able to place the properties on the market. *See* Brown Decl. at ¶¶ 6, 14; Krausz Decl. at ¶ 14; Jones Decl. ¶ 10. Their tenants have also demonstrated that they do not have the money to satisfy their obligations, which is why eviction is such an essential remedy.

NAA's members suffer these same harms on a nationwide scale. NAA's 85,485 members will be forced to cover millions in costs for defaulting tenants, with no hope of any recovery from either the tenants or any of the defendants. Many of NAA's member businesses are unlikely to recover from the economic devastation caused by CDC's Order.

While the district court recognized that "these harms are both concerning and significant," it nevertheless rejected them because it determined that Appellants failed to definitely prove that they would be non-compensable. ECF No. 48 at 59. Citing to *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348, 1358 (11th Cir. 2019), the district court determined that to show irreparable harm Appellants had to "have clearly shown that, in all likelihood, they will never recoup the losses that occur while the Order is in place." ECF No. 48 at 52.

The district court erred because it placed an impossible burden of proof on Appellants that is fundamentally inconsistent with that applicable to a preliminary

injunction. A preliminary injunction is a temporary measure taken "until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing." *Id*.

Appellants provided sworn affidavits proving that their tenants had not paid rent for months on end. In some instances the tenants had declared under penalty of perjury that their failure to pay *any* rent was consistent with their "best efforts" to make payments toward their obligations, and each Appellant provided reasons why they believed their tenants were insolvent. *See* Brown Decl. at ¶¶ 6, 14; Krausz Decl. at ¶ 14; Jones Decl. ¶ 10. At a preliminary proceeding, and with no opportunity to present live witnesses or other evidence, the district court's reasoning places an improper burden on Appellants. No one can "clearly" prove that they will "never" receive any remediation from their losses from their tenants. But Appellants have submitted significant evidence that suggests they will. At this stage of the proceeding, this suffices to warrant intervention.

Appellants have also been wrongly deprived of access to their unique property. Solely by operation of the CDC Order, they are unable to retake possession

of what everyone agrees, and several courts have already ordered, they rightfully should be able to possess. *See* Brown Decl. ¶ 14; Krausz Decl. ¶ 14; Jones Decl. ¶ 10. Even if it were possible for them to recover damages someday, that prospect does not replace the fact that CDC is forbidding them from gaining possession of their own property now, despite state laws ordering its return. NAA's 85,000+ members suffer these same harms writ large. *See* ECF No. 18-6 ¶ 5 (included in Attachment C). This constitutes "irreparable harm as a matter of law." *See Brooklyn Heights Ass'n, Inc.*, 777 F. Supp. 2d 424, 435 (E.D.N.Y. 2011).

The district court's rejection of these principles was without any legal basis. The district court simply 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." ECF No. 48 at 60. Additionally, the district court noted that Appellants do not "reside in the properties" and suggested that they somehow have a lesser interest in their own property. *Id.*

But real property is unique on its own, without any particular showing that is *special*. *See Shvartser v. Lekser*, 308 F. Supp. 3d 260, 267 (D.D.C. 2018) (real property need not be "'especially unique' in order for its loss to constitute irreparable harm"). What makes it unique is that it belongs exclusively to its owner, and there is no other that is the same. The loss of property "has no adequate remedy at law" and must, instead, be addressed through "equitable relief." *Carpenter Tech. Corp.*,

180 F.3d at 97. And owners who rent their property to others hardly forfeit their interests in their property—they turn them over for a limited time to be returned to them if the tenant breaches their agreement. Inherent in ownership of property is the right to dispose of the property as one chooses. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (describing property rights as the rights "to possess, use and dispose of it"). Appellants have undoubtedly been irreparably denied their rights to their own property.

C. The Injunction Is Equitable and in the Public Interest

A party seeking a preliminary injunction must demonstrate both "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken*, 556 U.S. at 435.

The CDC Order is unlawful and thus the balance of equities weighs heavily in favor of the preliminary injunction. Whatever the valid need may be for a lawful government response to the COVID-19 pandemic, the Order advances one specific policy solution that violates core limits on its authority. CDC's Order is a ham-fisted effort to address the pandemic in a strained and illogical way. The equities therefore require that the CDC Order be preliminarily enjoined.

The district court wrongly concluded that the public interest weighed against Appellants based on its assumption that Appellants had no likelihood of success and

the Order would protect against the spread of COVID-19. ECF No. 48 at 61-62, 64-65. However, as discussed above, neither premise is correct. On the balance, CDC's unlawful Order, which comes with no evidence to suggest it will in any way help stop the spread of disease should be enjoined.

III. CONCLUSION

For the reasons set out above, the Court should enjoin CDC's Order pending appeal.

November 12, 2020

Respectfully,

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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. Benfer, Emily A. (J.D., LL.M.), *Amicus Curiae* and *Counsel for Amici Curiae*
5. Bliss, Charles R., *Counsel for Amici Curiae*
6. Brown, Richard Lee, *Plaintiff-Appellant*
7. Children's Healthwatch, *Amicus Curiae*
8. Desmond, Matthew (Ph.D.), *Amicus Curiae*
9. Dunn, Eric, *Counsel for Amici Curiae*
10. Fulmer, Jenny, *Counsel for Amici Curiae*
11. Gainey, John O., *Counsel for Amici Curiae*
12. Georgia Chapter, American Academy of Pediatrics, *Amicus Curiae*
13. GLMA: Healthcare Professionals Advancing LGBTQ Equality, *Amicus Curiae*
14. Gonsalves, Gregg (Ph.D.), *Amicus Curiae*

15. Hawkins, James W., *Attorney for Plaintiffs-Appellants*

16. Jones, Sonya, *Plaintiff-Appellant*

17. Keene, Danya A. (Ph.D.), *Amicus Curiae*

18. Krausz, David, *Plaintiff-Appellant*

19. Kruckenberg, Caleb, *Attorney for Plaintiffs-Appellants*

20. Legal Services of Virginia, *Amicus Curiae*

21. Leifheit, Kathryn M. (Ph.D.), *Amicus Curiae*

22. Levy, Michael Z. (Ph.D.), *Amicus Curiae*

23. Linton, Sabriya A. (Ph.D.), *Amicus Curiae*

24. National Apartment Association, *Plaintiff-Appellant*

25. National Hispanic Medical Association, *Amicus Curiae*

26. National Housing Law Project, *Amicus Curiae*

27. National Medical Association, *Amicus Curiae*

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

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

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

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

32. Public Health Law Watch, *Amicus Curiae*

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

34. Rondeau, Jeffrey, *Plaintiff-Appellant*

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

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

37. Siegel, Lindsey M., *Counsel for Amici Curiae*

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

39. South Carolina Chapter, American Academy of Pediatrics, *Amicus Curiae*

40. Southern Poverty Law Center, *Amicus Curiae*

41. The American Academy of Pediatrics, *Amicus Curiae*

42. The George Consortium, *Amicus Curiae*

43. U.S. Centers for Disease Control and Prevention, *Defendant-Appellee*

44. U.S. Department of Health and Human Services, *Defendant-Appellee*

45. Vigen, Leslie Cooper, *Attorney for Defendants-Appellees*

46. Virginia Chapter, American Academy of Pediatrics, *Amicus Curiae*

47. Vlahov, David (Ph.D., RN), *Amicus Curiae*

48. Walz, Kate, *Counsel for Amici Curiae*

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

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

Dated: November 12, 2020

/s/ Kara Rollins
Kara Rollins
Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because this motion contains 5,162 words, excluding accompanying documents authorized by Fed. R. App. P. 27(a)(2)(B).

This motion 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 Times New Roman font.

Dated: November 12, 2020

/s/ Kara Rollins
Kara Rollins
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020, 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.

I further certify that on November 12, 2020, a true and correct copy of the foregoing Motion for Injunction Pending Appeal, with first class postage prepaid, has been deposited in the U.S. Mail and properly addressed to counsel of record for Defendants in the case below, as listed herein:

Leslie Cooper Vigen
DOJ-Civ
1100 L Street NW
Washington, DC 20005

Dated: November 12, 2020

/s/ Kara Rollins
Kara Rollins
Counsel for Plaintiffs-Appellants

Attachment A

Complaint

(ECF No. 1)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD LEE BROWN Plaintiff, v. ALEX AZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES: & U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES: & NINA B. WITKOFSKY, IN HER OFFICIAL CAPACITY AS ACTING CHIEF OF STAFF U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, & U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, Defendants.	CIVIL ACTION NO.: COMPLAINT

COMPLAINT

When Plaintiff, Richard Lee (Rick) Brown, rented the property at issue, he expected that his tenant would uphold her end of the contract and pay her rent. He also expected, if she did not, that he could resort to the court system to evict his tenant so that he could regain possession of his property and let it to a tenant who would pay rent.

Mr. Brown upheld his end of the bargain. He provided a habitable home to his tenant and continues to pay for maintenance, utilities and other expenses. When Mr. Brown's tenant breached her agreement, he should have been able to follow the lawful process laid down by the Virginia General Assembly for retaking possession of his home.

Mr. Brown failed to anticipate, however that the U.S. Centers for Disease Control, a federal agency, would issue a sweeping unilateral order suspending *state* law under the flimsy premise that doing so was "necessary" to control the COVID-19 pandemic. CDC's actions are not authorized by statute or regulation. But even if they were, they are unprecedented in our history and are an affront to core constitutional limits on federal power. If allowed, the order would abrogate the right to access the courts, violate limits on the Supremacy Clause, implicate the non-delegation doctrine, and traduce anti-commandeering principles. CDC's effort to seize control of state law on such an insupportable basis must be rejected.

PARTIES

1. Plaintiff Richard Lee (Rick) Brown is a natural person and a resident of the Commonwealth of Virginia.

2. Defendant Secretary Alex Azar is the agency head of the U.S. Department of Health and Human Services (HHS) and is sued in his official capacity.

3. Defendant HHS is an agency of the United States.

4. Defendant Nina B. Witkofsky is the Acting Chief of Staff for the Centers for Disease Control and Prevention (CDC) and is the agency head responsible for the challenged agency action. She is sued in her official capacity.

5. Defendant CDC is an agency of the United States located within HHS and headquartered in Atlanta, Georgia.

JURISDICTION AND VENUE

6. This Court has federal question jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331 as this matter involves questions arising under the Constitution of the United States and the Administrative Procedure Act.

7. This Court has the authority to grant declaratory and injunctive relief in this matter pursuant to 28 U.S.C. §§ 2201 and 2202.

8. Venue for this action properly lies in this district pursuant to 28 U.S.C. §§ 1391(b)(1), (2) because the defendants reside in this judicial district and because a

substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

STATEMENT OF FACTS

9. Plaintiff Rick Brown owns a residential property at 325 Highland Ave. Winchester, VA 22601 ("the property").

10. Mr. Brown has a mortgage on the property and makes monthly payments of approximately $400 for the mortgage principal, interest and taxes.

11. On April 1, 2017, Mr. Brown leased the property to a tenant, who agreed to pay monthly rent of $925.

12. The lease automatically renewed several times and is currently in effect.

13. The tenant of Mr. Brown's property has fallen behind on rent, and asserted to Mr. Brown that she is unable to pay because of economic stress arising from the COVID-19 pandemic, has used best efforts to obtain available government assistance and otherwise pay rent, has no other home to go to, and is making less than $99,000 annually.

14. To date, the tenant owes $8,092 in unpaid rent, and has made no payments at all to Mr. Brown for several months.

15. On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, P.L. 116-316, which included in Section 4024 a

limited and temporary moratorium on evictions for certain types of federally-backed housing that expired on July 24, 2020.

16. On August 7, 2020, a majority of the Supreme Court of Virginia issued an order, at the request of Virginia Governor Ralph Northam, modifying and extending a declaration of judicial emergency in response to COVID-19. *In re: Amendment of Eighth Order Extending Declaration of Judicial Emergency in Response to COVID-19 Emergency* (Va. Aug. 7, 2020) *available at* http://www.vacourts.gov/news/items/covid/2020_0807_scv_amendment_to_eighth_order.pdf. (August 7 Order).

17. The order provided that from August 10, 2020 through September 7, 2020 "the issuance of writs of eviction pursuant to unlawful detainer actions is suspended and continued. However, this suspension and continuation shall not apply to writs of eviction in unlawful detainer actions that are unrelated to the failure to pay rent." *Id*. at 2.

18. On September 1, 2020, Defendant Acting Chief Witkofsky issued an order titled, "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*."

19. The order became effective upon publication in the Federal Register, which occurred on September 4, 2020. 85 Fed. Reg. 55292 (Sept. 4, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf.

20. The order provided, "Under this Order, a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order." *Id*.

21. The order was not effective so long as a local jurisdiction applied similar eviction restrictions. *Id*.

22. The order said, "'Evict' and 'Eviction' means any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property. This does not include foreclosure on a home mortgage." *Id*. at 55293.

23. The order also said, "[A] person violating this Order may be subject to a fine of no more than $100,000 if the violation does not result in a death or one year in jail, or both, or a fine of no more than $250,000 if the violation results in a death or one year in jail, or both[.]" *Id*. at 55296.

24. The order was effective upon publication until December 31, 2020, "unless extended." *Id*. at 55297.

25. Mr. Brown has maintained the property in compliance with all legal obligations as a landlord, and the tenant has no other defense to her nonpayment of rent.

26. Mr. Brown is entitled to a writ of possession and a writ of eviction.

27. On August 18, 2020, Mr. Brown attempted to have the Winchester City Sheriff's Department serve a five-day termination notice pursuant to Va. Code § 55.1-1245(f) to the tenant.

28. Sheriff Les Taylor informed Mr. Brown that the Winchester City Sheriff's Department would no longer issue and serve such notices in compliance with the Supreme Court of Virginia's order.

29. Because of operation of the Supreme Court of Virginia's August 7 Order, Mr. Brown was unable to obtain a writ of eviction to oust the tenant for nonpayment of rent until September 7, 2020.

30. Mr. Brown now intends to seek eviction of his tenant for nonpayment of rent using legal process in Virginia state courts.

31. Upon information and belief, Mr. Brown's tenant is a "covered person" under CDC's Order.

32. Mr. Brown intends to violate CDC's order through lawful processes under Virginia law by seeking an eviction order, and having a sheriff forcibly remove his tenant from the property.

33. Mr. Brown intends to violate CDC's order even if his tenant presents an attestation in eviction proceedings that she is a "covered person" as defined in CDC's order.

34. Mr. Brown continues to provide habitable premises to the tenant, and his tenant has no other defense to eviction under Virginia law.

35. Because of the CDC order, Mr. Brown suffers significant economic damages, including $8,092 in unpaid rent, as well as monthly maintenance costs, damages to his property and the lost opportunity to rent or use the property at fair market value of at least $925 per month.

36. The tenant is also likely insolvent (and judgment proof), and Mr. Brown will be unlikely to obtain any economic relief or damages from the tenant once the CDC order expires at the end of December.

37. Mr. Brown's only opportunity to mitigate his loss will be from ousting the tenant who is in wrongful possession of the premises.

COUNT I: UNLAWFUL AGENCY ACTION IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §§ 706(2)(B),(C)—CDC EXCEEDED ITS STATUTORY AND REGULATORY AUTHORITY BY ISSUING THE HALT IN RESIDENTIAL EVICTIONS ORDER

38. Plaintiff incorporates by reference all of the preceding material as though fully set forth herein.

39. Under the Administrative Procedure Act, this Court is authorized to hold unlawful and set aside agency action, findings, and conclusions that it finds to be contrary to constitutional right or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. *See* 5 U.S.C. §§ 706(2)(B), (C).

40. The Order was purportedly issued under the authority of "Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 CFR 70.2."

41. Under 42 U.S.C. § 264(a) the CDC may only "make and enforce such regulations" that "are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession" and "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" to carry out and enforce such regulations.

42. Under 42 C.F.R. § 70.2, when the Director of the CDC "determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession" the Director is authorized to "take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection."

43. The Order purports to restrict "a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action" from "evict[ing] any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order." 85 Fed. Reg. at 55292. A "covered person" is "any tenant, lessee, or resident of a residential property who provides to their landlord, the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action, a declaration under penalty of perjury indicating" certain information outlined in the Order. 85 Fed. Reg. at 55293; see also 85 Fed. Reg. at 55297 (CDC Declaration form). The effective period of the Order is from September 4, 2020 through December 31, 2020. 85 Fed. Reg. at 55292.

44. The Order only applies to States, local, territorial, or tribal areas that do not have "a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order." 85 Fed. Reg. at 55292.

45. The Order baldly states that Defendant Witkofsky "determined the temporary halt in evictions in this Order constitutes a reasonably necessary measure under 42 CFR 70.2 to prevent the further spread of COVID-19 throughout the United States." 85 Fed. Reg. at 55296. The Order further states that she "determined that measures by states, localities, or U.S. territories that do not

meet or exceed these minimum protections [i.e., those that have residential eviction moratoria] are insufficient to prevent the interstate spread of COVID-19." 85 Fed. Reg. at 55296.

46. The Order does not identify or offer any analysis whatsoever about which States, local, territorial, or tribal areas have "a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order." 85 Fed. Reg. at 55292.

47. Individuals or organizations that violate the Order are subject to criminal penalties, including fines and jail time. *See* 85 Fed. Reg. at 55296; *see also* 18 U.S.C. §§ 3559, 3571; 42 U.S.C. § 271; 42 C.F.R. § 70.18.

48. Agencies have no inherent power to make law. *See Loving v. United States*, 517 U.S. 748, 758 (1996) ("the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity."). This limitation is a constitutional barrier to an exercise of legislative power by the executive branch. Agencies have "no power to act … unless and until Congress confers power upon [them]." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

49. Nothing in the relevant statutes or regulations purports to give CDC the power or authority to issue an eviction-moratorium order.

50. Nothing in the relevant statutes or regulations purports to give CDC the power or authority to criminalize otherwise lawful behavior.

51. The Order was issued in excess of any statutory authority and is therefore invalid.

WHEREFORE, Plaintiff demands judgment against CDC invalidating CDC's eviction-moratorium order and any other relief that may be appropriate.

COUNT II: VIOLATION OF THE RIGHT OF ACCESS TO COURTS UNDER THE U.S. CONSTITUTION—THE ORDER UNLAWFULLY DENIED MR. BROWN ACCESS TO THE ONLY LAWFUL MEANS OF EVICTING A DELINQUENT TENANT

52. Plaintiff incorporates by reference all of the preceding material as though fully set forth herein.

53. The Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth and Fourteenth Amendment Due Process Clauses and the Fourteenth Amendment's Equal Protection Clause collectively provide a federal constitutional right of access to courts. *Christopher v. Harbury*, 536 U.S. 403, 415, 415 n. 12 (2002).

54. No state actor may systemically frustrate a plaintiff "in preparing and filing suits" by foreclosing a particular type of relief. *Id*. at 413.

55. An unlawful detainer action is a landlord's *sole* means of reacquiring possession of his residential property in Virginia. A sheriff must enforce a writ of eviction. *See* Va. Code § 8.01-470 (writs of eviction generally). A residential landlord is forbidden from taking possession of his own property. Va. Code § 55.1-

1252. Instead, "[i]f a landlord unlawfully removes or excludes a tenant from the premises … the *tenant* may obtain an order from a general district court to recover possession, require the landlord to resume any such interrupted essential service, or terminate the rental agreement and, in any case, recover the actual damages sustained by him and reasonable attorney fees." Va. Code. § 55.1-1243(a).

56. Plaintiff is entitled to obtain a writ of eviction pursuant to Virginia law for the nonpayment of rent at 325 Highland Ave. Winchester, VA 22601.

57. The tenant currently owes $8092 in unpaid rent and has no defenses other than the CDC order to an unlawful detainer proceeding.

58. By operation of the order, Plaintiff is unable to obtain a writ of eviction pursuant to an unlawful detainer action.

59. Plaintiff has no ability to legally oust his tenant for nonpayment of rent.

WHEREFORE, Plaintiff demands judgment against CDC invalidating CDC's eviction-moratorium order and any other relief that may be appropriate.

COUNT III: VIOLATION OF U.S. CONSTITUTION'S SUPREMACY CLAUSE—THE CDC EVICTION-MORATORIUM ORDER CANNOT BE THE SUPREME LAW OF THE LAND BECAUSE IT IS NOT A LAW ADOPTED PURSUANT TO THE CONSTITUTION

60. Plaintiff incorporates by reference all of the preceding material as though fully set forth herein.

61. Article VI, Clause 2 of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

62. The Supremacy Clause grants "supreme" status only to the "*Laws* of the United States." *Id.* (emphasis added).

63. "[A]n agency literally has no power to act, let alone to pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *New York v. FERC*, 535 U.S. 1, 18 (2002).

64. "[P]reemption takes place only when and if the agency is acting within the scope of its congressionally delegated authority." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019).

65. The Supremacy Clause grants "supreme" status only to the "Laws of the United States which shall be made *in Pursuance thereof*," *i.e.* in pursuance of "This Constitution." U.S. Const. Art. VI, cl. 2 (emphasis added).

66. The conditional nature of the Supremacy Clause accords supremacy to federal statutes or regulations made "in Pursuance of" the Constitution.

67. CDC has not identified any act of Congress that confers upon it the power to impose a halt on residential evictions.

68. CDC has not identified any act of Congress that shows it is acting within the scope of some congressionally delegated authority to impose eviction moratoriums across the United States.

69. Indeed, Section 4024 of the CARES Act, which imposed a temporary moratorium on certain evictions, contained no delegation of authority to any agency, much less CDC, and even then only applied to certain federally-backed housing.

70. The weaker the link between relevant federal statutes and CDC's eviction-moratorium order, the weaker is CDC's ability to invoke the Supremacy Clause to deprive Plaintiff of his right to state-court eviction process.

WHEREFORE, Plaintiff demands judgment against CDC invalidating CDC's eviction-moratorium order and any other relief that may be appropriate.

COUNT IV: VIOLATION OF U.S. CONSTITUTION'S SUPREMACY CLAUSE AND TENTH AMENDMENT—THE CDC EVICTION-MORATORIUM ORDER DOES NOT VALIDLY PREEMPT STATE LAW

71. Plaintiff incorporates by reference all of the preceding material as though fully set forth herein.

72. Article VI, Clause 2 of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance

thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

73. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

74. The relevant statute, 42 U.S.C. § 264(a), only authorizes CDC to make and enforce regulations that "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."

75. The relevant regulation, 42 C.F.R. § 70.2, also only authorizes CDC to "take measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection."

76. Nothing in the relevant statutes or regulations purports to give CDC the authority to issue an eviction-moratorium order that preempts state landlord-tenant law.

77. Nothing in the relevant statutes or regulations purports to give CDC the authority to preempt the Contracts Clause of Article I, Section 10 of the United States Constitution, the Contracts Clauses of the state constitutions, or otherwise preempt state law protecting from impairment the obligations of private contracts that are in force.

78. Nothing in the relevant statutes or regulations gives CDC the authority to order a nationwide moratorium "to temporarily halt residential evictions to prevent the further spread of COVID-19," CDC Order, 85 Fed. Reg. at 55292, because CDC's authority is confined to undertaking measures providing for "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." 42 U.S.C. § 264(a); 42 C.F.R. § 70.2.

79. Although "state laws can be pre-empted by federal regulations as well as by federal statutes," *Hillsborough County, Fla. v. Automated Medical Lab, Inc.*, 471 U.S. 707, 713 (1985), the relevant statute contains a savings clause, which states: "Nothing in this section or section 266 of this title, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an

exercise of Federal authority under this section or section 266 of this title." 42 U.S.C. § 264(e).

80. The savings clause of 42 U.S.C. § 264(e) states that 42 U.S.C. § 264(a) and 42 C.F.R. § 70.2 cannot "be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States)." In other words, the CDC is statutorily expressly deauthorized from issuing orders such as the eviction-moratorium order that would supersede state landlord-tenant law, or state laws relating to non-impairment of contracts.

81. The relevant state landlord-tenant laws and laws relating to non-impairment of contracts do not conflict with CDC's authority to regulate "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." 42 U.S.C. § 264(a).

82. Landlord-tenant law and law relating to non-impairment of contracts "has long been regarded as a virtually exclusive province of the States" under the Tenth Amendment upon which the federal government cannot intrude. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The CDC order displaces inherent state authority over residential evictions and therefore violates the Tenth Amendment.

WHEREFORE, Plaintiff demands judgment against CDC invalidating CDC's eviction-moratorium order and any other relief that may be appropriate.

COUNT V: VIOLATION OF U.S. CONSTITUTION'S TENTH AMENDMENT—THE CDC EVICTION-MORATORIUM ORDER UNCONSTITUTIONALLY COMMANDEERS STATE RESOURCES AND STATE OFFICERS TO ACHIEVE FEDERAL POLICY OBJECTVES OR EXECUTE FEDERAL LAWS

83. Plaintiff incorporates by reference all of the preceding material as though fully set forth herein.

84. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

85. Under the Tenth Amendment and the anti-commandeering doctrine, CDC cannot commandeer state resources to achieve federal policy objectives or commandeer state officers to execute federal laws. CDC's eviction-moratorium order impermissibly commandeers state courts and state officers to act as arms of CDC. CDC's eviction-moratorium order impermissibly commandeers state courts and state officers to apply, enforce, and implement an unconstitutional federal law. *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

86. CDC cannot order state courts and relevant state actors not to process summary evictions. A landlord, like the Plaintiff, who relies on state process, runs

the risk of a federal prosecution for doing so. Plaintiff runs the risk of being fined up to $100,000 and sentenced to one year in prison for invoking and utilizing relevant state laws. *See* CDC Order, 85 Fed. Reg. at 55296.

87. Neither Congress nor CDC can "compel the States to … administer a federal regulatory program." *New York v. United States*, 504 U.S. at 188. Neither Congress nor CDC can "halt" pending or forthcoming state adjudicatory proceedings. CDC Order, 85 Fed. Reg. at 55296. Neither Congress nor CDC can modify state judicial processes by dictating that a declaration executed by a tenant shall be adequate proof or otherwise suffice to halt or suspend the judicial eviction action. *Id.* at 55292–93, 55297.

WHEREFORE, Plaintiff demands judgment against CDC invalidating CDC's eviction-moratorium order and any other relief that may be appropriate.

COUNT VI: VIOLATION OF U.S. CONSTITUTION ART I, § 1—THE CDC ORDER IS AN INVALID EXERCISE OF LEGISLATIVE POWER

88. Plaintiff incorporates by reference all of the preceding material as though fully set forth herein.

89. Article I, § 1 of the U.S. Constitution states, "*All* legislative Powers herein granted shall be vested in a Congress of the United States." (Emphasis added.) The grant of "[a]ll legislative Powers" to Congress in the Vesting Clause means

that Congress may not divest "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825).

90. Whether federal legislation effects a permissible or prohibited delegation of legislative powers—and thus violates the Article I, § 1 Vesting Clause—is determined based on whether the legislation provides "an intelligible principle" to which an administering agency is directed to conform when carrying out its functions under the legislation. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). If the law fails to provide a guiding principle of that sort but instead delegates to the agency authority to establish its own policies, the legislation is invalid because it violates the Vesting Clause. *Id*.

91. As interpreted by CDC, 42 U.S.C. § 264(a) fails to set forth any "intelligible principle" to which CDC is directed to conform. Citing § 264(a), the Order imposes a nationwide moratorium on residential evictions based on CDC's judgment that a moratorium is necessary to curb "the introduction, transmission, or spread of communicable diseases." But if that finding is sufficient to justify the moratorium, then § 264(a) imposes no discernible limits on CDC's regulatory authority.

92. Alternatively, if § 264(a) supplies a sufficient intelligible principle under current interpretation, then the doctrine must be re-examined so as to adhere to the proper limits contained in the Vesting Clause of Article I, § 1.

93. As interpreted by the Order, § 264(a) would also authorize CDC to prohibit all citizens from attending church services, assembling for the purpose of expressing their political views, or even leaving their own homes. It is debatable whether such measures could pass constitutional muster if adopted by Congress itself; but it is beyond dispute that such measures constitute the sorts of policy decisions that the Constitution reserves to Congress alone in its role as the Nation's exclusive repository of legislative power.

94. Because § 264(a), as interpreted by CDC, fails to include an intelligible principle that imposes limits on CDC's alleged regulatory authority, § 264(a) violates the Article I, § 1 Vesting Clause and is thus invalid as applied.

95. Because § 264(a) is unconstitutional as applied here, CDC lacks any statutory authority to adopt the Order.

WHEREFORE, Plaintiff demands judgment against CDC invalidating CDC's eviction-moratorium order and any other relief that may be appropriate.

COUNT VII: UNLAWFUL SUSPENSION OF LAW—NEITHER STATUTE NOR CONSTITUTION AUTHORIZES CDC TO WAIVE, DISPENSE WITH, OR SUSPEND STATE EVICTION LAWS

96. Plaintiff incorporates by reference all of the preceding material as though fully set forth herein.

97. Evictions are a function of the police power of the several states. *Cf. Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 247 (1922) (considering the New

York legislature's authority to enact emergency housing laws under the state's police power). In Virginia, a landlord's rights and remedies upon a material breach of a rental agreement, including the right to an eviction and the recovery of possession based on nonpayment of rent, are governed by a comprehensive statutory scheme. *See* Va. Code §§ 8.01-470, 55.1-1245 *et seq*.

98. CDC's order purports to waive or suspend the duly enacted laws that govern evictions in the Commonwealth of Virginia.

99. CDC has no authority to waive, dispense with, or suspend duly enacted state laws; nor does the Executive Branch more generally. *See Matthews v. Zane's Lessee*, 9 U.S. 92, 98 (1809) (Marshall, C.J.) ("The president cannot dispense with the law, nor suspend its operation."); *Baker v. Carr*, 369 U.S. 186, 244 n.2 (1962) ("No tribunal or department in our system of governments ever can be lawfully authorized to dispense with the laws, like some of the tyrannical Stuarts, or to repeal, or abolish, or suspend the whole body of them[.]") (quoting *Luther v. Borden*, 48 U.S. 1, 69 (1849) (Woodbury, J., dissenting)).

100. To the contrary, the United States Constitution forbids the Executive Branch from suspending the law.

101. The separation of powers enshrined in our Constitution prevents the suspension of law through executive action, as it would effect a merger of the executive and legislative powers. *See* Philip Hamburger, Nat'l Rev., *Are Health-*

Care Waivers Unconstitutional? (Feb. 8, 2011), *available* at https://www.nationalreview.com/2011/02/are-health-care-waiversunconstitutional-philip-hamburger ("The power to dispense with the laws had no place in a constitution that divided the active power of government into executive and legislative powers."). Suspension of laws by the Executive Branch is "a power exercised not through and under the law, but above it." *Id*.

102. The Founder's placement of the Suspension Clause in Article I reflects that the U.S. Constitution continued the English common-law tradition of vesting the suspension power solely in the Legislative Branch. *See* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1919 (2009); Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (2017) (chronicling the original meaning of the Suspension Clause). The limited exception for the suspension of habeas corpus "in Cases of Rebellion or Invasion" when "the public Safety may require it" proves the more general rule that duly enacted laws may not be suspended during an emergency that is neither a rebellion nor an invasion, even by Congress. U.S. Cont., art. I, § 9, cl. 2.

103. And in contrast to the legislature's suspension authority, the executive "could not, even during an emergency, seize property" or "constrain the natural liberty of persons who were within the protection of the law, unless [the

executive] had legislative authorization." Hamburger, *Beyond Protection*, 109 COLUM. L. REV. at 1919.

104. CDC has not identified any act of Congress that delegated authority to impose an eviction moratorium across the United States. Section 264(a) authorizes CDC only to make and enforce regulations that "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."

105. With no applicable grant of statutory authority to suspend laws, CDC has no authority to do anything with respect to Virginia's comprehensive laws. *See Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934) ("Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.").

106. Because CDC could not lawfully waive the application of Virginia's laws governing evictions, Va. Code §§ 8.01-470, 55.1-1245 *et seq.*, the Order is void *ab initio* and must fail.

WHEREFORE, Plaintiff demands judgment against CDC invalidating CDC's eviction-moratorium order and any other relief that may be appropriate.

September 8, 2020

Respectfully,

/s/ James W. Hawkins
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing court filing has been prepared in 14-point Times New Roman font and complies with LR 5.1, NDGa and LR 7.1(D), NDGa.

/s/ James W. Hawkins
James W. Hawkins
Counsel for Plaintiff

Attachment B

Amended Complaint

(ECF No. 12)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD LEE BROWN, & JEFFREY RONDEAU, & DAVID KRAUSZ, & SONYA JONES, & NATIONAL APARTMENT ASSOCIATION, Plaintiffs, v. ALEX AZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES: & U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES: & 	CIVIL ACTION NO.: 1:20-CV-3702-WMR AMENDED COMPLAINT

NINA B. WITKOFSKY,
IN HER OFFICIAL CAPACITY AS
ACTING CHIEF OF STAFF
U.S. CENTERS FOR DISEASE
CONTROL AND PREVENTION,

&

U.S. CENTERS FOR DISEASE
CONTROL AND PREVENTION,

Defendants.

AMENDED COMPLAINT

When Plaintiffs Richard Lee (Rick) Brown, Jeffrey Rondeau, David Krausz and Sonya Jones and the members of Plaintiff National Apartment Association (NAA) rented their respective properties, they expected that their tenants would uphold their end of the contract and pay their rent. They also expected, if the tenants did not, that they could resort to the law and court system to evict their tenants so that they could regain possession of their property and let it to tenants who would pay rent.

Plaintiffs upheld their end of the bargain. They provided a habitable home to their tenants and continue to pay for maintenance, utilities and other expenses. When their tenants breached their agreement, Plaintiffs should have been able to follow the lawful processes laid down by state law for retaking possession of their homes.

Plaintiffs failed to anticipate, however, that the U.S. Centers for Disease Control, a federal agency, would issue a sweeping unilateral order suspending *state* law under the flimsy premise that doing so was "necessary" to control the COVID-19 pandemic. CDC's actions are not authorized by statute or regulation. But even if they were, they are unprecedented in our history and are an affront to core constitutional limits on federal power. If allowed, the Order would abrogate the right to access the courts, violate limits on the Supremacy Clause, implicate the non-delegation doctrine, and traduce anti-commandeering principles. CDC's effort to seize control of state law on such an insupportable basis must be rejected.

PARTIES

1. Plaintiff Richard Lee (Rick) Brown is a natural person and a resident of the Commonwealth of Virginia.

2. Plaintiff Jeffrey Rondeau is a natural person and resident of the State of New Jersey.

3. Plaintiff David Krausz is a natural person and resident of the State of South Carolina.

4. Plaintiff Sonya Jones is a natural person and resident of the State of Georgia.

5. Plaintiff National Apartment Association is a trade association for owners and managers of rental housing that is comprised of 157 state and local affiliated

apartment associations, and over 82,600 members managing more than 9.7 million rental homes throughout the United States, Canada, and the United Kingdom.

6. Defendant Secretary Alex Azar is the agency head of the U.S. Department of Health and Human Services (HHS) and is sued in his official capacity.

7. Defendant HHS is an agency of the United States.

8. Defendant Nina B. Witkofsky is the Acting Chief of Staff for the Centers for Disease Control and Prevention (CDC) and is the agency head responsible for the challenged agency action. She is sued in her official capacity.

9. Defendant CDC is an agency of the United States located within HHS and headquartered in Atlanta, Georgia.

JURISDICTION AND VENUE

10. This Court has federal question jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331 as this matter involves questions arising under the Constitution of the United States and the Administrative Procedure Act.

11. This Court has the authority to grant declaratory and injunctive relief in this matter pursuant to 28 U.S.C. §§ 2201 and 2202.

12. Venue for this action properly lies in this district pursuant to 28 U.S.C. §§ 1391(b)(1), (2) because the defendants reside in this judicial district and because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

STATEMENT OF FACTS

13. Plaintiff Rick Brown owns a residential property in Winchester, VA.

14. Mr. Brown has a mortgage on the property and makes monthly payments of approximately $400 for the mortgage principal, interest and taxes.

15. On April 1, 2017, Mr. Brown leased the property to a tenant, who agreed to pay monthly rent of $925.

16. The lease automatically renewed several times and is currently in effect.

17. The tenant of Mr. Brown's property has fallen behind on rent, and asserted to Mr. Brown that she is unable to pay because of economic stress arising from the COVID-19 pandemic, has used best efforts to obtain available government assistance and otherwise pay rent, has no other home to go to, and is making less than $99,000 annually.

18. To date, the tenant owes $8,092 in unpaid rent, and has made no payments at all to Mr. Brown for several months.

19. Plaintiff Jeffrey Rondeau owns a residential property in Vale, NC. He intends to use this property as his home once he retires.

20. Mr. Rondeau has a mortgage on the property and makes monthly payments of approximately $880 for the mortgage principal, interest and taxes. He pays a property management company 10% of the monthly rent ($100) to collect rent from the property.

21. On May 1, 2019, Mr. Rondeau leased the property to tenant, who agreed to pay monthly rent of $1,000. Mr. Rondeau and his tenant renewed their lease as of May 1, 2020, for a term of one year.

22. Mr. Rondeau's tenants have had a spotty payment history, typically filing rent significantly after its due date. The tenants stopped paying altogether and have not paid any rent since July 6, 2020.

23. The tenants of Mr. Rondeau's property have fallen behind on rent, and asserted to Mr. Rondeau that they are unable to pay because of economic stress arising from the COVID-19 pandemic, have used best efforts to obtain available government assistance and otherwise pay rent, have no other home to go to, and are making less than $99,000 annually.

24. To date, the tenants owe more than $2,100 in unpaid rent and fees and has made no payments at all to Mr. Rondeau for several months.

25. Plaintiff David Krausz owns a residential own a residential property in Columbia SC, which he leased to a tenant for a monthly rent of $700.

26. Mr. Krausz has a currently effective lease agreement with the tenant.

27. Mr. Krausz's tenant fell behind on rent in July 2020, and now owes approximately $2265 in unpaid rent. Under South Carolina law Mr. Krausz is entitled to seek an eviction for nonpayment of rent.

28. Plaintiff Sonya Jones owns a residential property in Jesup, GA.

29. Ms. Jones leased the property to a tenant for a monthly rent of $450.

30. Ms. Jones has a currently effective lease agreement with her tenant.

31. Ms. Jones' tenant has fallen behind on rent and now owes more than $1800 in unpaid rent. The tenant also owes additional late fees. Under Georgia law Ms. Jones is entitled to seek an eviction for nonpayment of rent.

32. On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, P.L. 116-316, which included in Section 4024 a limited and temporary moratorium on evictions for certain types of federally-backed housing that expired on July 24, 2020.

33. On August 7, 2020, a majority of the Supreme Court of Virginia issued an order, at the request of Virginia Governor Ralph Northam, modifying and extending a declaration of judicial emergency in response to COVID-19. *In re: Amendment of Eighth Order Extending Declaration of Judicial Emergency in Response to COVID-19 Emergency* (Va. Aug. 7, 2020) *available at* http://www.vacourts.gov/news/items/covid/2020_0807_scv_amendment_to_eighth_order.pdf.

34. The order provided that from August 10, 2020 through September 7, 2020 "the issuance of writs of eviction pursuant to unlawful detainer actions is suspended and continued. However, this suspension and continuation shall not

apply to writs of eviction in unlawful detainer actions that are unrelated to the failure to pay rent." *Id*. at 2.

35. On May 30, 2020, Chief Justice Cheri Beasley of the North Carolina Supreme Court issued emergency directive 17, which stayed all pending eviction proceedings until June 21, 2020, and declared that "Sheriffs shall not be required to execute pending writs of possession of real property or make due return of such writs until 30 June 2020." Emergency Directives 17-9, Order of the Chief Justice of the Supreme Court of North Carolina (N.C. May 30, 2020), *available at* https://www.nccourts.gov/assets/news-uploads/30%20May%202020%207A-39%28b%29%282%29%20Order.pdf?v6tK3XJVqgOY0Ps80nAcS6s5ghD2XLeU.

36. North Carolina Governor Roy Blunt issued Executive Order No. 142 on May 30, 2020, which supplemented Chief Justice Beasley's directive and prohibited residential landlords from evicting tenants for late or nonpayment through July 20, 2020. *Assisting North Carolinians by Placing Temporary Prohibitions on Evictions and Extending the Prohibition on Utility Shut-Offs*, State of North Carolina Executive Order No. 142 (N.C. May 30, 2020), *available at* https://files.nc.gov/governor/documents/files/EO142-Temp-Prohibitions-on-Evictions-and-Extending-Prohibition-on-Utility-Shut-Offs.pdf.

37. On March 17, 2020 the Supreme Court of South Carolina stayed all evictions proceedings in the state until May 1, 2020. RE: Statewide Evictions,

Order of the Chief Justice of the Supreme Court of South Carolina (N.C. Mar. 17, 2020) *available at* https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2020-03-17-02.

38. On September 1, 2020, Defendant Acting Chief Witkofsky issued an order titled, "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*."

39. The CDC Order became effective upon publication in the Federal Register, which occurred on September 4, 2020. 85 Fed. Reg. 55292 (Sept. 4, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf.

40. The CDC Order provided, "Under this Order, a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order." *Id*.

41. The CDC Order was not effective so long as a local jurisdiction applied similar eviction restrictions. *Id*.

42. The CDC Order said, "'Evict' and 'Eviction' means any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a

covered person from a residential property. This does not include foreclosure on a home mortgage." *Id*. at 55293.

43. The CDC Order also said, "[A] person violating this Order may be subject to a fine of no more than $100,000 if the violation does not result in a death or one year in jail, or both, or a fine of no more than $250,000 if the violation results in a death or one year in jail, or both[.]" *Id*. at 55296.

44. The CDC Order was effective upon publication until December 31, 2020, "unless extended." *Id*. at 55297.

45. Mr. Brown has maintained the property in compliance with all legal obligations as landlord, and the tenant has no other defense to her nonpayment of rent.

46. Mr. Brown is entitled to a writ of possession and a writ of eviction.

47. On August 18, 2020, Mr. Brown attempted to have the Winchester City Sheriff's Department serve a five-day termination notice pursuant to Va. Code § 55.1-1245(f) to the tenant.

48. Sheriff Les Taylor informed Mr. Brown that the Winchester City Sheriff's Department would no longer issue and serve such notices in compliance with the Supreme Court of Virginia's order.

49. Because of operation of the Supreme Court of Virginia's August 7 Order, Mr. Brown was unable to obtain a writ of eviction to oust the tenant for nonpayment of rent until September 7, 2020.

50. Mr. Brown now intends to seek eviction of his tenant for nonpayment of rent using legal process in Virginia state courts.

51. Upon information and belief, Mr. Brown's tenant is a "covered person" under the CDC Order.

52. Mr. Brown intends to violate the CDC Order through lawful processes under Virginia law by seeking an eviction order, and having a sheriff forcibly remove his tenant from the property.

53. Mr. Brown intends to violate the CDC Order even if his tenant presents an attestation in eviction proceedings that she is a "covered person" as defined in the CDC Order.

54. Mr. Brown continues to provide habitable premises to the tenant, and his tenant has no other defense to eviction under Virginia law.

55. Because of the CDC Order, Mr. Brown suffers significant economic damages, including $8,092 in unpaid rent, as well as monthly maintenance costs, damages to his property and the lost opportunity to rent or use the property at fair market value of at least $925 per month.

56. The tenant is also likely insolvent (and judgment proof), and Mr. Brown will be unlikely to obtain any economic relief or damages from the tenant once the CDC Order expires at the end of December.

57. Mr. Brown's only opportunity to mitigate his loss will be from ousting the tenant who is in wrongful possession of the premises.

58. Mr. Rondeau is entitled to a writ of possession and a writ of ejectment.

59. On August 17, 2020, Mr. Rondeau filed for a summary ejectment in North Carolina state court. One week later, on August 24, a state judge granted ejectment and ordered a sheriff to serve a writ of possession removing the tenants from the property.

60. Mr. Rondeau's writ of ejectment became final and unappealable on September 3, 2020. But, on September 6, 2020, Mr. Rondeau's tenant provided him with a signed affidavit consistent with the CDC Order.

61. On September 14, 2020, Mr. Rondeau requested a writ of possession. The eviction is currently scheduled for September 21, 2020, at 9:00 a.m.

62. Mr. Rondeau intends to violate the CDC Order through lawful processes under North Carolina law by seeking an eviction order, and having a sheriff forcibly remove his tenants from the property.

63. Mr. Rondeau continues to provide habitable premises to the tenants, and his tenants have no other defense to eviction under North Carolina law.

64. Because of the CDC Order, Mr. Rondeau suffers significant economic damages, including $2,100 in unpaid rent and fees, as well as monthly maintenance costs, damages to his property and the lost opportunity to rent or use the property at fair market value of at least $1,000 per month.

65. If Mr. Rondeau is unable to earn any rent on his property before January 2021 he faces a likelihood of being unable to pay the mortgage on the property and is at risk of foreclosure.

66. The tenant is also likely insolvent (and judgment proof), and Mr. Rondeau will be unlikely to obtain any economic relief or damages from the tenant once the CDC Order expires at the end of December.

67. Mr. Rondeau's only opportunity to mitigate his loss will be from ousting the tenant who is in wrongful possession of the premises.

68. On July 7, 2020, Mr. Krausz filed an Application for Ejectment to initiate the legal eviction process under South Carolina law.

69. Mr. Krausz's tenant requested a hearing, which was held on July 30, 2020.

70. At the hearing Mr. Krausz and his tenant entered into a consent agreement where the tenant would have 4 days to pay $700 towards past due rent, and then was required to pay an additional $2265 in unpaid rent by August 31, 2020. The tenant agreed to waive their right to an additional hearing. If the tenant breached the agreement, which was accepted by the court, then Mr. Krausz was entitled to

request the court issue a Writ of Ejectment immediately without any further hearings on the matter.

71. Mr. Krausz's tenant paid $700 for July's rent as agreed but failed to pay any portion of the outstanding $2265.

72. On September 11, 2020 Mr. Krausz requested service of a writ of ejectment from the magistrate court, which is a process by which a sheriff evicts a tenant under South Carolina law.

73. The writ was granted, and the Richland County South Carolina Sheriff's Department scheduled an eviction of Mr. Krausz's tenant for September 21, 2020.

74. On September 16, 2020, Mr. Krausz's tenant provided the South Carolina court with a declaration consistent with the CDC Order, declaring that the tenant was unable to pay rent because of economic stress arising from the COVID-19 pandemic, had used best efforts to obtain available government assistance and was using best efforts to make timely partial payments that are as close to the full payment as possible, had no other home to go to, and was making less than $99,000 annually.

75. The South Carolina court then immediately stayed the eviction.

76. Mr. Krausz has maintained his property in compliance with all legal obligations as a landlord, and his tenant has no defense for her nonpayment of rent.

Mr. Krausz is also entitled to regain possession of his property under South Carolina law.

77. Because of the CDC Order, Mr. Krausz has incurred significant economic damages, including approximately $2,265 in unpaid rent and fees, as well as monthly maintenance costs, damages to his property and the lost opportunity to rent or use the property at fair market value of at least $700 per month. The tenant appears to be insolvent, and Mr. Krausz will likely not be able to obtain any economic relief or damages from her. Mr. Krausz's only opportunity to mitigate my loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant.

78. On August 24, 2020 Ms. Jones filed and served a dispossessory affidavit on her tenant consistent with Georgia law, which directed her tenant to vacate the property.

79. Ms. Jones' tenant requested a hearing, which was held on September 8, 2020. That was the first business day following the effective date of the CDC's order.

80. At the hearing Ms. Jones' tenant said that his challenge to the eviction was related to the COVID-19 pandemic, and the court continued all proceedings until January 2021 in purported compliance with CDC's eviction moratorium order.

81. Based on information provided to Ms. Jones by her tenant, and the tenant's representations in court, Ms. Jones' tenant is a "covered person" as defined by the CDC order.

82. Ms. Jones maintained her property in compliance with all legal obligations as a landlord, and the tenant has no defense for their nonpayment of rent. She is also entitled to regain possession of the property under Georgia law.

83. Because of the CDC Order, Ms. Jones has incurred significant economic damages, including approximately $1,800 in unpaid rent and fees, as well as monthly maintenance costs, damages to the property and the lost opportunity to rent or use the property at fair market value of at least $450 per month.

84. The tenant is also insolvent, and Ms. Jones will not be able to obtain any economic relief or damages from him.

85. Ms. Jones' only opportunity to mitigate my loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant.

86. NAA is a trade association for owners and managers of rental housing that is comprised of 157 state and local affiliated apartment associations, and over 85,485 members managing more than 10 million rental units throughout the United States. NAA has members in all 50 states.

87. NAA has members throughout the United States who are entitled to writs of possession and eviction in states without eviction moratoria.

88. NAA's members continue to provide habitable premises to their tenants, but have been order by CDC not to utilize existing state law procedures for evicting tenants for nonpayment of rent when presented with a form affidavit.

89. Because of the CDC Order, NAA's members have suffered significant economic damages, including unpaid rent and fees, as well as monthly maintenance costs, damages to their property and the lost opportunity to rent or use their properties at fair market value.

90. NAA's members will be unlikely to obtain any economic relief or damages from their tenants once the CDC Order expires at the end of December because, by definition, any tenant presenting an appropriate attestation will be insolvent.

91. NAA's members will lose millions of dollars in uncollected rents, while expending huge sums for maintenance and costs. Many of NAA's member businesses are unlikely to recover from the economic stress caused by the CDC Order.

92. NAA members' only opportunity to mitigate their losses will be from ousting their tenants who are in wrongful possession of the premises.

COUNT I: UNLAWFUL AGENCY ACTION IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §§ 706(2)(B), (C)—CDC EXCEEDED ITS STATUTORY AND REGULATORY AUTHORITY BY ISSUING THE HALT IN RESIDENTIAL EVICTIONS ORDER

93. Plaintiffs incorporate by reference all of the preceding material as though fully set forth herein.

94. Under the Administrative Procedure Act, this Court is authorized to hold unlawful and set aside agency action, findings, and conclusions that it finds to be contrary to constitutional right or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. *See* 5 U.S.C. §§ 706(2)(B), (C).

95. The CDC Order was purportedly issued under the authority of "Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 CFR 70.2."

96. Under 42 U.S.C. § 264(a), the CDC may only "make and enforce such regulations" that "are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession" and "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" to carry out and enforce such regulations.

97. Under 42 C.F.R. § 70.2, when the Director of the CDC "determines that the measures taken by health authorities of any State or possession (including political

subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession" the Director is authorized to "take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection."

98. The CDC Order purports to restrict "a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action" from "evict[ing] any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order." 85 Fed. Reg. at 55292. A "covered person" is "any tenant, lessee, or resident of a residential property who provides to their landlord, the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action, a declaration under penalty of perjury indicating" certain information outlined in the Order. 85 Fed. Reg. at 55293; *see also* 85 Fed. Reg. at 55297 (CDC Declaration form). The effective period of the Order is from September 4, 2020 through December 31, 2020. 85 Fed. Reg. at 55292.

99. The CDC Order only applies to States, local, territorial, or tribal areas that do not have "a moratorium on residential evictions that provides the same or

greater level of public-health protection than the requirements listed in this Order." 85 Fed. Reg. at 55292.

100. The CDC Order baldly states that Defendant Witkofsky "determined the temporary halt in evictions in this Order constitutes a reasonably necessary measure under 42 CFR 70.2 to prevent the further spread of COVID-19 throughout the United States." 85 Fed. Reg. at 55296. The Order further states that she "determined that measures by states, localities, or U.S. territories that do not meet or exceed these minimum protections [i.e., those that have residential eviction moratoria] are insufficient to prevent the interstate spread of COVID-19." 85 Fed. Reg. at 55296.

101. The CDC Order does not identify or offer any analysis whatsoever about which States, local, territorial, or tribal areas have "a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order." 85 Fed. Reg. at 55292.

102. Individuals or organizations that violate the Order are subject to criminal penalties, including fines and jail time. *See* 85 Fed. Reg. at 55296; *see also* 18 U.S.C. §§ 3559, 3571; 42 U.S.C. § 271; 42 C.F.R. § 70.18.

103. Agencies have no inherent power to make law. *See Loving v. United States*, 517 U.S. 748, 758 (1996) ("[T]he lawmaking function belongs to Congress … and may not be conveyed to another branch or entity."). This limitation is a

constitutional barrier to an exercise of legislative power by the executive branch. Agencies have "no power to act … unless and until Congress confers power upon [them]." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

104. Nothing in the relevant statutes or regulations purports to give CDC the power or authority to issue an eviction-moratorium order.

105. Nothing in the relevant statutes or regulations purports to give CDC the power or authority to criminalize otherwise lawful behavior.

106. The Order was issued in excess of any statutory authority and is therefore invalid.

WHEREFORE, Plaintiffs demand judgment against CDC invalidating CDC's Eviction-Moratorium Order and any other relief that may be appropriate.

COUNT II: ARBITRARY AND CAPRICIOUS AGENCY ACTION IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(A)—THE ORDER IS NOT SUPPORTED BY A RATIONAL DETERMINATION DRAWN FROM SUBSTANTIAL EVIDENCE

107. Plaintiffs incorporates by reference all of the preceding material as though fully set forth herein.

108. Under the Administrative Procedure Act, a court must set aside "arbitrary and capricious" agency action. 5 U.S.C. § 706(2)(A).

109. The CDC Order fails the arbitrary and capricious standard because it is not supported by a rational determination drawn from substantial evidence.

110. CDC has not met its baseline obligation of showing that local jurisdictions are taking "insufficient" measures to prevent the spread of COVID-19, as required when CDC acts under the authority purportedly granted by 42 C.F.R. § 70.2 (granting authority to CDC when the agency "determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases[.]").

111. CDC has also failed to catalogue the efforts taken by *any* jurisdiction to combat COVID-19; or explain why allowing eviction proceedings, more than any other purported lacuna in prevention strategies, represents the line that states may not cross; or cite *any* evidence that any infection has arisen because of an eviction proceeding.

112. CDC's secondary conclusion, that an eviction moratorium is "necessary" to stop the spread of COVID-19 is unsupported by substantial evidence.

113. In fact, CDC is careful never to actually say that the moratorium is necessary—the best it says is that "[i]n the context of a pandemic, eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of communicable disease." 85 Fed. Reg. at 55294. But even this tepid statement has no real evidentiary support.

114. Instead, CDC relies on hyperbolic reasoning—saying that "mass evictions" and "homelessness" might increase the likelihood of COVID-19, and thus that that the *only* appropriate course of action is to halt evictions nationwide. *See* 85 Fed. Reg. at 55294-96. CDC does not explain sufficiently why this would be so or why other remedial measures are inadequate. *See Perez-Zenteno v. U.S. Att'y Gen.*, 913 F.3d 1301, 1306 (11th Cir. 2019) (ruling that an agency decision must be "supported by reasonable, substantial, and probative evidence on the record considered as a whole").

115. CDC also does not explain why other remedial measures are inadequate.

116. The evidence on which CDC relies fails to support CDC's Order, and it is thus arbitrary and capricious.

WHEREFORE, Plaintiffs demand judgment against CDC invalidating CDC's Eviction-Moratorium Order and any other relief that may be appropriate.

COUNT III: VIOLATION OF THE RIGHT OF ACCESS TO COURTS UNDER THE U.S. CONSTITUTION—THE ORDER UNLAWFULLY DENIED PLAINTIFFS ACCESS TO THE ONLY LAWFUL MEANS OF EVICTING A DELINQUENT TENANT

117. Plaintiffs incorporate by reference all of the preceding material as though fully set forth herein.

118. The Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth and Fourteenth Amendment Due Process Clauses and the Fourteenth Amendment's Equal Protection Clause collectively provide a federal

constitutional right of access to courts. *Christopher v. Harbury*, 536 U.S. 403, 415, 415 n.12 (2002).

119. No state actor may systemically frustrate a plaintiff "in preparing and filing suits" by foreclosing a particular type of relief. *Id*. at 413.

120. An unlawful detainer action is a landlord's *sole* means of reacquiring possession of his residential property in Virginia. A sheriff must enforce a writ of eviction. *See* Va. Code § 8.01-470 (writs of eviction generally). A residential landlord is forbidden from taking possession of his own property. Va. Code § 55.1-1252. Instead, "[i]f a landlord unlawfully removes or excludes a tenant from the premises … the *tenant* may obtain an order from a general district court to recover possession, require the landlord to resume any such interrupted essential service, or terminate the rental agreement and, in any case, recover the actual damages sustained by him and reasonable attorney fees." Va. Code. § 55.1-1243(a).

121. Similarly, North Carolina courts provide a landlord's sole means of eviction and regaining possession of his or her property from a tenant who has breached a lease: "It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in Article 3 or Article 7 of this Chapter."

N.C. Gen. Stat. § 42-25.6; *see also id.* § 1-313 ("The execution must be directed to the sheriff[.]").

122. In South Carolina a landlord must also utilize a court eviction process, and obtain a writ of ejectment from a judge. *See* S.C. Code § 27-40-710. The writ must be executed by a state official, and a landlord may not attempt to evict a tenant through self-help. S.C. Code § 27-40-760. A landlord is also liable to a tenant for the greater of three months' rent or twice actual damages for an unlawful ouster if he attempts to evict a tenant outside the court process. S.C. Code § 27-40-660.

123. Georgia also requires residential landlords to use court eviction proceedings, and only permits eviction by a sheriff, constable or marshal's execution of a writ of possession. *See* Ga. Code § 44-7-55(d). Without being issued such a writ, a landlord may not retake possession of her residential property. *See id.* A landlord who resorts to self-help evictions faces criminal punishment. *See* Ga. Code § 44-7-14.1 ("Unlawful to suspend furnishing of utilities to tenant until final disposition of dispossessory proceeding.").

124. Indeed, in a majority of jurisdictions across the United States residential landlords must follow utilize state eviction proceedings before lawfully ousting tenants for nonpayment of rent.

125. Plaintiffs are entitled to obtain a writs pursuant to state law to regain possession of their properties for nonpayment of rent.

126. Plaintiffs' tenants currently owe unpaid rent and have no defenses in state court other than the CDC Order.

127. By operation of the CDC Order, Plaintiffs are unable to obtain writs of eviction pursuant to the legal processes set out by their respective state laws

128. Plaintiffs have no ability to legally oust their tenants for nonpayment of rent.

WHEREFORE, Plaintiffs demand judgment against CDC invalidating CDC's Eviction-Moratorium Order and any other relief that may be appropriate.

COUNT IV: VIOLATION OF U.S. CONSTITUTION'S SUPREMACY CLAUSE—THE CDC EVICTION-MORATORIUM ORDER CANNOT BE THE SUPREME LAW OF THE LAND BECAUSE IT IS NOT A LAW ADOPTED PURSUANT TO THE CONSTITUTION

129. Plaintiffs incorporate by reference all of the preceding material as though fully set forth herein.

130. Article VI, Clause 2 of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

131. The Supremacy Clause grants "supreme" status only to the "*Laws* of the United States." *Id.* (emphasis added).

132. "[A]n agency literally has no power to act, let alone to pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *New York v. FERC*, 535 U.S. 1, 18 (2002).

133. "[P]reemption takes place only when and if the agency is acting within the scope of its congressionally delegated authority." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019).

134. The Supremacy Clause grants "supreme" status only to the "Laws of the United States which shall be made *in Pursuance thereof*," *i.e.* in pursuance of "This Constitution." U.S. Const. Art. VI, cl. 2 (emphasis added).

135. The conditional nature of the Supremacy Clause accords supremacy to federal statutes or regulations made "in Pursuance of" the Constitution.

136. CDC has not identified any act of Congress that confers upon it the power to impose a halt on residential evictions.

137. CDC has not identified any act of Congress that shows it is acting within the scope of some congressionally delegated authority to impose eviction moratoriums across the United States.

138. Indeed, Section 4024 of the CARES Act, which imposed a temporary moratorium on certain evictions, contained no delegation of authority to any agency, much less CDC, and even then applied only to certain federally-backed housing.

139. The weaker the link between relevant federal statutes and CDC's Order, the weaker is CDC's ability to invoke the Supremacy Clause to deprive Plaintiffs of their right to state-court eviction process.

WHEREFORE, Plaintiffs demand judgment against CDC invalidating CDC's Eviction-Moratorium Order and any other relief that may be appropriate.

COUNT V: VIOLATION OF U.S. CONSTITUTION'S SUPREMACY CLAUSE AND TENTH AMENDMENT—THE CDC EVICTION-MORATORIUM ORDER DOES NOT VALIDLY PREEMPT STATE LAW

140. Plaintiffs incorporate by reference all of the preceding material as though fully set forth herein.

141. Article VI, Clause 2 of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

142. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

143. The relevant statute, 42 U.S.C. § 264(a), authorizes CDC only to make and enforce regulations that "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."

144. The relevant regulation, 42 C.F.R. § 70.2, also authorizes CDC only to "take measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection."

145. Nothing in the relevant statutes or regulations purports to give CDC the authority to order an eviction moratorium that preempts state landlord-tenant law.

146. Nothing in the relevant statutes or regulations purports to give CDC the authority to preempt the Contracts Clause of Article I, Section 10 of the United States Constitution, the Contracts Clauses of the state constitutions, or otherwise preempt state law protecting from impairment the obligations of private contracts that are in force.

147. Nothing in the relevant statutes or regulations gives CDC the authority to order a nationwide moratorium "to temporarily halt residential evictions to prevent the further spread of COVID-19," CDC Order, 85 Fed. Reg. at 55292, because CDC's authority is confined to undertaking measures providing for "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." 42 U.S.C. § 264(a); 42 C.F.R. § 70.2.

148. Although "state laws can be pre-empted by federal regulations as well as by federal statutes," *Hillsborough County, Fla. v. Automated Medical Lab, Inc.*, 471 U.S. 707, 713 (1985), the relevant statute contains a savings clause, which states: "Nothing in this section or section 266 of this title, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 266 of this title." 42 U.S.C. § 264(e).

149. The savings clause of 42 U.S.C. § 264(e) states that 42 U.S.C. § 264(a) and 42 C.F.R. § 70.2 cannot "be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States)." In other words, the CDC is statutorily expressly deauthorized from issuing orders such as the Order that would supersede state landlord-tenant law, or state laws relating to non-impairment of contracts.

150. The relevant state landlord-tenant laws and laws relating to non-impairment of contracts do not conflict with CDC's authority to regulate "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." 42 U.S.C. § 264(a).

151. Landlord-tenant law and law relating to non-impairment of contracts "has long been regarded as a virtually exclusive province of the States" under the Tenth Amendment upon which the federal government cannot intrude. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The CDC Order displaces inherent state authority over residential evictions and therefore violates the Tenth Amendment.

WHEREFORE, Plaintiffs demand judgment against CDC invalidating CDC's Eviction-Moratorium Order and any other relief that may be appropriate.

COUNT VI: VIOLATION OF U.S. CONSTITUTION'S TENTH AMENDMENT—THE CDC EVICTION-MORATORIUM ORDER UNCONSTITUTIONALLY COMMANDEERS STATE RESOURCES AND STATE OFFICERS TO ACHIEVE FEDERAL POLICY OBJECTIVES OR EXECUTE FEDERAL LAWS

152. Plaintiffs incorporate by reference all of the preceding material as though fully set forth herein.

153. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

154. Under the Tenth Amendment and the anti-commandeering doctrine, CDC cannot commandeer state resources to achieve federal policy objectives or commandeer state officers to execute federal laws. CDC's Order impermissibly

commandeers state courts and state officers to apply, enforce, and implement an unconstitutional federal law. *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

155. CDC cannot order state courts and relevant state actors not to process summary evictions. Landlords, like Plaintiffs, who rely on state process, run the risk of a federal prosecution for doing so. Plaintiffs run the risk of being fined up to $100,000 and sentenced to one year in prison for invoking and utilizing relevant state laws. *See* CDC Order, 85 Fed. Reg. at 55296.

156. Neither Congress nor CDC can "compel the States to … administer a federal regulatory program." *New York v. United States*, 504 U.S. at 188. Neither Congress nor CDC can "halt" pending or forthcoming state adjudicatory proceedings. CDC Order, 85 Fed. Reg. at 55296. Neither Congress nor CDC can modify state judicial processes by dictating that a declaration executed by a tenant shall be adequate proof or otherwise suffice to halt or suspend the judicial eviction action. *Id.* at 55292–93, 55297.

WHEREFORE, Plaintiffs demand judgment against CDC invalidating CDC's Eviction-Moratorium Order and any other relief that may be appropriate.

COUNT VII: VIOLATION OF U.S. CONSTITUTION ART I, § 1—THE CDC ORDER IS AN INVALID EXERCISE OF LEGISLATIVE POWER

157. Plaintiffs incorporate by reference all of the preceding material as though fully set forth herein.

158. Article I, § 1 of the U.S. Constitution states, "*All* legislative Powers herein granted shall be vested in a Congress of the United States." (Emphasis added.) The grant of "[a]ll legislative Powers" to Congress in the Vesting Clause means that Congress may not divest "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825).

159. Whether federal legislation effects a permissible or prohibited delegation of legislative powers—and thus violates the Article I, § 1 Vesting Clause—is determined based on whether the legislation provides "an intelligible principle" to which an administering agency is directed to conform when carrying out its functions under the legislation. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). If the law fails to provide a guiding principle of that sort but instead delegates to the agency authority to establish its own policies, the legislation is invalid because it violates the Vesting Clause. *Id*.

160. As interpreted by CDC, 42 U.S.C. § 264(a) fails to set forth any "intelligible principle" to which CDC is directed to conform. Citing § 264(a), the Order imposes a nationwide moratorium on residential evictions based on CDC's judgment that a moratorium is necessary to curb "the introduction, transmission, or spread of communicable diseases." But if that finding is sufficient to justify the moratorium, then § 264(a) imposes no discernible limits on CDC's regulatory authority.

161. Alternatively, if § 264(a) supplies a sufficient intelligible principle under current interpretation, then the doctrine must be re-examined so as to adhere to the proper limits contained in the Vesting Clause of Article I, § 1.

162. As interpreted by the CDC Order, § 264(a) would also authorize CDC to prohibit all citizens from attending church services, assembling for the purpose of expressing their political views, or even leaving their own homes. It is debatable whether such measures could pass constitutional muster if adopted by Congress itself; but it is beyond dispute that such measures constitute the sorts of policy decisions that the Constitution reserves to Congress alone in its role as the Nation's exclusive repository of legislative power.

163. Because § 264(a), as interpreted by CDC, fails to include an intelligible principle that imposes limits on CDC's alleged regulatory authority, § 264(a) violates the Article I, § 1 Vesting Clause and is thus invalid as applied.

164. Because § 264(a) is unconstitutional as applied here, CDC lacks any statutory authority to adopt the Order.

WHEREFORE, Plaintiffs demand judgment against CDC invalidating CDC's Eviction-Moratorium Order and any other relief that may be appropriate.

COUNT VIII: UNLAWFUL SUSPENSION OF LAW—NEITHER STATUTE NOR CONSTITUTION AUTHORIZES CDC TO WAIVE, DISPENSE WITH, OR SUSPEND STATE EVICTION LAWS

165. Plaintiffs incorporate by reference all of the preceding material as though fully set forth herein.

166. Evictions and the laws governing when and under what circumstances a property owner can regain possession of his or her property are a function of the police power of the several states. *Cf. Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 247 (1922) (considering the New York legislature's authority to enact emergency housing laws under the state's police power). In Virginia and North Carolina, like most other states, a landlord's rights and remedies upon a material breach of a rental agreement, including the right to an eviction and the recovery of possession based on nonpayment of rent, are governed by a comprehensive statutory scheme. *See* Va. Code §§ 8.01-470, 55.1-1245 *et seq*.; N.C. Gen. Stat. §§ 1-313, 42-1 *et seq*.

167. CDC's Order purports to waive or suspend the duly enacted laws that govern evictions in the several states.

168. CDC has no authority to waive, dispense with, or suspend duly enacted state laws; nor does the Executive Branch more generally. *See Matthews v. Zane's Lessee*, 9 U.S. 92, 98 (1809) (Marshall, C.J.) ("The president cannot dispense with the law, nor suspend its operation."); *Baker v. Carr*, 369 U.S. 186, 244 n.2 (1962) ("No tribunal or department in our system of governments ever can be lawfully authorized to dispense with the laws, like some of the tyrannical Stuarts, or to

repeal, or abolish, or suspend the whole body of them[.]") (quoting *Luther v. Borden*, 48 U.S. 1, 69 (1849) (Woodbury, J., dissenting)).

169. To the contrary, the United States Constitution forbids the Executive Branch from suspending the law.

170. The separation of powers enshrined in our Constitution prevents the suspension of law through executive action, as it would effect a merger of the executive and legislative powers. *See* Philip Hamburger, Nat'l Rev., *Are Health-Care Waivers Unconstitutional?* (Feb. 8, 2011), *available* at https://www.nationalreview.com/2011/02/are-health-care-waiversunconstitutional-philip-hamburger ("The power to dispense with the laws had no place in a constitution that divided the active power of government into executive and legislative powers."). Suspension of laws by the Executive Branch is "a power exercised not through and under the law, but above it." *Id*.

171. The Founder's placement of the Suspension Clause in Article I reflects that the U.S. Constitution continued the English common-law tradition of vesting the suspension power solely in the Legislative Branch. *See* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1919 (2009); Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (2017) (chronicling the original meaning of the Suspension Clause). The limited exception for the suspension of habeas corpus "in Cases of Rebellion or Invasion" when "the

public Safety may require it" proves the more general rule that duly enacted laws may not be suspended during an emergency that is neither a rebellion nor an invasion, even by Congress. U.S. Cont., art. I, § 9, cl. 2.

172. And in contrast to the legislature's suspension authority, the executive "could not, even during an emergency, seize property" or "constrain the natural liberty of persons who were within the protection of the law, unless [the executive] had legislative authorization." Hamburger, *Beyond Protection*, 109 COLUM. L. REV. at 1919.

173. CDC has not identified any act of Congress that delegated authority to impose an eviction moratorium across the United States. Section 264(a) authorizes CDC only to make and enforce regulations that "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."

174. With no applicable grant of statutory authority to suspend laws, CDC has no authority to do anything with respect to the several states' comprehensive laws. *See Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934) ("Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.").

175. Because CDC could not lawfully waive the application of state laws governing evictions, the Order is void *ab initio* and must fail.

WHEREFORE, Plaintiffs demand judgment against CDC invalidating CDC's Eviction-Moratorium Order and any other relief that may be appropriate.

September 18, 2020

Respectfully,

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Attachment C

Plaintiffs' Motion for Preliminary Injunction and Supporting Documents

(ECF Nos. 18 – 18-6)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD LEE BROWN, ET AL.,	:	
	:	CIVIL ACTION NO.:
	:	1:20-cv-3702-WMR
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SEC. ALEX AZAR, ET AL.,	:	
	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Richard Lee (Rick) Brown, Jeffrey Rondeau, David Krausz, Sonya Jones and the National Apartment Association (NAA) move for a preliminary injunction pending trial in this matter against Defendants, Secretary Alex Azar, U.S. Department of Health and Human Services, Acting Chief of Staff Nina B. Witkofsky, and U.S. Centers for Disease Control and Prevention (collectively "CDC") vacating their September 1, 2020 Order, which suspended lawful residential evictions as applied to Plaintiffs.

In support of their motion, Plaintiffs say as follows:

1. Mr. Brown owns a residential property in Winchester VA. (Rick Brown Decl. at ¶ 3.) Mr. Brown has a mortgage on the property and makes monthly payments of

approximately $400 for the mortgage principal, interest and taxes. (Rick Brown Decl. at ¶ 4.)

2. On April 1, 2017, Mr. Brown leased the property to a tenant, who agreed to pay monthly rent of $925. (Rick Brown Decl. at ¶ 5.) The lease automatically renewed several times and is currently in effect. (Rick Brown Decl. at ¶ 5.)

3. The tenant of Mr. Brown's property has fallen behind on rent and asserted to Mr. Brown that she is unable to pay because of economic stress arising from the COVID-19 pandemic, has used best efforts to obtain available government assistance and otherwise pay rent, has no other home to go to, and is making less than $99,000 annually. (Rick Brown Decl. at ¶ 6.) To date, the tenant owes $8,092 in unpaid rent and has made no payments at all to Mr. Brown for several months. (Rick Brown Decl. at ¶ 6.)

4. Mr. Rondeau owns a residential property in Vale, NC. (Jeff Rondeau Decl. at ¶ 3.) Starting on May 1, 2019, he rented the property for a monthly rent of $1,000. (Jeff Rondeau Decl. at ¶ 5.) The lease was renewed in May 2020 and is currently in effect. (Jeff Rondeau Decl. at ¶ 5.)

5. Mr. Rondeau's tenant had a spotty payment history, typically filing rent significantly after its due date. (Jeff Rondeau Decl. at ¶ 7.) Finally, the tenant stopped paying altogether and has not paid any rent since July 6, 2020 and now owes more than $2,100 in rent and fees. (Jeff Rondeau Decl. at ¶ 7.)

6. On August 24, 2020 a North Carolina state judge granted ejectment and ordered a sheriff to serve a writ of possession removing the tenants from the property. (Jeff Rondeau Decl. at ¶ 8.) The eviction was set to take place on September 21, 2020. (Jeff Rondeau Decl. at ¶ 9.)

7. Mr. Krausz owns a residential own a residential property in Columbia SC, which he leased to a tenant for a monthly rent of $700. (David Krausz Decl. at ¶ 3.)

8. Mr. Krausz's tenant fell behind on rent in July 2020, and now owes approximately $2265 in unpaid rent. (David Krausz Decl. at ¶ 4.) Under South Carolina law Mr. Krausz is entitled to seek an eviction for nonpayment of rent. (David Krausz Decl. at ¶ 13.)

9. On September 11, 2020 Mr. Krausz requested a writ of ejectment from a South Carolina magistrate court, which is a process by which a sheriff evicts a tenant under South Carolina law. (David Krausz Decl. at ¶ 9.) The writ was granted, and the Richland County South Carolina Sheriff's Department scheduled an eviction of Mr. Krausz's tenant for September 21, 2020. (David Krausz Decl. at ¶ 10.)

10. Ms. Jones owns a residential property in Jesup, GA, which she leased to a tenant for a monthly rent of $450. (Sonya Jones Decl. at ¶ 3.) Ms. Jones has a currently effective lease agreement with her tenant. (Sonya Jones Decl. at ¶ 3.)

11. Ms. Jones' tenant has fallen behind on rent and now owes more than $1800 in unpaid rent. (Sonya Jones Decl. at ¶ 4.) The tenant also owes additional late fees.

(Sonya Jones Decl. at ¶ 4.) Under Georgia law Ms. Jones is entitled to seek an eviction for nonpayment of rent. (Sonya Jones Decl. at ¶ 4.)

12. On September 1, 2020, Defendant Acting Chief Witkofsky issued an order titled, "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*." The CDC Order became effective upon publication in the Federal Register, which occurred on September 4, 2020. 85 Fed. Reg. 55292 (Sept. 4, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf.

13. The Order said, "Under this Order, a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order." *Id*.

14. The Order applied to "covered persons" who attest that they meet five conditions. *Id*. at 55293.

15. Mr. Brown has maintained the property in compliance with all legal obligations as a landlord, and the tenant has no other defense to her nonpayment of rent. (Rick Brown Decl. at ¶ 7.) Mr. Brown is entitled to a writ of possession and a writ of eviction. (Rick Brown Decl. at ¶ 7.) Mr. Brown now intends to seek eviction of his tenant for nonpayment of rent using legal process in Virginia state courts. (Rick Brown Decl. at ¶ 9.) Based on information provided by his tenant, Mr. Brown

believes that his tenant is a "covered person" under the CDC Order, and will provide a relevant affidavit if Mr. Brown initiates eviction procedures against her. (Rick Brown Decl. at ¶ 10.)

16. Mr. Brown intends to violate the CDC Order through lawful processes under Virginia law by seeking an eviction order, and having a sheriff forcibly remove his tenant from the property. (Rick Brown Decl. at ¶ 11.) Mr. Brown intends to violate the CDC Order even if his tenant presents an attestation in eviction proceedings that she is a "covered person" as defined the CDC Order. (Rick Brown Decl. at ¶ 12.)

17. Because of the CDC Order, Mr. Brown is suffering significant economic damages, including $8,092 in unpaid rent, as well as monthly maintenance costs, damages to his property and the lost opportunity to rent or use the property at fair market value of at least $925 per month. (Rick Brown Decl. at ¶ 14.) The tenant is also insolvent (and judgment proof), and Mr. Brown will not be able to obtain any economic relief or damages from the tenant once the CDC Order expires at the end of December. (Rick Brown Decl. at ¶ 14.) Mr. Brown's only opportunity to mitigate his loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant. (Rick Brown Decl. at ¶ 14.)

18. Mr. Rondeau has complied with all legal obligations as a landlord, and his tenants had no other defense to eviction under North Carolina law. (Jeff Rondeau Decl. at ¶ 11.) On September 6, 2020, however, Mr. Rondeau's tenants provided him

with an affidavit pursuant to the CDC Order. (Jeff Rondeau Decl. at ¶ 10.) The tenant declared under penalty of perjury that all conditions required for the CDC Order applied to them. (Jeff Rondeau Decl. at ¶ 10.) Mr. Rondeau intends to use legal means under North Carolina law to remove the tenants from the property notwithstanding the CDC Order purporting to halt state eviction proceedings. (Jeff Rondeau Decl. at ¶ 12.)

19. Because of the CDC Order, Mr. Rondeau has also suffered significant economic damages, including $2100 in unpaid rent and fees, as well as monthly maintenance costs, damages to his property and the lost opportunity to rent or use the property at fair market value of at least $1000 per month. (Jeff Rondeau Decl. at ¶ 13.) His tenant has also declared that she is insolvent, meaning that his only hope to mitigate his losses will be from ousting the tenant and renting the property to another tenant. (Jeff Rondeau Decl. at ¶ 13.) Mr. Rondeau also faces the very real possibility that if he is unable to evict his tenant and earn rent prior to the Order's expiration in January 2021, he will be unable to meet his mortgage obligations and will lose his house in foreclosure. (Jeff Rondeau Decl. at ¶ 14.)

20. On September 16, 2020, Mr. Krausz's tenant provided the South Carolina court with a declaration consistent with the CDC Order, declaring that the tenant was unable to pay rent because of economic stress arising from the COVID-19 pandemic, had used best efforts to obtain available government assistance and was using best

efforts to make timely partial payments that are as close to the full payment as possible, had no other home to go to, and was making less than $99,000 annually. (David Krausz Decl. at ¶ 11.) The South Carolina court then immediately stayed the eviction. (David Krausz Decl. at ¶ 12.)

21. Mr. Krausz has maintained his property in compliance with all legal obligations as a landlord, and his tenant has no defense for her nonpayment of rent. (David Krausz Decl. at ¶ 13.) Mr. Krausz is also entitled to regain possession of his property under South Carolina law. (David Krausz Decl. at ¶ 13.) Because of the CDC Order, Mr. Krausz has incurred significant economic damages, including approximately $2,265 in unpaid rent and fees, as well as monthly maintenance costs, damages to his property and the lost opportunity to rent or use the property at fair market value of at least $700 per month. (David Krausz Decl. at ¶ 14.) The tenant is also likely insolvent, and Mr. Krausz will not likely be able to obtain any economic relief or damages from her. . (David Krausz Decl. at ¶ 14.) Mr. Krausz's only opportunity to mitigate his loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant. (David Krausz Decl. at ¶ 14.)

22. On August 24, 2020 Ms. Jones filed and served a dispossessory affidavit on her tenant consistent with Georgia law, which directed her tenant to vacate the property. (Sonya Jones Decl. ¶ 5.) Ms. Jones' tenant requested a hearing, which was

held on September 8, 2020. (Sonya Jones Decl. ¶ 6.) That was the first business day following the effective date of the CDC's order. (Sonya Jones Decl. ¶ 6.)

23. At the hearing Ms. Jones' tenant said that his challenge to the eviction was related to the COVID-19 pandemic, and the court continued all proceedings until January 2021 in purported compliance with CDC's eviction moratorium order. (Sonya Jones Decl. ¶ 7.) Based on information provided to Ms. Jones by her tenant, and the tenant's representations in court, Ms. Jones' tenant is a "covered person" as defined by the CDC order. (Sonya Jones Decl. ¶ 8.)

24. Ms. Jones maintained her property in compliance with all legal obligations as a landlord, and the tenant has no defense for their nonpayment of rent. (Sonya Jones Decl. ¶ 9.) She is also entitled to regain possession of the property under Georgia law. (Sonya Jones Decl. ¶ 9.)

25. Because of the CDC Order, Ms. Jones has incurred significant economic damages, including approximately $1,800 in unpaid rent and fees, as well as monthly maintenance costs, damages to the property and the lost opportunity to rent or use the property at fair market value of at least $450 per month. (Sonya Jones Decl. ¶ 10.) The tenant is also insolvent, and Ms. Jones will not be able to obtain any economic relief or damages from him. (Sonya Jones Decl. ¶ 10.) Ms. Jones' only opportunity to mitigate her loss will be from ousting the tenant who is in wrongful

possession of the premises and renting the property to another tenant. (Sonya Jones Decl. ¶ 10.)

26. NAA is a trade association for owners and managers of rental housing that is comprised of over 85,185 members managing more than 10 million rental units throughout the United States. (Robert Pinnegar Decl. at ¶ 1.)

27. NAA's members have tenants in jurisdictions across the country in default of their leases for nonpayment of rent. (Robert Pinnegar Decl. at ¶¶ 4-5.) Overwhelmingly, these members are unable to access lawful eviction proceedings because of the CDC Order. (Robert Pinnegar Decl. at ¶¶ 2-3.) Because of the CDC Order, NAA's members have suffered significant economic damages, including unpaid rent and fees, as well as monthly maintenance costs, damages to their property and the lost opportunity to rent or use their properties at fair market value. (Robert Pinnegar Decl. at ¶¶ 4-5.) NAA's members will be unlikely to obtain any economic relief or damages from their tenants once the CDC Order expires at the end of December because, by definition, any tenant presenting an appropriate attestation will be insolvent. (Robert Pinnegar Decl. at ¶¶ 4-5.) NAA members' only opportunity to mitigate their losses will be from ousting their tenants who are in wrongful possession of the premises. (Robert Pinnegar Decl. at ¶¶ 4-5.)

28. Plaintiffs are likely to succeed on a challenge to the CDC Order because it was issued without a statutory or regulatory basis. *See* 5 U.S.C. §§ 706(2)(B), (C).

29. Plaintiffs are likely to succeed on a challenge to the CDC Order because it constitutes arbitrary and capricious agency action. *See* 5 U.S.C. § 706(2)(A).

30. Plaintiffs are likely to succeed on a challenge to the CDC Order because it violates their right to access the courts. *See Christopher v. Harbury*, 536 U.S. 403, 415 (2002).

31. Plaintiffs will suffer irreparable harm by suffering constitutional violations that cannot be remedied as well as financial harms through lost business opportunities that cannot be recovered from the tenant or the defendants.

32. The balance of equities weighs heavily in favor of an injunction or temporary restraining order because it is the public interest to ensure the CDC complies with constitutional and statutory limits.

33. CDC's Order purports to void the substantive law of every state and locality in the United States, and an immediate ruling is necessary to preserve the status quo.

34. Plaintiffs have attested to the irreparable harm that they have suffered because of the Order, and an immediate ruling is necessary to prevent further harms. (Rick Brown Decl. at ¶ 14; Jeff Rondeau Decl. at ¶¶ 13-14; David Krausz Decl. at ¶14; Robert Pinnegar Decl. at ¶ 4-5.)

WHEREFORE the Court should issue a preliminary injunction prohibiting Defendants from enforcing the CDC Order.

September 18, 2020

Respectfully,

/s/ James W. Hawkins
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing court filing has been prepared in 14-point Times New Roman font and complies with LR 5.1, NDGa and LR 7.1(D), NDGa.

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD LEE BROWN, ET AL.,	:	
	:	CIVIL ACTION NO.:
	:	1:20-cv-3702-WMR
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SEC. ALEX AZAR, ET AL.,	:	
	:	
Defendants.	:	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Richard Lee (Rick) Brown, Jeffrey Rondeau, David Krausz, Sonya Jones and the National Apartment Association (NAA) move for a preliminary injunction against Defendants, Secretary Alex Azar, U.S. Department of Health and Human Services, Acting Chief of Staff Nina B. Witkofsky, and U.S. Centers for Disease Control and Prevention (collectively "CDC") vacating their September 1, 2020 Order, which suspended lawful residential evictions as applied to Plaintiffs.

Plaintiffs have faithfully upheld their end of the landlord/tenant contract. Plaintiffs had a right to expect that if their tenants did not pay rent the law and the

courts would be open to them. The livelihoods of NAA members across the country depend on this understanding.

Plaintiffs upheld their end of the bargain. They provided habitable homes to their tenants and continue to pay for maintenance, utilities and other expenses. Upon breach of lease Plaintiffs should have been able to follow the lawful process laid down by state law for retaking possession of their homes.

Plaintiffs failed to anticipate, however, that CDC, a federal agency without any authority over housing, would issue a sweeping order suspending *state* law under the flimsy premise that doing so was "necessary" to control the COVID-19 pandemic. CDC's actions are not authorized by statute or regulation. They are unprecedented in our history and unconstitutionally deny property owners across the country to access the courts. CDC's effort to seize control of state law on such an insupportable basis is causing irreparable harm and must be rejected. This Court should therefore issue a preliminary injunction.

I. FACTS

Mr. Brown owns a residential property in Winchester, VA. (Brown Decl. at ¶ 3.) He has a mortgage on the property and makes monthly payments of approximately $400 for the mortgage principal, interest and taxes. (Brown Decl. at ¶ 4.) On April 1, 2017, Mr. Brown leased the property to a tenant, who agreed to pay monthly rent of $925, and the lease is currently in effect. (Brown Decl. at ¶ 5.)

Mr. Brown's tenant has fallen behind on rent and asserted to Mr. Brown that she is unable to pay because of economic stress arising from the COVID-19 pandemic, has used best efforts to obtain available government assistance and otherwise pay rent, has no other home to go to, and is making less than $99,000 annually. (Brown Decl. at ¶ 6.) To date, the tenant owes $8,092 in unpaid rent and has made no payments at all to Mr. Brown for several months. (Brown Decl. at ¶ 6.)

Mr. Rondeau owns a residential property in Vale, NC, where he intends to live once he retires. (Rondeau Decl. at ¶ 3.) Starting on May 1, 2019, he rented the property for a monthly rent of $1,000, and the lease was renewed in May 2020 and is currently in effect. (Rondeau Decl. at ¶ 5.)

Mr. Rondeau's tenant had a spotty payment history and has not paid any rent since July 6, 2020. (Rondeau Decl. at ¶ 7.) The tenant now owes more than $2,100 in rent and fees. (Rondeau Decl. at ¶ 7.) On August 17, 2020, Mr. Rondeau filed for a summary ejectment in North Carolina state court. (Rondeau Decl. at ¶ 8.) A state judge granted ejectment on August 24, 2020 and ordered a sheriff to serve a writ of possession removing the tenants from the property. (Rondeau Decl. at ¶ 8.) The eviction was set to take place on September 21, 2020. (Rondeau Decl. at ¶ 9.)

Mr. Krausz owns a residential property in Columbia SC, which he leased to a tenant for a monthly rent of $700. (Krausz Decl. at ¶ 3.) He has a currently effective lease agreement with the tenant. (Krausz Decl. at ¶ 3.) Mr. Krausz's tenant fell

behind on rent in July 2020, and now owes approximately $2265 in unpaid rent. (Krausz Decl. at ¶ 4.)

On July 7, 2020, Mr. Krausz filed an application for ejectment to initiate the legal eviction process under South Carolina law. (Krausz Decl. at ¶ 5.) Mr. Krausz's tenant requested a hearing, which was held on July 30, 2020. (Krausz Decl. at ¶ 6.) At the hearing Mr. Krausz and his tenant entered into a consent agreement where the tenant would have 4 days to pay $700 towards past due rent, and then was required to pay an additional $2265 in unpaid rent by August 31, 2020. (Krausz Decl. at ¶ 7.) The tenant agreed to waive their right to an additional hearing. (Krausz Decl. at ¶ 7.) If the tenant breached the agreement, which was accepted by the court, then Mr. Krausz was entitled to request the court issue a writ of ejectment immediately without any further hearings on the matter. (Krausz Decl. at ¶ 7.) Mr. Krausz's tenant paid $700 for July's rent as agreed but failed to pay any portion of the outstanding $2265. (Krausz Decl. at ¶ 8.)

On September 11, 2020 Mr. Krausz requested service of a writ of ejectment from the magistrate court, which is a process by which a sheriff evicts a tenant under South Carolina law. (Krausz Decl. at ¶ 9.) The writ was granted, and the Richland County South Carolina Sheriff's Department scheduled an eviction of Mr. Krausz's tenant for September 21, 2020. (Krausz Decl. at ¶ 10.)

Ms. Jones owns a residential property in Jesup, GA, which she leased to a tenant for a monthly rent of $450. (Jones Decl. at ¶ 3.) Ms. Jones has a currently effective lease agreement with her tenant. (Jones Decl. at ¶ 3.) Ms. Jones' tenant has fallen behind on rent and now owes more than $1800 in unpaid rent, plus late fees. (Jones Decl. at ¶ 4.) Under Georgia law Ms. Jones is entitled to seek an eviction for nonpayment of rent. (Jones Decl. at ¶ 4.)

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, P.L. 116-316, which included in Section 4024 a limited and temporary moratorium on evictions for certain types of federally-backed housing that expired on July 24, 2020.

On September 1, 2020, Defendant Acting Chief Witkofsky issued an order titled, "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*." The CDC Order became effective upon publication in the Federal Register, which occurred on September 4, 2020. 85 Fed. Reg. 55292 (Sept. 4, 2020).

The Order said, "Under this Order, a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order." *Id*.

The Order said, "'Evict' and 'Eviction' means any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a

possessory action, to remove or cause the removal of a covered person from a residential property. This does not include foreclosure on a home mortgage." *Id*. at 55293. The Order also said, "[A] person violating this Order may be subject to a fine of no more than $100,000 if the violation does not result in a death or one year in jail, or both, or a fine of no more than $250,000 if the violation results in a death or one year in jail, or both[.]" *Id*. at 55296.

It also applied to "covered persons" who are tenants "of a residential property" who attest that they (1) have "used best efforts to obtain all available government assistance for rent or housing;" (2) "either (i) expects to earn no more than $99,000 in annual income for Calendar Year 2020 … (ii) w[ere] not required to report any income in 2019 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment [under] … the CARES Act;" (3) are "unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses;" (4) they are "using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses;" and (5) "eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options." *Id*. at 55293.

The Order claimed to have been issued pursuant to Section 361 of the Public Health Service Act, 42 U.S.C. § 264, and 42 C.F.R. § 70.2. *Id*. at 55297. It claimed criminal enforcement authority under 18 U.S.C. §§ 3559, 3571, 42 U.S.C. §§ 243, 268, 271, and 42 C.F.R. § 70.18. *Id*. at 55296.

CDC also set out a series of justifications and "findings." *Id*. at 55294-96. Because "[e]victed renters must move," the Order concluded eviction "leads to multiple outcomes that increase the risk of COVID-19 spread." *Id*. at 55294. It then concluded that "mass evictions" and "homelessness" "would likely increase the interstate spread of COVID-19." *Id*. at 55295. Thus, Acting Chief Witkofsky "determined the temporary halt in evictions in this Order constitutes a reasonably necessary measure under 42 CFR 70.2 to prevent the further spread of COVID-19 throughout the United States. [She] further determined that measures by states, localities, or U.S. territories that do not meet or exceed these minimum protections are insufficient to prevent the interstate spread of COVID-19." *Id*. at 55296.

The Order was effective upon publication until December 31, 2020, "unless extended." *Id*. at 55297.

Mr. Brown has maintained the property in compliance with all legal obligations as a landlord, and the tenant has no other defense to her nonpayment of rent. (Brown Decl. at ¶ 7.) Mr. Brown is entitled to writs of possession and eviction. (Brown Decl. at ¶ 7.) He now intends to seek eviction of his tenant for nonpayment

of rent using legal process in Virginia state courts. (Brown Decl. at ¶ 9.) Based on information provided by his tenant, Mr. Brown believes that his tenant is a "covered person" under the CDC Order, and will provide a relevant affidavit if Mr. Brown initiates eviction procedures against her. (Brown Decl. at ¶ 10.) Mr. Brown intends to violate the CDC Order through lawful processes under Virginia law by seeking an eviction order and having a sheriff forcibly remove his tenant from the property. (Brown Decl. at ¶ 11.) Mr. Brown intends to violate the CDC Order even if his tenant presents an attestation in eviction proceedings that she is a "covered person" as defined the CDC Order. (Brown Decl. at ¶ 12.)

Because of the CDC Order, Mr. Brown is suffering significant economic damages, including $8,092 in unpaid rent, as well as monthly maintenance costs, damages to his property and the lost opportunity to rent or use the property at fair market value of at least $925 per month. (Brown Decl. at ¶ 14.) The tenant is also insolvent (and judgment proof), and Mr. Brown will not be able to obtain any economic relief or damages from the tenant once the CDC Order expires at the end of December. (Brown Decl. at ¶ 14.) Mr. Brown's only opportunity to mitigate his loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant. (Brown Decl. at ¶ 14.)

Mr. Rondeau has complied with all legal obligations as a landlord, and his tenants had no other defense to eviction under North Carolina law. (Rondeau Decl.

at ¶ 11.) On September 6, 2020, however, Mr. Rondeau's tenants provided him with an affidavit pursuant to the CDC Order. (Rondeau Decl. at ¶ 10.) The tenant declared under penalty of perjury that all conditions required for the CDC Order applied to them. (Rondeau Decl. at ¶ 10.) Mr. Rondeau intends to use legal means under North Carolina law to remove the tenants from the property notwithstanding the CDC Order purporting to halt state eviction proceedings. (Rondeau Decl. at ¶ 12.)

Because of the CDC Order, Mr. Rondeau has also suffered significant economic damages, including $2100 in unpaid rent and fees, as well as monthly maintenance costs, damages to his property and the lost opportunity to rent or use the property at fair market value of at least $1000 per month. (Rondeau Decl. at ¶ 13.) His tenant has also declared that she is insolvent, meaning that his only hope to mitigate his losses will be from ousting the tenant and renting the property to another tenant. (Rondeau Decl. at ¶ 13.) Mr. Rondeau also faces the very real possibility that, if he is unable to evict his tenant and earn rent prior to the Order's expiration in January 2021, he will be unable to meet his mortgage obligations and will lose his house in foreclosure. (Rondeau Decl. at ¶ 14.)

On September 16, 2020, Mr. Krausz's tenant provided the South Carolina court with a declaration consistent with the CDC Order. (Krausz Decl. at ¶ 11.) The South Carolina court then immediately stayed the eviction. (Krausz Decl. at ¶ 12.)

Mr. Krausz has maintained his property in compliance with all legal obligations as a landlord, and his tenant has no defense for her nonpayment of rent. (Krausz Decl. at ¶ 13.) Mr. Krausz is also entitled to regain possession of his property under South Carolina law. (Krausz Decl. at ¶ 13.) Because of the CDC Order, Mr. Krausz has incurred significant economic damages, including approximately $2,265 in unpaid rent and fees, as well as monthly maintenance costs, damages to his property and the lost opportunity to rent or use the property at fair market value of at least $700 per month. (Krausz Decl. at ¶ 14.) The tenant is also likely insolvent, and Mr. Krausz will not likely be able to obtain any economic relief or damages from her. Mr. Krausz's only opportunity to mitigate his loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant. (Krausz Decl. at ¶ 14.)

On August 24, 2020, Ms. Jones filed and served a dispossessory affidavit on her tenant consistent with Georgia law, directing her tenant to vacate the property. (Jones Decl. ¶ 5.) Ms. Jones' tenant requested a hearing, which was held on September 8, 2020, the first business day following the effective date of the CDC Order. (Jones Decl. ¶ 6.) At the hearing Ms. Jones' tenant said that his challenge to the eviction was related to the COVID-19 pandemic, and the court continued all proceedings until January 2021 in purported compliance with the CDC Order. (Jones Decl. ¶ 7.) Based on information provided to Ms. Jones by her tenant, and the

tenant's representations in court, Ms. Jones' tenant is a "covered person" as defined by the CDC Order. (Jones Decl. ¶ 8.)

Ms. Jones has maintained her property in compliance with all legal obligations as a landlord, and the tenant has no defense for their nonpayment of rent. (Jones Decl. ¶ 9.) She is entitled to regain possession of the property under Georgia law. (Jones Decl. ¶ 9.) Because of the CDC Order, Ms. Jones has incurred significant economic damages, including about $1,800 in unpaid rent and fees, plus monthly maintenance costs, damages to the property and the lost opportunity to rent or use the property at fair market value of at least $450 per month. (Jones Decl. ¶ 10.) The tenant is also insolvent, and Ms. Jones will not be able to obtain any economic relief or damages from him. (Jones Decl. ¶ 10.) Ms. Jones' only opportunity to mitigate the loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant. (Jones Decl. ¶ 10.)

NAA is a trade association for owners and managers of rental housing that is comprised of over 85,185 members managing more than 10 million rental units throughout the United States. (Pinnegar Decl. at ¶ 1.) NAA has members in all 50 states. NAA also has a significant number of members managing "Class C" properties, which typically have lower rents and serve lower-income tenants than Class A or B properties.

There are currently an estimated 43,811,786 renter-occupied housing units in the United States. Approximately 86% of those units are occupied by tenants with annual household incomes below $100,000. Recent studies have estimated that because of the economic downturn associated with COVID-19, there will be a nationwide shortfall of rental payments over the next four months of $21,545,000,000. Stout Risius Ross, LLC, *Estimation of Households Experiencing Rental Shortfall and Potentially Facing Eviction*, https://app.powerbi.com/view?r=eyJrIjoiNzRhYjg2NzAtMGE1MC00NmNjLTllOTMtYjM2NjFmOTA4ZjMyIiwidCI6Ijc5MGJmNjk2LTE3NDYtNGE4OS1hZjI0LTc4ZGE5Y2RhZGE2MSIsImMiOjN9, (last visited September 17, 2020).

NAA's members have seen a growing problem in the past few months with tenants unable to pay to rent. (Pinnegar Decl. at ¶¶ 3-4.) In a recent national survey, more than half of small landlords reported that they had at least one tenant not pay rent in June. Terner Center for Housing Innovation, U.C. Berkley, *How Are Smaller Landlords Weathering the COVID-19 Pandemic?* (July 2020), https://nahrep.org/downloads/NAHREP-Terner-Center-Landlord-Survey-Factsheet.pdf. More than half of landlords reported that rent collections are down from the first quarter, with 30% of respondents saying they are down more than 25%. *Id*. One-quarter of all respondents had to borrow funds to cover shortfalls in operating costs. *Id.* Moreover, nearly 40% of respondents lacked confidence "in

being able to cover their operating costs over the next quarter," even *without* restrictions on evictions. *Id.*

Nationwide "[o]ne-in-three renters started September with outstanding back rent owed." Igor Popov, Rob Warnock, and Chris Salviati, *Despite Slight Improvement, Rent Payment Struggles Continue*, Apartment List (Sept. 9, 2020), https://www.apartmentlist.com/research/september-housing-payments. Moreover, only about a third of all renters "made an on-time rent payment in the first week of September." *Id*. In the end, approximately 10% of tenants are not expected to pay rent at all during September. *Id.*

Class C properties, moreover, have experienced even greater financial strain. With the expiration of many COVID-related government assistance, Class C properties "have seen a 15 percent point drop" in "full rent payments" from June to July of this year. LeaseLock, *Class C Residents Show Signs of Growing Financial Strain* (July 2020). The total "percentage of rent collected at Class C properties has dipped 17 percentage points and remains more than 40 percentage points below the pre-COVID average." *Id*. Nationwide, only 24% of Class C tenants paid their rent within the first 15 days of July. *Id*.

NAA's members have tenants in jurisdictions across the country in default of their leases for nonpayment of rent. (Pinnegar Decl. at ¶¶ 4-5.) Overwhelmingly, these members are unable to access lawful eviction proceedings because of the CDC

Order. (Pinnegar Decl. at ¶¶ 2-3.) Because of the CDC Order, NAA's members have suffered significant economic damages, including unpaid rent and fees, as well as monthly maintenance costs, damages to their property and the lost opportunity to rent or use their properties at fair market value. (Pinnegar Decl. at ¶¶ 4-5.) NAA's members will be unlikely to obtain any economic relief or damages from their tenants once the CDC Order expires at the end of December because, by definition, any tenant presenting an appropriate attestation will be insolvent. (Pinnegar Decl. at ¶¶ 4-5.) NAA members' only opportunity to mitigate their losses will be from ousting their tenants who are in wrongful possession of the premises. (Pinnegar Decl. at ¶¶ 4-5.)

II. ARGUMENT

A. Jurisdiction

A plaintiff has standing to raise a pre-enforcement challenge to a criminal restriction when they can tie economic harm to government action and there is a realistic threat of enforcement. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) ("We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that the plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them."); *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1172 (11th Cir. 2014) ("Economic harm ...

[is] a well-established injur[y]-in-fact under federal standing jurisprudence."); *Ga. Latino All. for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1257-58 (11th Cir. 2012) ("When, as here, plaintiffs file a pre-enforcement, constitutional challenge to a state statute, the injury requirement may be satisfied by establishing a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement.").

The Administrative Procedure Act (APA) entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ... to judicial review thereof." 5 U.S.C. § 702. The APA requires courts to set aside agency action that is rule that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right" or "in excess of statutory jurisdiction [or] authority." 5 U.S.C. §§ 706(2)(A), (B), (C).[1]

[1] Alternatively, the Supreme Court has "long held that federal courts may in some circumstances grant injunctive relief against" federal officials violating federal law. *Armstrong v. Exceptional Child Ctr., Inc.*, --- U.S. ----, 135 S. Ct. 1378, 1384 (2015); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."). "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384. Moreover, while "the APA is the general mechanism by which to challenge final agency action" "this does not mean the APA forecloses other causes of action." *Sierra Club v. Trump*, 929 F.3d 670, 699 (9th Cir. 2019). Thus, a court has the equitable power to entertain a constitutional claim even if it is not reviewable under the APA—"claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA." *Id*. To the extent that any of

Rule 65(a) of the Federal Rules of Civil Procedure allows a court to issue a preliminary injunction if there is: (1) a substantial likelihood of success on the merits; (2) that the preliminary injunction is necessary to prevent irreparable injury; (3) that the threatened injury outweighs the harm the preliminary injunction would cause the other litigant; and (4) that the preliminary injunction would not be averse to the public interest. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Siebert v. Allen*, 506 F.3d 1047, 1049 (11th Cir. 2007).

B. Plaintiffs Have a Likelihood of Success on the Merits

1. The CDC Order Is Without a Statutory or Regulatory Basis

"Even before the birth of this country, separation of powers was known to be a defense against tyranny," and "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 756-57 (1996). Thus, "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "[A]n administrative agency's power to regulate … must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

Plaintiffs' constitutional claims are not cognizable under the APA, they bring them here as a matter of equity under this Court's inherent jurisdiction.

CDC's Order is purportedly authorized by 42 U.S.C. § 264 and 42 C.F.R. § 70.2, but neither provision grants the agency the broad authority to unilaterally void state laws across the country. Section 264(a) says that the Surgeon General may "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from … one State or possession into any other State or possession." And in particular, the statute allows 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." *Id*.

The regulation, in turn, allows the CDC Director to "take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection" when she "determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession[.]" 42 C.F.R. § 70.2.

Neither § 264(a) nor § 70.2 authorize CDC to issue a nationwide eviction moratorium. At most, those provisions allow limited orders related to certain disease

control measures, but it does not justify a wholly unrelated ban on legal eviction proceedings. Traditional canons of construction such as *ejusdem generis*, *expressio unius*, *noscitur a sociis*, and *casus omissus* show that CDC lacks the authority it needs to hold out the Order as the supreme law of the land. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 199-213, 107-111, 195-198, 93-100, 174-179 (Thompson/West 2012). These canons show that the link between the relevant federal statutes and CDC Order is too weak and attenuated to allow CDC to lawfully deprive Plaintiffs of state-court eviction processes.

Both the statute and regulation speak in terms of "inspection, fumigation, disinfection, sanitation, pest extermination, [or] destruction of animals or articles," 42 U.S.C. § 264(a); 42 C.F.R. § 70.2, all of which are far afield from *eviction procedures under state law*. Under the *ejusdem generis* canon, both provisions must be limited to actions taken in keeping with these examples. *Ejusdem generis* looks to the genus to which the initial terms belong—controlling communicable diseases through inspection and destruction of animals and articles—and presumes that the drafter has that genus or category in mind for the entire passage; the tagalong general term cannot render the prior enumeration superfluous. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 115 (2001) ("contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" held to include only transportation workers in foreign or interstate

commerce); *McBoyle v. United States*, 283 U.S. 25, 26, 27 (1931) ("automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails" held not to apply to an airplane). Voiding state eviction laws, of course, bears no relationship to "inspection, fumigation, disinfection, sanitation, pest extermination, [or] destruction of animals or articles," and thus would extend the term "other measures as … may be necessary" far beyond any rational reading. *See* 42 U.S.C. § 264(a).

Expressio unius, or the negative-implication canon, supports the same result. This canon has greater force the more specific a statutory enumeration. Scalia & Garner at 108. Here, the enumeration in 42 U.S.C. § 264(a) is so specific to the types of ways to stop the "spread of communicable diseases" that the more general phrase ("and other measures, as in his judgment may be necessary") cannot go much beyond the scope of the narrow specifics that precede it. Nor can the regulation's reference to "reasonably necessary" measures extend to CDC's Order. Evictions, property law, landlord-tenant law, and law relating to non-impairment of contracts are well beyond the genus of the enumeration in § 264(a) and, therefore, CDC has no power to issue the eviction moratorium challenged here.

Noscitur a sociis, or the associated-words canon, also instructs that words in a list are associated in a context suggesting that they should have a similar meaning. Scalia & Garner at 195; *Yates v. United States*, 574 U.S. 528, 544 (2015) ("'Tangible

object' is the last in a list of terms that begins 'any record [or] document.' The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information."). So too here. "[A]ny other measures" is appropriately read to refer, not to *any* measures such as eviction moratoriums but only to a subset of measures similar to those enumerated: "inspection, fumigation, disinfection," and so forth. *See* 42 U.S.C. § 264(a). And "reasonably necessary" measures must be also be the same in kind. *See* 42 C.F.R. § 70.2.

Casus omissus, or the omitted-case canon, instructs the courts to be careful not to supply "judicial legislation." *Ebert v. Poston*, 266 U.S. 548, 554 (1925). "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926). Neither the operative statute nor the regulation say anything about displacing state property law, and it would be inappropriate for this Court to supply that which Congress left out of 42 U.S.C. § 264(a). To read these provisions so broadly would be a breathtaking expansion of what Congress clearly meant to allow.

Reading either provision to allow for CDC to create a substantive criminal law for violating a federal eviction moratorium would violate the constitutionally-required rule of lenity. *See Yates v. United States*, 135 S.Ct. 1074, 1088 (2015); *United States v. Jeter*, 329 F.3d 1229, 1230 (11th Cir. 2003). Lenity is a rule of statutory construction that "requires courts to construe ambiguous criminal statutes

narrowly in favor of the accused." *United States v. Wright*, 607 F.3d 708, 716 (11th Cir. 2010) (Pryor, J. concurring).

Two constitutional principles underlie lenity: due process and the separation of powers. The rule protects individuals' rights "by requiring fair warning of what the law intends to do if a certain line is passed." *Id.* at 717 (cleaned up). Lenity also protects the separation of powers "by reserving to the legislature the task of determining what conduct to prohibit and what punishment to impose." *Id.*; *see United States v. Bass*, 404 U.S. 336, 348 (1971). Stated another way, lenity "promotes separation of powers by reserving to Congress the power to 'define a crime, and ordain its punishment.'" *Wright*, 607 F.3d at 719 (Pryor, J., concurring) (citation omitted). By construing ambiguous criminal statutes in favor of the accused, the "judicial branch refrains from expansively interpreting criminal statutes so as to prohibit more conduct or punish more severely than Congress intended." *Id.* at 717 (citing *Ladner v. United States*, 358 U.S. 169, 177-78 (1958)).

To the extent that there is any ambiguity in the phrasing "inspection, fumigation, disinfection," etc., the language must be construed against CDC given the criminal penalties the Order imposes. If the language were read to allow the eviction moratorium, CDC could consolidate both legislative and executive functions in a single branch and create new criminal law where none existed before. CDC is explicit that those who violate the Order face criminal consequences,

including up to a year in prison and hundreds of thousands of dollars in fines. 85 Fed. Reg. at 55296. But processing evictions under state law is undoubtedly a lawful exercise of the states' legislative judgment. And it is certainly not *criminal* in the eyes of Congress. Vesting unilateral authority to say otherwise and imprison citizens for *following state law* based on the thinnest reed of being "necessary" for disease control violates lenity. *See Wright*, 607 F.3d at 719 (Pryor, J., concurring).

Even if the provisions *could* be read so broadly as to allow the Order, CDC's actions fail the textual limit of being "reasonably necessary." Section 70.2 requires CDC to first determine that "measures taken by health authorities of any State … are insufficient to prevent the spread of any of the communicable diseases from such State." But CDC's findings are woefully inadequate. CDC relies on the outlandish leap in imagination that because "mass evictions" and "homelessness" might increase the likelihood of COVID-19 infection then allowing any number of evictions in any state is insufficient to prevent the spread of the disease. *See* 85 Fed. Reg. at 55294-96. Such catastrophizing hardly follows basic logic. Why should a single eviction following ordinary process necessarily result in "mass evictions," much less mass homelessness? And why should courts assume that newly evicted individuals will not find less expensive (or perhaps fully subsidized) housing? CDC has not established a factual basis for its assumption that newly evicted individuals might mingle with others in a way more dangerous to public health than dining in

restaurants or attending church services. CDC's Order seems to refute this notion as it does not apply to "foreclosures on a home mortgage," even though such evictions would seem to implicate homelessness to the same degree as residential lessees. *Id*. at 55293. CDC apparently sees nothing unreasonable in states allowing in-person dining, indoor worship, and even in-person bar service but has somehow determined that using ordinary property laws to allow evictions are "insufficient."

CDC also fails to show that the Order is "reasonably necessary" to prevent the spread of disease. Even if one accepts the premise that mass homelessness could create an uptick in COVID-19 infections, why is an eviction moratorium "necessary" to stop it? There is no evidence that allowing normal processes to play out would cause "mass evictions," much less catastrophic homelessness. And there is even less evidence that suspending all evictions nationwide is "necessary" to stop this imagined wave of mass homelessness. There are simply too many leaps in logic and evidence to support such an overwhelming show of federal authority. CDC has made little effort to show the *necessity* of its eviction ban.

In short, CDC's Order cannot be justified by its statutory and regulatory source. Plaintiffs are likely to succeed on their claim that it is an invalid agency action.

2. The CDC Order Is Arbitrary and Capricious

A court must set aside "arbitrary and capricious" agency action. 5 U.S.C. § 706(2)(A). This requires a "searching and careful" review to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996) (citation omitted). An agency's action is arbitrary and capricious "if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Further, when an agency fails to adequately explain its authority for a certain action, its actions are arbitrary and capricious. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911-12 (2020). "To put a finer point on it, the APA requires agencies to reasonably explain to reviewing courts the bases for the actions they take and the conclusions they reach." *Bhd. of Locomotive Engineers & Trainmen v. Fed. R.R. Admin.*, --- F.3d ---, 2020 WL 5079389, at *26 (D.C. Cir. Aug. 28, 2020).

In determining whether the agency acted arbitrarily and capriciously, a court asks if the agency "examine[d] the relevant data and articulate[d] a satisfactory

explanation for its action." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1288 (11th Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). While a court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned ... [it] may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id*. at 1288 (citations omitted). A court must also find "substantial evidence" for the agency action. *Adefemi v. Ashcroft*, 386 F.3d 1022, 1027 (11th Cir. 2004) (en banc). Accordingly, the agency decision must be "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Perez-Zenteno v. U.S. Att'y Gen.*, 913 F.3d 1301, 1306 (11th Cir. 2019) (citation omitted). Reasoned decisionmaking requires the agency to "examine the relevant data" and precludes the agency from offering "an explanation ... that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43

The CDC Order is arbitrary and capricious because it is not supported by a rational determination drawn from substantial evidence. As a threshold, CDC has not met its baseline obligation of showing that local jurisdictions are taking "insufficient" measures to prevent the spread of COVID-19. Recall that 42 C.F.R. § 70.2 purports to grant authority to CDC when the agency "determines that the measures taken by health authorities of any State … are insufficient to prevent the spread of any of the communicable diseases[.]" But CDC hardly bothers to suggest

that states have undertaken "insufficient" measures by simply allowing eviction processes, irrespective of other mitigation strategies. CDC just asserts that because a nationwide halt to evictions could help spread the disease, jurisdictions "that do not meet or exceed these minimum protections are insufficient to prevent the interstate spread of COVID-19." 85 Fed. Reg. at 55296. That is a fallacy. Even if an eviction moratorium *could* prevent infections, that hardly means a jurisdiction allowing evictions has had an "insufficient" response to the disease.

CDC's inadequate explanation breaks down even more when considering what it omits. Nowhere does CDC even mention any of the efforts taken by *any* jurisdiction to combat COVID-19. Nowhere does it explain why allowing eviction proceedings, more than any other purported lacuna in prevention strategies, represents the line that states may not cross. CDC has cited *no* evidence that any infection has arisen because of an eviction proceeding.[2]

Furthermore, CDC's secondary conclusion, that an eviction moratorium is "necessary" to stop the spread of COVID-19, is unsupported by substantial evidence. In fact, CDC is careful never to actually say that the moratorium is necessary—the best it says is that "[i]n the context of a pandemic, eviction moratoria—like

[2] Instead, CDC asserts that COVID-19 infection rates are concerning in homeless populations. 85 Fed. Reg. at 55295. This hardly proves that eviction proceedings *must* be stopped, and that state mitigation strategies are inadequate if they also allow for evictions.

quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of communicable disease." 85 Fed. Reg. at 55294. But even this tepid statement has no real evidentiary support. As discussed, CDC relies on hyperbole—saying that "mass evictions" and "homelessness" might increase the likelihood of COVID-19, and thus that that the *only* appropriate course of action is to halt evictions nationwide. *See* 85 Fed. Reg. at 55294-96. CDC does not explain sufficiently why this would be so, which by itself warrants rejection of the rule as being inadequately reasoned. *See Perez-Zenteno*, 913 F.3d at 1306. CDC does not explain why other remedial measures are inadequate. Attending school in person and patronizing bars might increase the risk of infection. And North Carolina, where Mr. Rondeau's property is situated, allows both. Yet CDC's Order addresses only evictions as if it were the sole—or even a significant—factor in the spread of the disease. Because CDC did not "examine the relevant data" the Order is invalid. *See Dist. Hosp. Partners, L.P.*, 786 F.3d at 56.

CDC's Order runs counter to the evidence before the agency. CDC's data suggests that evictions are hardly the most pressing concern for virus containment. CDC says the obvious—"The virus that causes COVID–19 spreads very easily and sustainably between people who are in close contact with one another (within about 6 feet), mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks." 85 Fed. Reg. at 55293. And it says "quarantine, isolation,

and social distancing" are sound strategies for reducing transmission. *Id*. at 55294. But that evidentiary thread could only be sufficient to support restrictions that actually address "people who are in close contact with one another." CDC has simply not shown that an eviction leads to homelessness and, in turn, makes close contact more likely. But, as discussed, many daily activities, like shopping, dining, school, worship, etc., clearly do implicate physical closeness. The evidence simply fails to support CDC's Order, and it is thus arbitrary and capricious.

3. The CDC Order Violates Plaintiffs' Right to Access the Courts

"The Constitution promises individuals the right to seek legal redress for wrongs reasonably based in law and fact." *Harer v. Casey*, 962 F.3d 299, 306 (7th Cir. 2020); *see also Christopher v. Harbury*, 536 U.S. 403, 415 (2002) ("However unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court.").

As the Supreme Court recognized more than 100 years ago:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907).

The right is grounded in Article IV's Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth and Fourteenth Amendment Due Process Clauses and the Fourteenth Amendment's Equal Protection Clause. *Christopher*, 536 U.S. at 415 n.12. Regardless of the specific source, citizens have a fundamental right of "access to the courts." *Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *accord Christopher*, 536 US. at 414.

Typically, claims of denial of access to the courts involve "systemic official action [that] frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time." *Christopher*, 536 U.S. at 413. Such a claim "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Id*. at 415. When a government official erects barriers that constitute a "complete foreclosure of relief" for a valid underlying action, the government has denied a plaintiff's right to access the courts. *Harer*, 962 F.3d at 311-12. After all, "[o]f what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom door can be hermetically sealed against him by a functionary who, by refusal or neglect, impedes the filing of his papers?" *McCray v. State of Md.*, 456 F.2d 1, 6 (4th Cir. 1972).

Perhaps the most famous case involving the right to access is also the most applicable here. In *Boddie v. Connecticut*, 401 U.S. 371, 372, 374, 380 (1971), the

Supreme Court invalidated a state law requiring prepayment of filing fees for divorce proceedings because it foreclosed the "sole means … for obtaining a divorce" for indigent litigants. "[G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving [the marriage] relationship" "due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Id*. at 374; *see also Christopher*, 536 U.S. at 413 (citing *Boddie* as an access-to-courts case).

The *Boddie* decision ensures that classes of litigants are not locked out of the courthouse. A law requiring a litigant to post a bond to access a trial in a court of record was invalid, because it was "the only effective means of resolving the dispute at hand." *Lecates v. Justice of Peace Court No. 4 of State of Del.*, 637 F.2d 898, 908 (3d Cir. 1980) (citation omitted). So too was a public school barred from requiring a tenured teacher to pay for the costs of a disciplinary proceeding, as there was no way for a teacher to "exercise" his rights "other than in a manner penalizing those seeking to assert it." *Rankin v. Indep. Sch. Dist. No. I-3, Noble Cty., Okl.*, 876 F.2d 838, 841 (10th Cir. 1989). Courts have recognized that the constitutional guarantee does not rely "solely on the fundamental nature of the marriage relationship" but instead turns on whether "(1) resort to the courts is the sole path of relief, and (2) governmental control over the process for defining rights and obligations is

exclusive." *Lecates*, 637 F.2d at 908-09. Indeed, even a limited property interest in continuing employment as a teacher was of equal weight as the interest in obtaining a divorce in *Boddie*. *Rankin*, 876 F.2d at 841.

The CDC Order has unlawfully stripped Plaintiffs of their constitutional right to access the courts. Mr. Brown, Mr. Rondeau, Mr. Krausz and Ms. Jones have undisputed rights to evict their tenants under state law but have been totally barred by the Order from exercising those rights. Mr. Brown has a valid lease agreement and has provided habitable premises to his tenant. (Brown Decl. at ¶¶ 5-7.) Yet the tenant has refused to pay him rent, now owing him almost *ten times* the monthly rent—a total of $8092. (Brown Decl. at ¶ 6.) Ms. Jones' tenant has also fallen behind and owes four months of back rent. (Jones Decl. at ¶¶ 3-4.) And Mr. Rondeau and Mr. Krausz have actually obtained eviction orders from their respective state courts because of their tenants' nonpayment of rent. (Rondeau Decl. at ¶ 9; Krausz Decl. at ¶ 10.) If not for CDC's Order, Plaintiffs would be fully entitled to have their tenants ejected from their properties so that they could either use them or seek rent from solvent tenants. Plaintiffs have therefore met the initial requirement of showing the merit of their underlying claims. *See Christopher*, 536 U.S. at 413.

The Order constitutes a "complete foreclosure of relief" because it denies Plaintiffs the *only* lawful means of regaining possession of their property. *See Harer*, 962 F.3d at 311-12. Mr. Brown ordinarily would be entitled to terminate the rental

agreement and retake possession through eviction proceedings for his tenant's nonpayment. Va. Code §§ 55.1-1245(f), 55.1-1251. But court proceedings are a Virginia landlord's *sole* means of reacquiring possession of his residential property. A sheriff must enforce a writ of eviction. *See* Va. Code § 8.01-470 (writs of eviction generally). A residential landlord is forbidden from taking possession of his own property. Va. Code § 55.1-1252. In fact, "[i]f a landlord unlawfully removes or excludes a tenant from the premises … the *tenant* may obtain an order from a general district court to recover possession, require the landlord to resume any such interrupted essential service, or terminate the rental agreement and, in any case, recover the actual damages sustained by him and reasonable attorney fees." Va. Code. § 55.1-1243(a) (emphasis added). Thus, "self help" evictions are unlawful in the Commonwealth and can themselves be prosecuted as an unlawful eviction. *See Evans v. Offutt*, 6 Va. Cir. 528, 1978 WL 208147, at *5 (Cir. Ct. Arl. Cty. 1978).

For Mr. Rondeau, Mr. Krausz and Ms. Jones the rules are largely the same. In North Carolina, when a landlord proves a tenant has breached his lease agreement a magistrate "shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises[.]" N.C. Gen. Stat. § 42-30. Before executing a writ of possession, a sheriff must provide the tenant with at least five days' notice. N.C. Gen. Stat. § 42-36.2(a). "It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall

be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure" set out in the law. N.C. Gen. Stat. § 42-25.6. Since 1981, North Carolina has "prohibited" "all self-help evictions in residential tenancies." *Stanley v. Moore*, 454 S.E.2d 225, 228 (N.C. 1995).

In South Carolina, a landlord must also utilize a court eviction process and obtain a writ of ejectment from judge. *See* S.C. Code § 27-40-710. The writ must be executed by a state official, and a landlord may not attempt to evict a tenant through self-help. S.C. Code § 27-40-760. A landlord is also liable to a tenant for the greater of three months' rent or twice actual damages for an unlawful ouster if he attempts to evict a tenant outside the court process. S.C. Code § 27-40-660.

Georgia also requires residential landlords to use court eviction proceedings, and only permits eviction by a sheriff's execution of a writ of possession. *See* Ga. Code § 44-7-55(d). Without being issued such a writ, a landlord may not retake possession of her residential property. *See id.* A landlord who resorts to self-help evictions faces criminal punishment. *See* Ga. Code § 44-7-14.1.

This process is the same in essentially the same form across the country. "[T]he growing modern trend holds that self-help is never available to dispose of a tenant." Shannon Dunn McCarthy, *Squatting: Lifting the Heavy Burden to Evict Unwanted Company*, 9 U. Mass. L. Rev. 156, 178 (2014). "Most states have eliminated the ability of homeowners to use self-help in the residential housing

context." *Id*. Eviction proceedings are the sole means for nearly all of NAA's 85,485 member landlords to retake possession of their property. (*See* Pinnegar Decl. at ¶ 2.)

The CDC Order has thus deprived Plaintiffs of their only path for recovery of their property. Because the "governmental control over the process for defining rights and obligations" for evictions "is exclusive," see *Lecates*, 637 F.2d at 908-09, and the Order has closed the "only effective means of resolving the dispute at hand," see *Boddie*, 401 U.S. at 376, Plaintiffs' rights to access the courts have been violated.

C. Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction

To satisfy the irreparable harm requirement, Plaintiffs need only demonstrate that absent a preliminary injunction, they are "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (citation omitted). When a plaintiff is an organization representing affected members, courts aggregate the harm affecting an organization's members. *See, e.g.*, *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

"An injury is 'irreparable' only if it cannot be undone through monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir.

2001) (citation omitted).[3] This is because the constitutional injuries cannot be made whole. *See Kikumura*, 242 F.3d at 963.

Monetary harms are irreparable when there is no adequate remedy available. *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 1242 (11th Cir. 2005). Often, "[t]hese injuries are in the form of lost opportunities, which are difficult, if not impossible, to quantify." *Id.*; *see also Ferrero v. Assoc. Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir.1991) ("loss of customers and goodwill is an 'irreparable' injury"). Harm is also irreparable when "damages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected." *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984), and collecting cases).

Plaintiffs have suffered and will continue to suffer from irreparable harm in

[3] *See also Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("When constitutional rights are threatened or impaired, irreparable injury is presumed."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("The district court properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights."); *Davis v. D.C.*, 158 F.3d 1342, 1346 (D.C. Cir. 1998) ("A prospective violation of a constitutional right constitutes irreparable injury."); *Northeastern Fla. Chapter of the Assoc. of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (citing cases and saying, "The rationale behind these decisions was that chilled free speech and invasions of privacy, because of their intangible nature, could not be compensated by monetary damages; in other words, plaintiffs could not be made whole").

two forms: (1) violation of their constitutional rights; and (2) noncompensable loss of the value of their property. As discussed, the CDC Order is unconstitutional, and thus Plaintiffs need not show any harm beyond that fundamental violation of their rights. *See Assoc. of Gen. Contractors*, 896 F.2d at 1285.

Plaintiffs cannot recover any of the economic damages they continue to incur because tenants covered by the CDC Order, by definition, are insolvent. Indeed, the Order expressly applies only to *insolvent* tenants, who are "unable to pay the full rent." 85 Fed. Reg. at 55293. For Mr. Brown, Mr. Rondeau Mr. Krausz, and Ms. Jones the economic harms are immediate. To date, Mr. Brown's tenant owes him more than $8000 in unpaid rent. (Brown Decl. at ¶ 6.) That says nothing of the costs of maintaining the of the property or the lost revenue Mr. Brown could generate were he able to place the property on the market. (Brown Decl. at ¶ 14.) Mr. Rondeau's tenant owes more than $2100 in rent and fees, yet Mr. Rondeau carries a mortgage on the property that is almost equal to his monthly mortgage payment. (Rondeau Decl. at ¶¶ 4, 7.) If he is unable to collect any rents until the Order's 2021 expiration, Mr. Rondeau faces the real possibility of losing his property in foreclosure. (Rondeau Decl. at ¶ 14.) Mr. Krausz and Ms. Jones are owed more than $2265 and $1800, respectively, in unpaid rent, and they too must continue to incur expenses in providing the tenant with a habitable home. (Krausz Decl. at ¶ 14; Sonya Jones Dec. ¶ 10.) Their tenants have also demonstrated that they do not have the money to

satisfy their obligations, which is why eviction is such an essential remedy. Eviction is the only remedy that could allow Mr. Brown, Mr. Rondeau, Mr. Krausz or Ms. Jones to place their properties on the market and seek rent from a solvent lessee, and it is the only one that would relieve them of their unilateral obligations to maintain the property for a tenant in breach.

NAA's members suffer these same harms on a nationwide scale. They can expect only a third of tenants to make on-time payments, with even fewer tenants in Class C properties making *any* payments by the 15th of the next month. *See* Popov, et al., *supra*. While 10% of tenants nationwide will likely not pay any rent, those numbers will likely be higher for low-income tenants. *See id.*; LeaseLock, *supra*. Even a 10% default rate would be catastrophic for NAA's members, as those landlords would have no recourse through eviction. These numbers will likely rise every month, as more and more tenants fell behind, forcing NAA's 85,485 to cover millions in costs for defaulting tenants, with no hope of any recovery from either the tenants or any of the defendants. (*See* Pinnegar Decl. at ¶¶ 1, 4-5.)

A preliminary injunction is therefore necessary to secure Plaintiffs' opportunity to recover the value of their properties as to both the "insolvent" tenants and the "loss of valuable business opportunities" that the Order has denied them. *See MacGinnitie*, 420 F.3d at 1242; *Hughes Network Sys., Inc.*, 17 F.3d at 694.

D. The Balance of Equities Weighs Heavily in Favor of Plaintiffs

A preliminary injunction is proper when "the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken*, 556 U.S. at 435.

"[T]here is a strong public interest in requiring that the plaintiffs' constitutional rights no longer be violated[.]" *Laube v. Haley*, 234 F.Supp. 2d 1227, 1252 (M.D. Ala. 2002); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Republican Party of Minn. v. White*, 416 F.3d 738, 753 (8th Cir. 2005) ("It can hardly be argued that seeking to uphold a constitutional protection ... is not per se a compelling state interest."); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("The vindication of constitutional rights ... serve[s] the public interest almost by definition.").

The CDC Order is unconstitutional and thus the balance of equities weighs heavily in favor of the preliminary injunction. Whatever the need for a government response to the COVID-19 pandemic, the Order advance one specific policy solution in violation of the constitutional interests of property holders across the nation. CDC's Order is a ham-fisted effort to address the pandemic in a strained and illogical

way. Moreover, it is a gross violation of CDC's constitutional limitations. The equities therefore require that the CDC Order be preliminarily enjoined.[4]

III. CONCLUSION

For the reasons set out above, the Court should enter a preliminary injunction against the CDC Order.

[4] For largely the same reasons no bond should be required here. Federal Rule of Civil Procedure 65(c) says, "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." But Plaintiffs are entitled to evict their tenants, and the TRO would do nothing more than restore the judicial process wrongly denied to them. The CDC can hardly incur damages by following the federal constitution and a process created by state laws.

September 18, 2020

Respectfully,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing court filing has been prepared in 14-point Times New Roman font and complies with LR 5.1, NDGa and LR 7.1(D), NDGa.

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD LEE BROWN.	:	
	:	CIVIL ACTION NO.:
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
SECRETARY ALEX AZAR, ET AL.	:	
	:	
Defendants.	:	

DECLARATION OF RICHARD LEE BROWN IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I, Richard Lee Brown, declare under penalty of perjury that the following is true and correct to the best of my present knowledge, information and belief:

1. I am a resident of the Commonwealth of Virginia and the Plaintiff in this matter.

2. I have reviewed the Complaint in this matter and verify the factual allegations set out therein.

3. I own a residential property at 325 Highland Ave Winchester VA 22601 ("the property").

4. I have a mortgage on the property and makes monthly payments of approximately $400 for the mortgage principal, interest and taxes.

5. On April 1, 2017, I leased the property to a tenant, who agree to pay monthly rent of $925. The lease automatically renewed several times and is currently in effect.

6. The tenant of my property has fallen behind on rent, and told me that she is unable to pay because of economic stress arising from the COVID-19 pandemic, has used best efforts to obtain available government assistance and otherwise pay rent, has no other home to go to, and is making less than $99,000 annually. To date, the tenant owes $8,092 in unpaid rent, and has made no payments at all to me for several months.

7. I have maintained the property in compliance with all legal obligations as a landlord, and the tenant has no defense to her nonpayment of rent. I am also entitled to a writ of possession and a writ of eviction under Virginia law.

8. On August 18, 2020, I attempted to have the Winchester City Sheriff's Department serve a five-day termination notice pursuant to Va. Code § 55.1-1245(f) to the tenant. Sheriff Les Taylor informed me that the Winchester City Sheriff's Department would no longer issue and serve such notices in compliance with a then-existing order by the Supreme Court of Virginia. That order expired on September 7, 2020.

9. I now intend to seek eviction of my tenant for nonpayment of rent using legal process in Virginia state courts.

10. Based on information provided to me by my tenant, I believe my tenant is a "covered person" as defined by the CDC order, and will provide a relevant affidavit to me if I initiate eviction procedures against her.

11. I intend to violate CDC's order through lawful processes under Virginia law by seeking an eviction order, and having a sheriff forcibly remove my tenant from the property.

12. I intend to violate CDC's order even if my tenant presents an attestation in eviction proceedings that she is a "covered person" as defined in CDC's order.

13. I continue to provide habitable premises to the tenant, and my tenant has no defense to eviction under Virginia law.

14. Because of the CDC Order, I have significant economic damages, including $8,092 in unpaid rent, as well as monthly maintenance costs, damages to my property and the lost opportunity to rent or use the property at fair market value of at least $925 per month. The tenant is also insolvent, and I will not be able to obtain any economic relief or damages from her. My only opportunity to mitigate my loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant.

Executed on Sept. 8th, 2020

Richard Lee Brown

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD LEE BROWN, ET AL., :
: CIVIL ACTION NO.:
: 1:20-cv-3702-WMR
:
Plaintiffs, :
:
v. :
:
SEC. ALEX AZAR, ET AL., :
:
Defendants. :

DECLARATION OF JEFFREY RONDEAU IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Jeffrey Rondeau, declare under penalty of perjury that the following is true and correct to the best of my present knowledge, information and belief:

1. I am a resident of the State of New Jersey and a plaintiff in this matter.

2. I have reviewed the Complaint in this matter and verify the factual allegations set out therein as they relate to matters within my personal knowledge.

3. I own a residential property in Vale, North Carolina. I purchased the property to be my home when I retire.

4. I have a mortgage on the property and makes monthly payments of approximately $880 for the mortgage principal, interest and taxes.

5. On May 1, 2019, I leased the property to a tenant who agreed to pay monthly rent of $1,000. The lease was renewed on May 1, 2020 and is currently in effect.

6. I contracted with a property management company that collects rent from the property, and, in exchange, collects 10% of the monthly rent ($100).

7. The tenant of my property has a history of paying rent after its due date. The tenant has now fallen behind on rent, and not paid any rent since July 6, 2020. To date the tenant owes $2,100 in unpaid rent and associated late fees. The tenant also owes unpaid court costs and legal fees as allocated by North Carolina law.

8. On August 17, 2020 my property management company filed for a writ of summary ejectment in North Carolina state court. On August 24, 2020 the state court granted the writ and ordered that I am entitled to take legal possession of the property. That order became final on September 3, 2020 when the tenant failed to appeal.

9. I sought a writ of possession from the Lincoln County, North Carolina Sheriff's Department on or about September 14, 2020. Pursuant to the request the Sheriff's Department scheduled an eviction of my tenant on September 21, 2020 at 9:00 a.m.

10. Around September 6, 2020, my tenant provided me with an affidavit consistent with the CDC's September 4, 2020 eviction order, declaring that the tenant was unable to pay because of economic stress arising from the COVID-19

pandemic, had used best efforts to obtain available government assistance and was using best efforts to make timely partial payments that are as close to the full payment as possible, had no other home to go to, and was making less than $99,000 annually.

11. I have maintained the property in compliance with all legal obligations as a landlord, and the tenant has no defense for their nonpayment of rent. I am also entitled to regain possession of the property under North Carolina law.

12. I intend to use legal means under North Carolina law to remove the tenant from my property notwithstanding the CDC Order purporting to halt state eviction proceedings.

13. Because of the CDC Order, I have incurred significant economic damages, including $2,100 in unpaid rent and fees, as well as monthly maintenance costs, damages to my property and the lost opportunity to rent or use the property at fair market value of at least $1,000 per month. The tenant is also insolvent, and I will not be able to obtain any economic relief or damages from her. My only opportunity to mitigate my loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant.

14. If I am unable to earn any rental income for the property prior to January 2021, I will likely be unable to pay my existing mortgage and will be at risk of foreclosure.

Executed on Sept. 16, 2020

Jeffrey Rondeau

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD LEE BROWN, ET AL.,	:	
	:	CIVIL ACTION NO.:
	:	1:20-cv-3702-WMR
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SEC. ALEX AZAR, ET AL.,	:	:
Defendants.	:	

DECLARATION OF DAVID KRAUSZ IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, David Krausz, declare under penalty of perjury that the following is true and correct to the best of my present knowledge, information and belief:

1. I am a resident of the State of South Carolina and a plaintiff in this matter.

2. I have reviewed the Complaint in this matter and verify the factual allegations set out therein as they relate to matters within my personal knowledge.

3. I own a residential property in Columbia SC, which I leased to a tenant for a monthly rent of $700. I have a currently effective lease agreement with the tenant.

4. My tenant fell behind on rent in July 2020, and now owes approximately $2265 in unpaid rent.

5. On July 7, 2020, I filed an Application For Ejectment (Eviction) to initiate the legal eviction process under South Carolina law.

6. My tenant requested a hearing, which was held on July 30, 2020.

7. At the hearing my tenant and I entered into a consent agreement where she would have 4 days to pay $700 towards past due rent, and then was required to pay an additional $2265 in unpaid rent by August 31, 2020. The tenant agreed to waive their right to an additional hearing. If the tenant breached the agreement, which was accepted by the court, then I was entitled to request the court issue the Writ of Ejectment immediately without any further hearings on the matter.

8. The tenant paid $700 for July's rent as agreed but failed to pay any portion of the outstanding $2265.

9. On September 11, 2020 I requested service of a writ of ejectment from the magistrate court, which is a process by which a sheriff evicts a tenant under South Carolina law.

10. The writ was granted, and the Richland County South Carolina Sheriff's Department scheduled an eviction of my tenant for September 21, 2020.

11. On September 16, 2020, my tenant provided the South Carolina court with a declaration consistent with the CDC's September 4, 2020 eviction order, declaring that the tenant was unable to pay rent because of economic stress arising from the COVID-19 pandemic, had used best efforts to obtain available government assistance and was using best efforts to make timely partial payments that are as

close to the full payment as possible, had no other home to go to, and was making less than $99,000 annually.

12. The South Carolina court then immediately stayed the eviction.

13. I have maintained the property in compliance with all legal obligations as a landlord, and the tenant has no defense for her nonpayment of rent. I am also entitled to regain possession of the property under South Carolina law.

14. Because of the CDC Order, I have incurred significant economic damages, including approximately $2,265 in unpaid rent and fees, as well as monthly maintenance costs, damages to my property and the lost opportunity to rent or use the property at fair market value of at least $700 per month. The tenant appears to be insolvent, and I will not likely be able to obtain any economic relief or damages from her. My only opportunity to mitigate my loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant.

Executed on 9/17, 2020

David G. Krausz

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD LEE BROWN, ET AL.,	:	
	:	CIVIL ACTION NO.:
	:	1:20-cv-3702-WMR
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SEC. ALEX AZAR, ET AL.,	:	
	:	
Defendants.	:	

DECLARATION OF SONYA JONES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Sonya Jones, declare under penalty of perjury that the following is true and correct to the best of my present knowledge, information and belief:

1. I am a resident of the State of Georgia and a plaintiff in this matter.

2. I have reviewed the Complaint in this matter and verify the factual allegations set out therein as they relate to matters within my personal knowledge.

3. I own a residential property in Jesup, GA, which I leased to a tenant for a monthly rent of $450. I have a currently effective lease agreement with the tenant.

4. My tenant has fallen behind on rent and now owes more than $1800 in unpaid rent. The tenant also owes additional late fees. Under Georgia law I am entitled to seek an eviction for nonpayment of rent.

5. On August 24, 2020 I filed and served a dispossessory affidavit on my tenant consistent with Georgia law, which directed my tenant to vacate the property.

6. The tenant requested a hearing, which was held on September 8, 2020. That was the first business day following the effective date of the CDC's eviction moratorium order.

7. At the hearing the tenant said that his challenge to the eviction was related to the COVID-19 pandemic, and the court continued all proceedings until January 2021 in purported compliance with CDC's eviction moratorium order.

8. Based on information provided to me by my tenant, and the tenant's representations in court, I believe my tenant is a "covered person" as defined by the CDC order.

9. I have maintained the property in compliance with all legal obligations as a landlord, and the tenant has no defense for their nonpayment of rent. I am also entitled to regain possession of the property under Georgia law.

10. Because of the CDC Order, I have incurred significant economic damages, including approximately $1,800 in unpaid rent and fees, as well as monthly maintenance costs, damages to my property and the lost opportunity to rent or use the property at fair market value of at least $450 per month. The tenant is also insolvent, and I will not be able to obtain any economic relief or damages from him. My only opportunity to mitigate my loss will be from ousting the tenant who is in wrongful possession of the premises and renting the property to another tenant.

Executed on 9-16, 2020

Sonya Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD LEE BROWN, ET AL.,	:	
	:	CIVIL ACTION NO.:
	:	1:20-cv-3702-WMR
Plaintiffs,	:	
v.	:	
SEC. ALEX AZAR, ET AL.,	:	
Defendants.	:	

DECLARATION OF ROBERT PINNEGAR IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Robert Pinnegar, declare under penalty of perjury that the following is true and correct to the best of my present knowledge, information and belief:

1. I am the CEO of the National Apartment Association (NAA), the largest national trade association dedicated to the interests of rental housing providers in the United States. NAA represents the owner and managers of over 10 million apartment homes and has 85,185 members who have been harmed by the CDC Order.

2. Rental property owners and managers have the same interests in the orderly administration of justice as do other citizens. The COVID-19 epidemic has disrupted that process by closing courts around the country and delaying the ability

of NAA members to provide housing to those who wish to rent and by freeing up housing units from those who are not paying rent.

3. The eviction process could last 30 days to six months depending upon the jurisdiction in normal times. While the courts are gradually reopening, criminal cases continue to receive priority because of Speedy Trial concerns and court dates were delayed by weeks and months (in some cases) even before the CDC's order. Now the rent debt from the Spring months has become uncollectable in many cases and the CDC order has limited housing owners and managers from providing contracted services to tenants who have paid their rent and paying financial obligations like taxes and mortgages.

4. Some NAA members include publicly traded companies with obligations to their shareholders. However, the vast majority of rental housing in the United States is owned by small investors who use the rental income to supplement retirement plans and social security payments. That rental income is disappearing because the CDC Order was issued without an opportunity for normal notice and commentary at a time when the rental housing sector was already under extreme pressure.

5. NAA's members have been irreparably harmed by the CDC order and its unwarranted insertion of authority into landlord /tenant regulation in an area historically addressed by the courts and state legislatures.

Executed on 9-20, 2020

Robert Pinnegar
CEO
National Apartment Association

Attachment D

Order Denying Motion for Preliminary Injunction

(ECF No. 48)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD LEE BROWN, et al.,

Plaintiffs,

v.

ALEX AZAR, in his official capacity as Secretary, U.S. Department of Health & Human Services, et al.,

Defendants.

CIVIL ACTION NO.
1:20-CV-03702-JPB

ORDER

This matter is before the Court on Richard Lee Brown, Jeffrey Rondeau, David Krausz, Sonya Jones and the National Apartment Association's ("NAA") (collectively, "Plaintiffs") Motion for Preliminary Injunction. [Doc. 18]. This Court finds as follows:

FACTS AND PROCEDURAL HISTORY

"It would be a colossal understatement to say that the COVID-19 pandemic has had far-reaching effects. It has changed everything from the way that friends and families interact to the way that businesses and schools operate to the way that courts hear and decide cases." Swain v. Junior, 961 F.3d 1276, 1280 (11th Cir. 2020). As a result of the pandemic, "Federal, State, and local governments have

taken unprecedented or exceedingly rare actions, including border closures, restrictions on travel, stay-at-home orders, mask requirements, and eviction moratoria." Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020). This case involves one of those measures—eviction moratoria for certain qualifying individuals.

On September 4, 2020, the Centers for Disease Control and Prevention ("CDC"), a division of the Department of Health and Human Services ("HHS"), implemented a temporary eviction moratorium to prevent the further spread of COVID-19 (the "Order"). Id. While the Order is in place (September 4, 2020, through December 31, 2020, unless extended, modified or rescinded), landlords are prohibited from evicting a covered person from a residential property for the non-payment of rent. Id. at 55,292, 55,297. To qualify as a covered person, the individual tenant must provide a declaration to their landlord under penalty of perjury indicating that: (1) "[t]he individual has used best efforts to obtain all available government assistance for rent or housing"; (2) the individual satisfies certain income requirements; (3) "the individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses"; (4) "the individual is using best efforts to make timely partial

payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses"; and (5) "eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options." Id. at 55,293.

While the Order temporarily prohibits evictions of covered persons, the Order makes clear that it "does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation that the individual may have under a tenancy, lease, or similar contract." Id. at 55,294. The Order explicitly provides that the landlord is not precluded from charging or collecting fees, penalties or interest as a result of the failure to pay rent on a timely basis. Id. Moreover, nothing in the Order prevents evictions based on the tenant:

> (1) [e]ngaging in criminal activity while on the premises; (2) threatening the health or safety of other residents; (3) damaging or posing an immediate and significant risk of damage to property; (4) violating any applicable building code, health ordinance or other similar regulation relating to health and safety; or (5) violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment.

Id.

Except for Plaintiff NAA,[1] Plaintiffs are landlords seeking to evict their tenants for the non-payment of rent. Each of the individual plaintiffs supplied affidavits in support of the Motion for Preliminary Injunction. [Docs. 18-2, 18-3, 18-4 and 18-5]. Plaintiff Brown, according to his affidavit, owns a rental property in Virginia and is currently leasing it to a tenant for $925.00 per month. [Doc. 18-2, pp. 1-2]. Plaintiff Brown asserts that his tenant has not made payments for the past several months, and that if he initiates eviction proceedings against her, she will provide a declaration indicating that she is a covered person under the Order. Id. at 2-3. Plaintiff Brown concludes his affidavit by stating that his tenant is insolvent, and he will not be able to obtain any economic relief or damages from her. Id. at 3.

Similarly, Plaintiff Rondeau owns a rental property in Vale, North Carolina. [Doc. 18-3, p. 1]. Plaintiff Rondeau's property is currently leased to a tenant at a rate of $1,000.00 per month. Id. When Plaintiff Rondeau's tenant fell behind on her rental payments, Plaintiff Rondeau secured a writ of possession, and the Sheriff's Department scheduled the eviction for September 21, 2020. Id. The

[1] Plaintiff NAA, which has members in every state, is a trade association for owners and managers of rental housing. [Doc. 12, p. 3]. Plaintiff NAA is comprised of 157 state and locally affiliated apartment associations and over 85,485 members managing more than ten million rental units throughout the United States. Id. at 3-4.

eviction, however, did not proceed because the tenant provided Plaintiff Rondeau with a declaration indicating that she is a covered person under the Order. Id. at 1-2. Like Plaintiff Brown, Plaintiff Rondeau concludes his affidavit by stating that the tenant is insolvent, and he will not be able to obtain any economic relief or damages from her. Id. at 2.

Plaintiff Krausz owns a rental property in Columbia, South Carolina, and is currently leasing the property to a tenant for a monthly rent of $700.00. [Doc. 18-4, p. 1]. When Plaintiff Krausz' tenant failed to comply with the terms of a consent agreement regarding past due rent, Plaintiff Krausz obtained a writ of possession and scheduled the eviction for September 21, 2020. Id. at 2. Before the eviction could be executed, Plaintiff Krausz' tenant provided him with a declaration indicating that she is a covered person under the Order. Id. at 2-3. As a result, the eviction did not proceed as scheduled. Id. Plaintiff Krausz asserts that the tenant appears to be insolvent and that he will likely be unable to obtain any economic relief or damages from her. Id. at 3.

Plaintiff Jones owns a rental property in Georgia. [Doc. 18-5, p. 1]. On August 24, 2020, Plaintiff Jones began the eviction process by serving her tenant with a dispossessory affidavit. Id. At the hearing to determine whether the tenant would be evicted, which was held on September 8, 2020, Plaintiff Jones' tenant

represented to the court that his failure to pay rent was related to the COVID-19 pandemic. Id. Even though Plaintiff Jones' tenant did not submit a declaration that would comply with the Order or show that he is a covered person, the dispossessory court continued all proceedings until January 2021. Id. Plaintiff Jones concludes that her tenant is insolvent and that she will not be able to obtain any economic relief or damages from him. Id. at 2.

On September 8, 2020, Plaintiff Brown brought this action against Alex Azar, in his official capacity as Secretary of HHS, HHS, Nina B. Witkofsky, in her official capacity as acting chief of staff for the CDC, and the CDC (collectively, "Defendants") seeking to invalidate the Order. [Doc. 1]. Thereafter, on September 18, 2020, an Amended Complaint was filed adding the other plaintiffs. [Doc. 12]. The instant Motion for Preliminary Injunction was also filed on September 18, 2020. [Doc. 18]. In their Motion for Preliminary Injunction, Plaintiffs ask this Court to enter an order prohibiting Defendants from enforcing the Order. Id. at 10. Briefing on the motion closed on October 16, 2020,[2] and oral argument was heard by video conference on October 20, 2020. Plaintiffs' motion is ripe for review.

[2] In addition to the parties' briefs, and with the Court's permission, two amicus curiae briefs were filed with the Court. The first brief was submitted by twenty-four national and local associations and experts who focus on housing and/or public health. [Doc. 31-1, pp. 3-4]. Atlanta Legal Aid Society, the National Housing Law Project and Legal Services of Northern Virginia submitted the second brief. [Doc. 33-1].

ANALYSIS

A plaintiff seeking preliminary injunctive relief must show the following:

> (1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest.

Sofarelli v. Pinellas Cnty., 931 F.2d 718, 723-24 (11th Cir. 1991) (citation omitted). "[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establish[es] the 'burden of persuasion' as to each of the four prerequisites." Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (citation omitted). Granting a preliminary injunction is the exception rather than the rule. Id.

As a preliminary matter, Defendants challenge Plaintiffs' standing to bring the suit. They also argue that the action cannot proceed because Plaintiffs failed to join indispensable parties. The Court will first address the standing and joinder issues before turning to an analysis of the four preliminary injunction prerequisites.

I. Preliminary Issues

A. Plaintiffs' Standing

This Court must first answer the threshold question of whether Plaintiffs have standing. Litigants must have standing to properly invoke the jurisdiction of

the federal courts. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). "In the absence of standing, a court is not free to opine in an advisory capacity about the merits of a plaintiff's claims, and the court is powerless to continue." Hollywood Mobile Estates Ltd. v. Seminole Tribe, 641 F.3d 1259, 1265 (11th Cir. 2011) (citation omitted). The standing doctrine requires a plaintiff to show that he: (1) suffered an injury-in-fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision. Lujan, 504 U.S. at 560. At the pleading stage, the court must accept as true all material allegations and must construe them in favor of the complaining party. Corbett v. Transp. Sec. Admin., 930 F.3d 1225, 1228 (11th Cir. 2019). If a court is presented with "facts beyond the four corners of the pleading that are relevant to the question of standing," the court may consider those facts. Id. (citation and punctuation omitted).

Defendants contest the injury-in-fact requirement. The injury-in-fact requirement helps "ensure that the plaintiff has a 'personal stake in the outcome of the controversy.'" Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (citation omitted). A plaintiff must show that the injury is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" Id. (citation omitted). "An allegation of future injury may suffice if the threatened

injury is certainly impending or there is a substantial risk that the harm will occur." Id. (citation and punctuation omitted).

Each of the individual plaintiffs stated in their affidavits that because of the Order, they had incurred "damages to [their] property." [Docs. 18-2, p. 3, 18-3, p. 2, 18-4, p. 3 and 18-5, p. 2]. Taking issue with this particular statement, Defendants argue that the Order does not actually apply to any of the individual plaintiffs, and thus they are not injured. Defendants contend that the individual plaintiffs are permitted to evict each of their tenants now, despite the Order, because the Order permits a landlord to evict a tenant who damages property or poses a significant risk of damage to property. This Court disagrees.

As an initial matter, "[w]here only injunctive relief is sought, only one plaintiff with standing is required." Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration & Elections, 446 F. Supp. 3d 1111, 1118 (N.D. Ga. 2020) (citation and punctuation omitted); see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 n.9 (1977) (holding that when at least one plaintiff has standing, the Court need not consider whether the other plaintiffs have standing to maintain the suit). For the reasons explained below, this Court finds that at least two of the plaintiffs—Plaintiff Rondeau and Plaintiff Krausz—have shown that they have standing to bring this action.

Plaintiff Rondeau submitted an affidavit wherein he explained that he currently has a tenant renting his property in Vale, North Carolina for $1,000.00 a month. [Doc. 18-3, p. 1]. Plaintiff Rondeau's tenant has not paid any rent since July 6, 2020, and currently owes $2,100.00 in unpaid rent and associated late fees. Id. On August 24, 2020, Plaintiff Rondeau obtained a writ of summary ejectment for the non-payment of rent, which became final on September 3, 2020. Id. He subsequently obtained a writ of possession and scheduled the eviction for September 21, 2020. Id. Before Plaintiff Rondeau's tenant was removed, his tenant provided him with a declaration consistent with the Order, thus stopping the eviction. Id. at 1-2. Although Plaintiff Rondeau stated in his affidavit that he has incurred "damages to [his] property," no evidence is before the Court that Plaintiff Rondeau's tenant damaged the property in such a way that she could be evicted for anything other than the non-payment of rent.[3] The fact remains that Plaintiff Rondeau obtained a writ of possession based on the non-payment of rent, and not on any other ground.

This Court finds that Plaintiff Rondeau's injury is concrete and

[3] In addressing Defendants' argument as to this issue in their reply brief, Plaintiffs state that the damages mentioned in the affidavits refer to "wear and tear and ordinary damage to their property while their tenants remain [in the property] without legal authorization." [Doc. 45, pp. 4-5].

particularized. He obtained a writ of summary ejectment based on the non-payment of rent, a writ of possession and subsequently scheduled an eviction for September 21, 2020. When his tenant provided a declaration consistent with the Order, he was unable to proceed with the eviction. Now, his tenant remains in the property despite not paying rent. This is not a conjectural or hypothetical injury. But for the Order, Plaintiff Rondeau would have evicted his tenant. Accordingly, Plaintiff Rondeau has shown that he has standing to pursue the action.

Similarly, Plaintiff Krausz obtained a writ of ejectment with an eviction scheduled for September 21, 2020. [Doc. 18-4, p. 2]. Like Plaintiff Rondeau, the eviction was immediately stayed after Plaintiff Krausz' tenant presented a declaration showing that she is a covered person under the Order. Id. at 2-3. Accordingly, for the same reasons Plaintiff Rondeau has standing, Plaintiff Krausz does also.

For different reasons, Defendants separately attack the standing of Plaintiff Brown, Plaintiff Jones and Plaintiff NAA.[4] As explained above, however, when a case involves multiple plaintiffs and injunctive relief is sought, a court need not address the standing for each plaintiff. Therefore, at this time, this Court will not

[4] For instance, Defendants attack the standing of Plaintiff Brown because he has not yet initiated eviction proceedings and merely believes that if he did start the proceedings, his tenant would submit a declaration showing that she is a covered person under the Order.

analyze whether the remaining plaintiffs have standing.

B. Indispensable Parties

Defendants contend that Plaintiffs' tenants are indispensable parties, thus precluding the possibility of injunctive relief. Federal Rule of Civil Procedure 19 sets forth a two-part test for determining whether a party is indispensable. The court must first decide under Rule 19(a) whether the person in question should be joined. Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 847 (11th Cir. 1999). Then, if the court determines that the person should be joined, but for some reason cannot be, "the court must analyze the factors outlined in Rule 19(b) to determine whether 'in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person thus regarded as indispensable.'" Id. (citation omitted).

Rule 19(a)(1) sets forth two categories of necessary parties who must be joined if feasible:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

In deciding whether a party should be joined under Rule 19(a), "'pragmatic concerns, especially the effect on the parties and the litigation,' control." Challenge Homes, Inc. v. Greater Naples Care Ctr., Inc., 669 F.2d 667, 669 (11th Cir. 1982) (citation omitted).

In this case, Defendants have not shown that the tenants are necessary parties who should be, but cannot be, joined under Rule 19(a). As to the first category of necessary parties, Defendants have made no showing that complete relief is impossible absent the joinder of the tenants. Although Defendants argue that the tenants are necessary parties because an issue exists as to whether the tenants are actually covered persons under the Order, the parties can determine through discovery whether the tenant is a covered person even if that tenant is not made a party to this litigation. This argument is thus without merit.

As to the second category of necessary parties, which includes whether the party has an interest related to the subject of the action and the party's absence may impede the party's ability to protect that interest, Defendants have also failed to

meet their burden. Even though Plaintiffs' tenants unquestionably have an interest in this litigation inasmuch as if the Order is enjoined, then the tenants would no longer have protection against eviction through December 31, 2020, the tenants' interests remain adequately protected because they squarely align with Defendants' interests. Cf. Fla. Wildlife Fed'n, Inc. v. U.S. Army Corps. of Eng'rs, 859 F.3d 1306, 1317 (11th Cir. 2017) (recognizing that the potential indispensable party at issue had a strong interest in the outcome of the litigation and that the party's interest was not adequately protected by the existing parties). Furthermore, even though Plaintiffs' tenants have an interest in the home in which they live and are currently renting, the existing parties are not subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of that interest. Ultimately, because the tenants do not fit any of the Rule 19(a) categories for persons who should be joined if feasible, the tenants are not indispensable parties under Rule 19. As Defendants have not shown that Plaintiffs' tenants should be joined as parties, this Court need not analyze the second part of the test—determining whether in equity and good conscience the action should proceed.

For the reasons explained in the sections above, the Court is satisfied that Plaintiff Rondeau and Plaintiff Krausz have standing, and the action need not be

dismissed for the failure to join indispensable parties. As such, this Court will now review whether preliminary injunctive relief is proper.

II. Preliminary Injunction Prerequisites

A. Substantial Likelihood of Success on the Merits

A plaintiff seeking preliminary injunctive relief must show a substantial likelihood that he will ultimately prevail on the merits of his claim. Sofarelli, 931 F.2d at 723. This factor is generally considered the most important of the four factors. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986).

Plaintiffs' Amended Complaint raises eight challenges to the Order. [Doc. 12]. In their Motion for Preliminary Injunction, however, they advance only three of the claims. First, Plaintiffs contend that the Order lacks a statutory and regulatory basis. Second, Plaintiffs assert that even if the Order was authorized, the Order is arbitrary and capricious. Third, Plaintiffs argue that the Order violates Plaintiffs' rights to access the courts.

1. Statutory and Regulatory Basis

Plaintiffs argue that the CDC acted without statutory and regulatory authority because both 42 U.S.C. § 264 and 42 C.F.R. § 70.2 limit the CDC to implementing regulations that involve inspection, fumigation, disinfection, sanitation, pest extermination and destruction of animals or articles believed to be

sources of infection. Alternatively, Plaintiffs contend that even if the CDC has the authority to issue other types of regulations, the CDC acted without statutory and regulatory authority because (1) the Order is not reasonably necessary to prevent the spread of disease; and (2) the Order does not show that the state and local laws were insufficient to prevent the spread of disease.[5]

The question before this Court is whether the CDC had the authority to temporarily halt evictions for certain covered persons. The resolution of the question "requires an inquiry familiar to the courts: interpreting a federal statute to determine whether executive action is authorized by, or otherwise consistent with, the enactment." Gonzales v. Oregon, 546 U.S. 243, 249 (2006). Importantly, this Court's review is a narrow one: "to discern the meaning of the statute and the implementing regulation[]." Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 663 (1980) (Burger, J., concurring). Under no circumstances does the judicial function "extend to substantive revision of regulatory policy. That function lies elsewhere—in Congressional and Executive oversight or amendatory legislation." Id.

[5] Plaintiffs' alternative arguments are addressed in this Court's discussion of whether the Order is arbitrary and capricious.

The Order in this case was issued pursuant to 42 U.S.C. § 264 and 42 C.F.R. § 70.2, and thus discussions of both are necessary to determine whether the CDC had a statutory and regulatory basis for issuing the Order. 42 U.S.C. § 264(a) authorizes the Secretary of HHS[6] to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States . . . or from one State . . . into any other State." The statute then states that for purposes of carrying out and enforcing such regulations, the Secretary of HHS "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." § 264(a).

In turn, the Secretary of HHS delegated authority to the Director of the CDC. 42 C.F.R. § 70.2. § 70.2 states that whenever the Director of the CDC determines that the measures taken by the health authorities of any state or local

[6] Although the statute assigns authority to the Surgeon General, Reorganization Plan Number 3 of 1966 abolished the Office of the Surgeon General and transferred all statutory powers and functions of the Surgeon General to the Secretary of Health, Education and Welfare, now the Secretary of HHS. 31 Fed. Reg. 8855, 80 Stat. 1610 (June 25, 1966). The Office of the Surgeon General was reestablished in 1987, but the Secretary of HHS has retained these authorities.

jurisdiction are insufficient to prevent the spread of a communicable disease, "he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection."

The Eleventh Circuit has directed that "'courts should always begin the process of legislative interpretation . . . where they often should end it as well, which is with the words of the statutory provision.'" United States ex rel. Hunt v. Cochise Consultancy, Inc., 887 F.3d 1081, 1088 (11th Cir. 2018) (citation omitted). See also CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001) (stating that ordinarily, courts should begin the construction of a statutory provision with its words). Indeed, the Supreme Court has reiterated "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (internal citations and quotation marks omitted).

In determining whether the CDC was authorized to implement the Order, the starting point is therefore "the language of the delegation provision itself." Gonzales, 546 U.S. at 258. "In many cases authority is clear because the statute gives an agency broad power to enforce all provisions of the statute." Id. For

example, when an agency is authorized to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act," Congress' intent to give an agency broad power is clear. Id. at 259 (citation and punctuation omitted).

Here, the grant of authority is broad because the delegation provision (42 U.S.C. § 264) is not substantially different from statutes that give an agency the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act." Id. at 258. Thus, Congress' intent, as evidenced by the plain language of the delegation provision, is clear: Congress gave the Secretary of HHS broad power to issue regulations necessary to prevent the introduction, transmission or spread of communicable diseases. Because, as forth below, the Order is necessary to control the COVID-19 pandemic, the CDC was authorized to issue it.

The Court could rest its conclusion on this basis alone. See Polkey v. Transtecs Corp., 404 F.3d 1264, 1268 (11th Cir. 2005) (stating that where the "statute's meaning . . . is clear and unambiguous, its plain language controls [the] analysis," and the "language [of the statute] both begins and ends [the] inquiry"); Conn. Nat'l Bank, 503 U.S. at 253-54 ("When the words of a statute are unambiguous, then . . . judicial inquiry is complete.") (internal quotation marks

omitted). But additional analysis is useful in this case, particularly in light of Plaintiffs' argument that the second sentence of § 264(a), which states that "[f]or purposes of carrying out and enforcing such regulations, the [Secretary of HHS] 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," operates to limit the Secretary of HHS' authority to just those (or similar) measures. Thus, the Court will look at the "whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities." Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 7 (2011).

Further analysis amplifies the flaws in Plaintiffs' arguments. First, limiting the authority of the Secretary of HHS in the way Plaintiffs suggest makes little sense when considering the subsequent subsections of § 264. Specifically, § 264(b) provides, in part, that "[r]egulations prescribed under this section shall not provide for the apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time." § 264(c) provides that except as detailed in § 264(d), regulations providing for "the

apprehension, detention, examination, or conditional release of individuals, shall be applicable only to individuals coming into a State . . . from a foreign country." § 264(d)(1) clarifies that when an individual is reasonably believed to be infected with a communicable disease and moving between states, the regulations may provide that the individual "be detained for such time and in such manner as may be reasonably necessary."

In this Court's view, if the Secretary of HHS is only permitted to make and enforce regulations concerning the enumerated list found in § 264(a), then Congress had no reason to explain what authority the Secretary of HHS has when issuing regulations concerning individuals reasonably believed to be infected with a communicable disease as outlined in §§ 264(b)-264(d). In other words, if the list is exhaustive, then the Secretary of HHS would have no power at all to detain individuals. The presence of the additional subsections governing detainment of individuals means that the list contained in the first subsection is not an exhaustive list of the permissible measures available to the Secretary of HHS. See United States v. Hastie, 854 F.3d 1298, 1304 (11th Cir. 2017).

42 C.F.R. § 70.2, which is fully contained within one sentence, closely mirrors its statutory counterpart,[7] and therefore, for the same reasons the Secretary of HHS has broad authority to make and enforce regulations as in his judgment are necessary to prevent the spread of disease, the CDC likewise has the same authority. The only qualifying condition is that the CDC cannot act unless it determines that the measures taken by the health authorities of state or local governments are insufficient to prevent the spread of disease.

Additionally, this Court notes that the regulation states that the CDC may take measures to prevent the spread of disease as it deems necessary, "including" the enumerated items. § 70.2. "[T]he word *include* does not ordinarily introduce an exhaustive list." Hastie, 854 F.3d at 1304. In Hastie, the Eleventh Circuit explained that the Supreme Court has "repeatedly held that the word 'including' in a statute signifies enlargement, not limitation." Id. Because the term "including" in the regulation does not signal an exhaustive list, this Court finds that the list of measures in the regulation following the word including are not the only measures available to the CDC.

[7] Sometimes this is known as a "parroting regulation"—a regulation that merely paraphrases the statutory language. Gonzales, 546 U.S. at 257.

Finally, at least one other federal court has considered and rejected the argument Plaintiffs make here. Indep. Turtle Farmers of La. v. United States, 703 F. Supp. 2d 604, 620 (W.D. La. 2010). In Independent Turtle Farmers, the court analyzed a regulation promulgated by the Food and Drug Administration ("FDA") that banned the sale of viable turtle eggs and live turtles with a shell of less than four inches in length ("Turtle Ban"). Id. at 607. The Turtle Ban is the only federally enacted ban on the sale of any pet and was enacted primarily to curb the spread of salmonellosis. Id. The plaintiffs, an association of commercial turtle farmers, argued that the FDA did not have statutory and regulatory authority to enact and maintain the Turtle Ban. Id. at 618.

In analyzing whether Congress delegated power to the FDA to regulate the sale of turtles as pets, the court explained that the FDA derived its authority to enact the regulation from 42 U.S.C. § 264(a)—the same implementing statute involved in this case. Id. at 618-19. The court acknowledged that § 264(a) specifies that the FDA may provide for inspection, fumigation, disinfection, sanitation, pest extermination and destruction of animals or articles found to be so infected or contaminated. Id. at 619. Like Plaintiffs in this case, the Independent Turtle Farmers plaintiffs asked the court to "read this list of 'powers' as an exhaustive one." Id. That, the court was not willing to do.

First, the court explained that the list of enumerated items "directly precedes a 'catch-all' grant of authority, allowing the Secretary (or the FDA Commissioner) to enact '*other measures, as in his judgment may be necessary*,' in addition to the measures suggested in the list." Id. at 619-20 (emphasis added). The court explained that the catch-all phrase "precludes interpretation of the list as exhaustive." Id. at 620. The court further stated that "the list does not act as a limitation upon the types of regulations that may be enacted under [§ 264]. Instead, the list contains certain 'measures' which the FDA may employ [f]or purposes of carrying out and enforcing such regulations." Id. (citation omitted). Even though the enumerated list only speaks in terms of "destruction of animals"—and not regulating or preventing the sale of such animals—the court concluded that the Turtle Ban was permissible because "there is no express prohibition in the statute evidencing contrary congressional intent." Id. The court reasoned that the list of measures "is not phrased as a limitation upon the *type* of regulation that may be promulgated by the FDA. Instead, [§ 264(a)] grants the FDA authority to enact 'such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases.'" Id. (citation omitted). Ultimately, the court found that the FDA had the authority to enact a ban on the sale of turtles. Id.

In sum, the 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 the Independent Turtle Farmers 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.

Plaintiffs' additional argument that several of the canons of construction (*ejusdem generis*, *expression unius*, *noscuitur a sociis* and *casus omisus*) compel a different result is not persuasive. "For one thing, canons are not mandatory rules. They are guides that 'need not be conclusive.'" Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (citation omitted). See also Conn. Nat'l Bank, 503 U.S. at 253 (stating that "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation"). Canons are not necessarily outcome determinative because "other circumstances evidencing congressional intent can overcome their force," and "[s]pecific canons are often countered by some maxim pointing in a different direction." Chickasaw Nation, 534 U.S. at 94 (citation and internal punctuation omitted).

In any event, none of the four cannons Plaintiffs offer applies here because there is no ambiguity to which they could be applied. As the Court has already explained, the implementing statute (and derivative regulation) demonstrate Congress' unambiguous intent to delegate broad authority to the CDC to enter an order such as the one at issue here. The Court will nevertheless address each canon briefly for the purposes of a complete record.

The principle of *ejusdem generis* counsels that "'when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.'" Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 223 (2008) (citation omitted). "'The rule . . . is only an instrumentality for ascertaining the correct meaning of words *when there is uncertainty*,'" and "'it may not be used to defeat the obvious purpose of legislation.'" United States v. Powell, 423 U.S. 87, 91 (1975) (emphasis added) (citation omitted). Thus, where the court discerns no uncertainty in the statute and congressional intent is clear, it is inappropriate to apply the rule. Harrison v. PPG Indus., Inc., 446 U.S. 578, 588-89 (1980).

The Court finds it inappropriate to apply the principle of *ejusdem generis* here in large part because it has already found that there is no ambiguity in the statute or regulation. Accordingly, the rule cannot be used to procure a different

result or defeat clear congressional intent. Moreover, the canon is not applicable to § 70.2 because that regulation does not contain the requisite list of specific terms followed by a general one. Instead, the specific terms are *preceded* by the word "including," which signifies a more expansive, non-exhaustive list.

The *expressio unius* canon "stands for the proposition that the mention of one thing implies the exclusion of the other." Wilhelm Pudenz, GmbH v. Littlefuse, Inc., 177 F.3d 1204, 1209 (11th Cir. 1999). "The force of any negative implication . . . depends on context," and "[the Supreme Court] ha[s] long held that the *expressio unius* canon does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.'" Marx v. Gen. Revenue Corp., 568 U.S. 371, 381 (2013) (citation omitted). See also N.L.R.B. v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017) ("The *expressio unius* canon applies only when 'circumstances support[] a sensible inference that the term left out must have been meant to be excluded.'") (citation omitted).

In this case, there is no "sensible inference" that Congress meant to limit the measures the CDC may properly implement to just those listed in the text or their counterparts. Nor is there evidence that Congress meant to exclude the specific measure at issue here. Rather, the language employed in the statute and regulation demonstrates the opposite. As a result, the *expressio unius* canon does not apply.

At the core of the doctrine of *noscitur a sociis*, the third canon advanced by Plaintiffs, is the principle that "'an ambiguous term may be given more precise content by the neighboring words with which it is associated.'" Bilski v. Kappos, 561 U.S. 593, 604 (2010) (citation omitted). For example, in Jarecki v. G. D. Searle & Co., the court looked at two other words enumerated in a sentence, "exploration" and "prospecting," to determine the meaning of a third word, "discovery," which the court found was ambiguous and capable of many meanings. 367 U.S. 303, 307 (1961). The *noscitur a sociis* canon is not "an invariable rule [because] [a] word may have a character of its own not to be submerged by its association." Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923). Importantly, it "ha[s] no place [in statutory construction], . . . except in the domain of ambiguity," and it cannot be used to create doubt—only to remove it. Id.

Apart from the obvious flaw that Plaintiffs have failed to identify the existing ambiguous *word* that must be defined in reference to other similar enumerated words, like the other canons Plaintiffs have invoked, this rule is not applicable in the absence of ambiguity. Thus, its use here would be improper.

Finally, the principle of *casus omissus* echoes the common thread in this Court's opinion—that the "import of statutory language is what it says, not what it ought to say" or, in this case, not what Plaintiffs argue it meant to omit. Mamani v.

Berzain, 825 F.3d 1304, 1310 (11th Cir. 2016) (noting that the court is not "allowed to add or subtract words from a statute" that may better serve a certain policy and underscoring that its "task is merely to apply statutory language, not to rewrite it"). Under this rule, a seeming omission in a statute "does not justify judicial legislation." Ebert v. Poston, 266 U.S. 548, 554 (1925).

Contrary to Plaintiffs' assertion, reading the statute broadly as it is written is exactly in line with the *casus omissus* canon. And refusing to improperly narrow its meaning, as Plaintiffs propose, is not akin to inserting terms that Congress did not include.

In sum, this Court finds that Plaintiffs have not clearly shown a substantial likelihood of success on the merits as to their claim that the Order was promulgated without statutory and regulatory authority. In other words, Plaintiffs have not clearly shown that the regulation limits the CDC's authority to measures involving inspection, fumigation, disinfection, sanitation, pest extermination and the destruction of animals or articles believed to be sources of infection.

2. Arbitrary and Capricious

This Court will next analyze Plaintiffs' argument that the Order is arbitrary and capricious. The Administrative Procedure Act ("APA") "sets forth the procedures by which federal agencies are accountable to the public and their

actions subject to review by the courts." Franklin v. Massachusetts, 505 U.S. 788, 796 (1992). Agencies must engage in "reasoned decisionmaking," and agency rules must be set aside if they are arbitrary or capricious. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020).

> An agency rule is arbitrary and capricious if the agency relied on factors that Congress did not intend for it to consider, "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Wright v. Everson, 543 F.3d 649, 654 (11th Cir. 2008). The arbitrary and capricious standard is exceedingly deferential and "courts are required to defer to conclusions reached by an agency that are base[d] on its specialized expertise." Nat'l Parks Conservation Ass'n v. U.S. Dep't of the Interior, 835 F.3d 1377, 1384 (11th Cir. 2016). Certainly, where officials undertake to act in areas fraught with medical and scientific uncertainties, as is the case here, "their latitude must be 'especially broad.'" S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, J., concurring) (citation omitted). Moreover, "[w]here those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and

expertise to assess public health and is not accountable to the people." Id. at 1613-14 (citation omitted).

Plaintiffs argue that the Order is arbitrary and capricious because it is not supported by substantial evidence or relevant data. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Nat'l Parks, 835 F.3d at 1384. "This standard precludes a reviewing court from 'deciding the facts anew, making credibility determinations, or re-weighing the evidence.'" Id. (citation omitted). "It is a 'foundational principal of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" Dep't of Homeland Sec., 140 S. Ct. at 1907 (citation omitted). Importantly, "[a]n agency must defend its actions based on the reasons it gave when it acted." Id. at 1909. "To put a finer point on it, the APA requires agencies to reasonably explain to reviewing courts the bases for the actions they take and the conclusions they reach." Brotherhood of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin., 972 F.3d 83, 115 (D.C. Cir. 2020).

In this case, Plaintiffs contend that: (1) the CDC did not show with substantial evidence that a temporary eviction moratorium is reasonably necessary to prevent the spread of COVID-19; and (2) the CDC did not demonstrate with

substantial evidence that state and local measures were insufficient to prevent the spread of COVID-19.

i. Reasonably Necessary

Plaintiffs argue that the Order is not supported by evidence that shows that an eviction moratorium is "reasonably necessary" to prevent the further spread of disease. Specifically, Plaintiffs contend that the evidence does not show that evictions will increase COVID-19 infections. Plaintiffs then question why the CDC elected to address the issue of evictions instead of other things that might increase the risk of community spread, like attending school or patronizing bars. Plaintiffs ultimately contend that the Order is not reasonably necessary because it is "hardly the most pressing concern for virus containment." [Doc. 15-1, p. 27].

This Court disagrees with Plaintiffs because the Order explains, in detail, why a temporary eviction moratorium is reasonably necessary. The Order states that there is currently a global pandemic of COVID-19, which presents a "historic threat to public health." Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,292. As of August 24, 2020, COVID-19 had infected over 5.5 million individuals in the United States, resulting in over 174,000 deaths. Id. Underscoring the seriousness of the pandemic, the CDC referenced one study that showed that the mortality rate associated with

COVID-19 during the early phase of the outbreak was comparable to the 1918 influenza pandemic, where 675,000 lives were lost in the United States alone. Id. In the Order, the CDC explains that despite measures such as border closures, travel restrictions and stay-at-home orders, COVID-19 continues to spread, and further action is needed. Id.

Without an eviction moratorium, evidence relied upon by the CDC shows that as many as thirty to forty million people in the United States—an unprecedented number—could be at risk of eviction. Id. at 55,295. In plain terms, the Order notes that evicted people must move and many who are evicted (32% according to a Census Bureau American Housing Survey) move into shared housing or other congregate settings. Id. at 55,294. Shared housing includes moving in with friends and family or moving into transitional housing or shelters. Id.

In its Order, the CDC addresses the spread of disease in these congregate housing situations. First, the CDC recognizes that "COVID-19 spreads very easily and sustainably between people who are in close contact with one another (within about [six] feet), mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks." Id. at 55,292. The Order indicates that in transitional housing or shelters, challenges maintaining social distancing (staying

more than six feet apart) exist because residents often gather closely or use shared equipment, such as kitchen appliances, laundry facilities, stairwells and elevators. Id. at 55,294. Importantly, studies cited by the CDC demonstrate that "COVID-19 transmission occurs readily within households" and "household contacts are estimated to be [six] times more likely to be infected by an index case of COVID-19 than other close contacts." Id. In sum, the evidence shows that the transmission rates will increase if people are forced to live in congregate settings.

While some evicted individuals may move into shared housing or other congregate settings, as explained above, other evicted individuals may become homeless, thus raising a different set of concerns. Id. at 55,295. Between 2018 and 2019, approximately five to fifteen percent of individuals experiencing homelessness did so as the result of being evicted. Id. In terms of COVID-19, homeless individuals are a high-risk population because it may not be possible to avoid a congregate setting, like a homeless shelter, especially as winter approaches and the temperature drops. Id. Citing to evidence showing high infection rates in homeless shelters, the CDC explains that homeless shelters are particularly vulnerable to COVID-19 outbreaks, especially if they become overcrowded. Id. For the homeless not seeking refuge in a homeless shelter, the Order explains that many lack basic sanitation tools and equipment to effectively prevent disease. Id.

Based on this evidence, the CDC "determined the temporary halt in evictions . . . constitutes a reasonably necessary measure under 42 C.F.R. § 70.2 to prevent the further spread of COVID-19 throughout the United States." Id. at 55,296. The Order explains that this is an appropriate measure "[b]ased on the convergence of COVID-19, seasonal influenza, and the increased risk of individuals sheltering in close quarters in congregate settings such as homeless shelters, which may be unable to provide adequate social distancing as populations increase, all of which may be exacerbated as fall and winter approach." Id. Significantly, the eviction moratorium only applies to those individuals whose housing options, if evicted, are limited to congregate settings or homelessness. Id. at 55,293. Throughout the Order, the potential risks and dangers of moving into a congregate living situation or becoming homeless are detailed, and the Order only prevents evictions of those individuals that swear, under penalty of perjury, that an eviction would result in congregate living or homelessness. Id. at 55,292.

Contrary to Plaintiffs' argument, the CDC need not show that the eviction moratorium is the only measure that will prevent the spread of COVID-19 or the most pressing concern. The CDC also need not show that it is the very best measure to reduce the spread of disease. "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the

alternatives." Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782 (2016). In the situation we have here—an unprecedented pandemic with widespread contagion—this Court finds that the CDC's response is reasonably calibrated to the seriousness of the disease it is combatting. Simply put, the CDC has shown what it needs to: that an eviction moratorium for individuals likely to be forced into congregate living situations is an effective public health measure that prevents the spread of communicable diseases because it aids the implementation of stay-at home and social distancing directives. It is not this Court's job to render a judgment that the CDC should have taken some other public measure. Id. at 784. This Court's "important but limited role is to ensure that the [CDC] engaged in reasoned decisionmaking." Id. This Court is satisfied that it has done so, as the CDC cited evidence and intelligibly explained the reasons for implementing the Order. Ultimately, Plaintiffs have not shown a substantial likelihood of success on their claim that the Order is not reasonably necessary to prevent the spread of disease.

ii. State Measures

Plaintiffs also argue that the CDC did not show that the measures taken by the state and local governments were insufficient. This Court disagrees, as the Order plainly states that the measures in state and local jurisdictions that do not

provide protections for renters equal to or greater than the protections provided for in the Order are insufficient to prevent the spread of COVID-19. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,296. Furthermore, at the outset of the CDC's analysis, the CDC acknowledges that despite "best efforts, COVID-19 continues to spread and further action is needed." Id. at 55,292.

Although the Order does not discuss non-eviction related mitigation efforts taken by the various states and local governments, the CDC did analyze each state's eviction restrictions, and the evidence suggested that in the absence of eviction moratoria, tens of millions of Americans could be at risk of eviction on a scale that would be unprecedented in modern times. Id. at 55,295-96 n.36. The Eviction Lab Scorecard ("Scorecard"), which is cited by the CDC in its Order, contains a state-by-state analysis of eviction measures. COVID-19 Housing Policy Scorecard, Eviction Lab, https://evictionlab.org/covid-policy-scorecard/ (last visited Oct. 24, 2020). Specifically, the Scorecard distills the contents of "thousands of newly-released emergency orders, declarations, and legislation into a clear set of critical measures included in, and left out of, state-level pandemic responses related to eviction and housing." COVID-19 Housing Policy Scorecard Methodology, Eviction Lab, https://evictionlab.org/covid-housing-scorecard-

methods/ (Apr. 20, 2020). The Scorecard "provides comprehensive information about the varying approaches state-by-state" by analyzing the following categories: (1) initiation of eviction; (2) court process; (3) enforcement of eviction order; (4) short-term supports; and (5) tenancy preservation measures. Id. "The [S]corecard also includes figures for the number of renters in each state who could be affected by the housing crisis." Id.

In Alabama, for instance, where it is estimated that the rental population exceeds 1.4 million, no state restrictions currently exist on the initiation of eviction proceedings, the court processes associated with evictions or the enforcement of eviction orders. COVID-19 Housing Policy Scorecard, Eviction Lab, https://evictionlab.org/covid-policy-scorecard/ (last visited Oct. 24, 2020). In other words, in Alabama, absent the Order, a landlord could evict a tenant for non-payment of rent even if the tenant had sustained a substantial loss of household income and would likely be forced to live in a congregate living situation. Id. Like numerous other states, Virginia, North Carolina, South Carolina and Georgia—all states where Plaintiffs have rental properties—also currently have no state restrictions on evictions. Id.

The CDC referenced the measures in place in various jurisdictions and, based on that knowledge, determined that a moratorium was necessary.

Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,295-96 n.36. The knowledge that state and local governments in some of these jurisdictions have no restrictions at all on evictions (i.e., that evictions proceed unabated) combined with evidence that evictions contribute to the spread of COVID-19 by increasing the number of individuals living in congregate settings where disease spreads more rapidly is substantial evidence to show that the state restrictions (or lack thereof) were not adequate to prevent the spread of disease. Because substantial evidence exists that state and local measures were inadequate to prevent the spread of disease (as some states have no measures at all), Plaintiffs are not substantially likely to succeed on their claim that the Order is arbitrary and capricious.

3. Right to Access the Courts

Plaintiffs next argue that they have shown a substantial likelihood of success on the merits because the Order unlawfully strips them of their constitutional rights to access the courts. To properly determine whether Plaintiffs' rights to access the courts are violated, it is important to consider what the Order does and does not do.

The Order in this case does, on a temporary basis, prohibit a landlord from evicting a covered person from a residential property for the non-payment of rent. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-

19, 85 Fed. Reg. at 55,292. The Order does not, however, apply to every tenant or to every possible reason for an eviction. It also does not apply to all possible avenues of recovery for a landlord or to all procedural aspects of eviction proceedings.

As stated immediately above, the Order does not apply to every person renting a property. Instead, the Order only applies to those persons who provide a declaration to their landlord under penalty of perjury indicating that: (1) "[t]he individual has used best efforts to obtain all available government assistance for rent or housing"; (2) the individual satisfies certain income requirements; (3) "the individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses"; (4) "the individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses"; and (5) "eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options." Id. at 55,293.

The Order also does not apply to every reason a landlord may evict a tenant. Specifically, the Order does not impede evictions of tenants who:

> (1) engag[e] in criminal activity while on the premises; (2) threaten[] the health or safety of other residents; (3) damag[e] or pos[e] an immediate and significant risk of damage to property; (4) violat[e] any applicable building code, health ordinance or other similar regulation; or (5) violat[e] another contractual obligation, other than the timely payment of rent.

Id. at 55,294.

Moreover, the Order does not prohibit Plaintiffs from seeking a different remedy to recover their losses. The Order plainly preserves Plaintiffs' rights to charge and collect "fees, penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis." Id. at 55,292. Nothing in the Order prohibits a landlord from collecting these fees or past due rent via a breach of contract action or other similar remedy available under state law.

Lastly, the Order does not apply to all procedural aspects of the eviction proceedings. In a document entitled "Frequently Asked Questions," which was published by the CDC, the CDC clarified that "[t]he Order is not intended to terminate or suspend the operations of any state or local court. Nor is it intended to prevent landlords from starting eviction proceedings, provided that the *actual eviction* of a covered person for non-payment of rent does NOT take place during the period of the Order." [Doc. 43-1, p. 1] (first emphasis added). As clarified by

the CDC, under the Order, landlords are therefore not precluded from serving their tenants with any required non-payment notices, commencing court proceedings, attending trials or obtaining judgments. The Order only delays the actual eviction.

The narrow issue thus presented in this case is whether a law that temporarily curtails the enforcement of an eviction order—not a plaintiff's ability to secure that eviction order or pursue another type of action, like a breach of contract action—violates a plaintiff's right to access the courts.

The Supreme Court has indicated that there are two categories of claims involving the denial of access to courts. Christopher v. Harbury, 536 U.S. 403, 412-13 (2002). The first category of cases involves systemic official action that frustrates a plaintiff or a class of plaintiffs in preparing and filing suits at the present time. Id. at 413.

> In cases of this sort, the essence of the access claim is that official action is presently denying an opportunity to litigate for a class of potential plaintiffs. The opportunity has not been lost for all time, however, but only in the short term; the object of the denial-of-access suit, and the justification for recognizing that claim, is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed.

Id. The second category of claims involving the denial of access to courts "covers claims not in aid of a class of suits yet to be litigated, but of specific cases that

cannot now be tried (or tried with all material evidence), no matter what official action may be in the future." Id. at 413-14.

While the circumstances vary for each category of claims, "the ultimate justification for recognizing each kind of claim is the same." Id. at 414. "[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." Id. at 414-15. Right of access cases "rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." Id. at 415.

In evaluating state-mandated eviction moratoriums as they relate to a right to access claim, two federal courts have held that the landlords failed to show that their rights to access the courts were violated. In Elmsford Apartment Associates, LLC v. Cuomo, the court analyzed New York's eviction moratorium, which completely barred landlords from filing eviction proceedings for the non-payment of rent. No. 20-cv-4062 (CM), 2020 WL 3498456, at *4 (S.D.N.Y. June 29, 2020). Two primary reasons supported the court's conclusion that the eviction moratorium did not implicate the constitutional right to access. Id. at 16. First, the court held that the landlords had not shown that the eviction moratorium had the actual effect of frustrating their efforts to pursue a legal claim because the

landlords could "still sue their tenants for arrearages through a breach of contract action." Id. The eviction moratorium "suspended one of several avenues by which landlords can seek relief for nonpayment, while leaving other (if less favored) remedial proceedings for breach of contract (which is exactly what a breach of a lease is) in place." Id. at 17.

Second, the court held that the "mere delay" to filing a lawsuit cannot form the basis of a constitutional violation "when the plaintiff will, at some point, regain access to legal process." Id. at 16. Finding that the landlords' opportunity to bring eviction proceedings was merely delayed because they could bring an action upon the moratorium's expiration, the court denied the right to access claim. Id. The court concluded its analysis by stating that to rule that the eviction moratorium violates the constitutional right to access the courts "would greatly exaggerate the actual effects of a temporary pause on a subset of evictions, which nevertheless preserved the landlords' economic rights under the affected rental agreements, and which was tailored to avoid crowding in housing courts and homeless shelters during an ongoing public health emergency." Id. at 17.

Similarly, in Baptiste v. Kennealy, the court analyzed an eviction moratorium that barred landlords from filing and prosecuting eviction cases. No. 1:20-cv-11335-MLW, 2020 WL 5751572, at *25 (D. Mass. Sept. 25, 2020). The

court determined that the landlords were not reasonably likely to prevail on their claim that "by temporarily removing access to the Housing Court to pursue the statutory summary procedures to evict, the [eviction moratorium] when enacted violated their constitutional right to access the courts." Id. (implying that the "gravamen" of the landlords' claim was "not total deprivation . . . but only delay").

Turning to an analysis of the federal eviction moratorium at issue in this case, for three different reasons, this Court finds that it does not violate Plaintiffs' constitutional rights to access the courts. First, the Order does not prohibit Plaintiffs from pursuing a breach of contract action either now or in the future. Accordingly, Plaintiffs still have some form of relief available to them within the courts. While a breach of contract action is often not a landlord's "preferred remedy," the Order does not suspend a landlord's right to this remedy in any manner whatsoever, and this is significant. Elmsford, 2020 WL 3498456, at *16.

Second, the Order is temporary; therefore, Plaintiffs' ability to evict their tenants is only merely delayed until it expires on December 31, 2020, unless extended, modified or rescinded. As recognized in Elmsford, "mere delay" to filing a lawsuit cannot form the basis of a constitutional violation, "when the plaintiff will, at some point, regain access to legal process." Id. Here, it is clear that Plaintiffs will regain access to legal process upon expiration of the Order.

Lastly, instead of completely foreclosing Plaintiffs' rights to pursue an eviction, Plaintiffs can immediately start eviction proceedings now and are only delayed in enforcing any eviction order they might obtain. It is noteworthy that, in this regard, the Order is even more narrow than the state eviction moratoriums analyzed in Elmsford and Baptiste, neither of which were found to have violated a landlord's constitutional right to access the courts. The moratoriums at issue in those cases completely prohibited landlords from even beginning an eviction proceeding. This distinction is notable because the eviction process can be slow and cumbersome. See Elmsford, 2020 WL 3498456, at *4. Taking the New York state procedures discussed in Elmsford as an example, a landlord there must first serve the tenant with a notice of non-payment and give the tenant a chance to cure within fourteen days. Id. If the tenant does not cure within that time frame, the landlord can then commence summary non-payment proceedings by "filing a petition in the civil court, returnable by the tenant within [ten] days." Id. In the event a tenant responds, a trial is set within an eight-day period but can be "adjourned up to ten additional days if the parties so require in order to produce their witnesses." Id. If a warrant issues, the sheriff must then give the tenant another fourteen days' notice in writing prior to the execution of the warrant. Id. Only after all these steps are completed may a landlord remove a tenant from his

home. Based on these numbers, the entire eviction process can be time-consuming.

As clarified by the CDC, the Order at issue here does not preclude landlords from starting eviction proceedings or from taking most of the follow-up steps in the process (like commencing court proceedings, attending trials or obtaining judgments)—all of which can take considerable time. Thus, Plaintiffs here are less delayed than the landlords in Elmsford and Baptiste, where the entire eviction process was halted. Under this Order, Plaintiffs can obtain an eviction order now, and once the Order is lifted, immediately evict their tenants, instead of waiting until the Order expires to begin the potentially lengthy process.

Ultimately, because Plaintiffs are still permitted to file breach of contract actions and begin eviction proceedings, and are only merely delayed in enforcing eviction orders, this Court finds (for the same reasons explained in Elmsford and Baptiste) that Plaintiffs have not clearly shown a substantial likelihood of success on the merits as to their claim that the Order violates their constitutional rights to access the courts.

B. Irreparable Injury

"A showing of irreparable injury is the 'sine qua non of injunctive relief.'" Siegel, 234 F.3d at 1176 (citation omitted). Even if a plaintiff can show a

substantial likelihood of success on the merits, which is not the case here, "the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." Id. See also Northeastern Fla. Chapter of Ass'n of Gen. Contractors v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990) (holding that "[w]e need not address each element because we conclude that no showing of irreparable injury was made"); Commodities & Minerals Enter., Ltd. v. Citibank, N.A., No. 12-22333-CIV-UNGARO/TORRES, 2012 WL 12844749, at *3 (S.D. Fla. Aug. 16, 2012) (declining to analyze the other preliminary injunction requirements where the plaintiff could not demonstrate that he would suffer irreparable harm). In analyzing whether an injury is irreparable, the Eleventh Circuit has held that:

> [m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

United States v. Jefferson Cnty., 720 F.2d 1511, 1520 (11th Cir. 1983). The irreparable injury "must be neither remote nor speculative, but actual and imminent." Siegel, 234 F.3d at 1176. Stated another way, "[t]he moving party must make a 'clear showing' of 'substantial,' 'actual and imminent' irreparable harm, as opposed to 'a merely conjectural or hypothetical—threat of future

injury.'" FHR TB, LLC v. TB Isle Resort, LP., 865 F. Supp. 2d 1172, 1206 (S.D. Fla. 2011) (citation omitted).

Plaintiffs argue the following irreparable harms: (1) violation of their constitutional rights; (2) noncompensable loss of the value of their property; and (3) deprivation of residential property.[8] Each purported harm is addressed below.

1. Violation of Constitutional Rights

Plaintiffs argue that because the Order is unconstitutional, they need not show any additional harm to satisfy the irreparable injury requirement. In other words, Plaintiffs argue that their constitutional rights were violated; thus, the irreparable injury requirement is automatically satisfied. [Doc. 15-1, p. 36]. This Court disagrees. Merely asserting a constitutional claim is insufficient to trigger a finding of irreparable harm.

Plaintiffs cite only to General Contractors for the proposition that additional harm beyond a violation of a constitutional right need not be shown. 896 F.2d 1283. In that case, however, the Eleventh Circuit explicitly held that "[t]he only

[8] The final argument—deprivation of residential property as a per se irreparable harm—was raised for the first time in Plaintiffs' Reply Brief. "[A]rguments raised for the first time in a reply brief are not properly before a reviewing court." Herring v. Sec'y, Dep't. of Corr., 397 F.3d 1338, 1342 (11th Cir. 2005). This Court, nevertheless, will consider the argument because Defendants were given the opportunity to address the issue at oral argument.

area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury is in the area of first amendment and right of privacy jurisprudence." Id. at 1285. The court further explained that "[t]he rationale behind these decisions was that chilled free speech and invasions of privacy, because of their intangible nature, could not be compensated for by monetary damages; in other words, plaintiffs could not be made whole." Id. This Court finds that the rationale for finding irreparable injury for certain constitutional violations does not apply in this case. This case involves neither free speech nor invasion of privacy. Furthermore, "the damage to [Plaintiffs] here is chiefly, if not completely, economic." Id. at 1286.

2. Noncompensable Loss of the Value of Property

Plaintiffs assert that the irreparable injury requirement is satisfied because they will never be able to recover economic damages that accrue while the Order is in place. Specifically, Plaintiffs assert that their tenants are insolvent, and thus any judgment obtained against them would be uncollectible. [Doc. 15-1, pp. 36-37]. Defendants, on the other hand, contend that Plaintiffs' fears that a judgment would not be collectible are "unsupported" and "speculative." [Doc. 22, p. 34].

This Court will begin its review of Plaintiffs' argument by analyzing United States v. Askins & Miller Orthopaedics, P.A., a recent decision from the Eleventh

Circuit squarely addressing, for the first time by the court, the issue of "whether the collectability of a future money judgment to cure an expected future injury matters." 924 F.3d 1348, 1358 (11th Cir. 2019). In Askins, the defendants habitually failed to pay their federal employment taxes. Id. at 1351. As a result, the Internal Revenue Service ("IRS") asked the court for an injunction to protect it from the defendants' future non-payment of taxes—taxes that the IRS knew it would never be able to collect. Id. at 1358.

The evidence presented in Askins showed that the defendants failed to pay their employment taxes from 2010 until 2017. Id. at 1351. During this seven-year period, the IRS made numerous attempts to collect the debt, including conducting thirty-four meetings and entering into installment agreements with the defendants and warning them of further legal action. Id. at 1352. The IRS even served levies on multiple entities, but most responded by indicating that there were no funds available to cover the debt. Id. The IRS' collection efforts were made more difficult because the defendants unlawfully diverted their money to other accounts to avoid collection. Id.

In analyzing whether the IRS showed an irreparable harm, the court held that "'extraordinary circumstances,' including the likelihood that a defendant will never pay, [is] one way 'to give rise to the irreparable harm necessary for a preliminary

injunction.'" Id. at 1359 (citation omitted). In the court's opinion, the fact that the IRS was attempting to avoid future losses was important. Id. The court noted that as long as the defendants continued to accrue taxes, the IRS would continue to lose money, and this "sets the IRS apart from the position of other creditors (who can cut their losses by refusing to extend additional credit), and—crucially—means that the injunction sought is not simply an attempt to provide security for *past* debts." Id. The court highlighted that the proposed injunction "would staunch the flow of ongoing *future* losses." Id. Finding that irreparable harm was shown, the court stated that "[o]n these facts, the IRS's ability to sit on its hands until the defendants fail to pay their taxes (again) and only then bring an action for money damages does not qualify as an 'adequate' legal remedy." Id. at 1358. Ultimately, the court held that "the record amply demonstrates that, absent the requested injunction, the [IRS] will continue to suffer harm from [the defendants'] willful and continuing failure to comply with its employment tax obligations . . . and that, in all likelihood, the [IRS] will never recoup these losses." Id. at 1360.

Therefore, in order to determine whether Plaintiffs will be irreparably harmed, this Court must analyze, under Askins, whether Plaintiffs have clearly shown that, in all likelihood, they will never recoup the losses that occur while the Order is in place. The instant case presents some similarities to Askins but also

some important differences. As to the similarities, Plaintiffs in this case are not seeking an injunction to ensure collection of a previous debt owed, but they are seeking injunctive relief to protect against future losses—the non-payment of rent during the time the Order is in place. Like the IRS, Plaintiffs are not permitted to cut their losses, and so in that sense, Plaintiffs are involuntary creditors. In other words, Plaintiffs are not, of their own volition, extending additional credit to their tenants but are instead forced to allow the tenants to stay in the homes without payment.

Unlike Askins, where the IRS fully supported, with extensive evidence, its claim that a future judgment would not be collectible, Plaintiffs put very little evidence before this Court. Specifically, the IRS in Askins presented evidence explaining the efforts they had undertaken to ensure that they received payment, including, but not limited to, making phone calls, conducting in-person meetings, entering into repayment plans and levying the defendants' assets. Significantly, the IRS was able to show that despite the collection efforts, it did not appear that the defendants would be able to satisfy the debts. Moreover, the levies did not produce sufficient funds to satisfy the debts owed. Here, however, Plaintiffs have not presented any evidence regarding collection measures that they have taken to ensure that the rent is paid or whether a legal tool, such as a levy or garnishment,

would be unsuccessful in the event a judgment is entered at a later time. Plaintiffs have also presented no evidence that their tenants, like the defendants in Askins, would unlawfully divert funds to avoid the payment of a judgment.

Another difference from Askins is the history of non-payment. The record in Askins showed that the defendants habitually failed to pay their taxes for a period of seven years and would likely, in the opinion of the court, continue not to pay for years to come. In this case, the tenants' failures to pay are not nearly as extreme or pervasive. Plaintiff Brown stated that his tenant has made no payments for several months. [Doc. 18-2, p. 2]. Plaintiff Rondeau provided that his tenant has not paid any rent since July 6, 2020. [Doc. 18-3, p. 1]. Similarly, Plaintiff Krauz' tenant fell behind on rent in July 2020. [Doc. 18-4, p. 1]. Lastly, Plaintiff Jones explained that her tenant is four months behind on rent. [Doc. 18-5, pp. 1-2]. It is much easier for a court to conclude that a debtor who has not paid for seven years will not pay in the future than it is for a court to conclude that a debtor who has recently stopped paying will continue the history of non-payment indefinitely, especially when the Order expires in only two months.

Plaintiffs' evidence that they will never be able to collect a future judgment is slight. When asked during oral argument what evidence supports Plaintiffs' conclusion that their tenants are insolvent, Plaintiffs' counsel pointed to conditions

three and four of the tenants' declarations[9] and to the tenants' failure to pay rent. [Doc. 47, pp. 8-10]. He explained that condition three requires that the tenants swear that they are unable to pay the full amount of rent due to a substantial loss of household income, loss of compensable hours of work or extraordinary out-of-pocket medical expenses and that condition four requires the tenants to swear that they are using their best efforts to make timely partial payments. Id.; see Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,293. Plaintiffs' counsel then concluded that because the tenants are currently not paying their rent, the circumstances show that they are insolvent or judgment proof.[10] [Doc. 47, pp. 8-10]. Plaintiffs presented no additional evidence regarding the tenants' insolvency.

This limited evidence is not enough for this Court to find that, in all likelihood, Plaintiffs' tenants will not pay rent in the future and are judgment proof. While it is undisputed that the tenants are currently delinquent on their rent, this Court does not know, for example, the occupation of any of the tenants,

[9] Only two tenants provided declarations to their landlords.
[10] Insolvency, as defined by Black's Law Dictionary, means "[t]he condition of being unable to pay debts as they fall due or in the usual course of business." Insolvency, Black's Law Dictionary (11th ed. 2019). In the context of Plaintiffs' argument, however, Plaintiffs seem to use the term insolvent to encompass not only the inability to pay debts that are owed, but also the inability to ever collect on those debts.

whether they are employed or unemployed (and, if unemployed, their prospect for reemployment), whether they are (or have been) sick, whether they have money in the bank, whether they qualify for some type of government assistance, whether they could obtain a loan to cover their rent or the nature of their credit histories. All of these things either affect a tenant's ability to pay or demonstrate his likelihood to pay future rent or a judgment. Plaintiffs also did not detail the efforts they have undertaken to collect the rent that is due or measures they will take once the Order is lifted.

Plaintiffs' lack of evidence precludes a finding of irreparable harm because it is the plaintiff who bears the burden to show a significant threat of irreparable harm, and a plaintiff cannot merely rely on remote or speculative injuries. Ruffin v. Great Dane Trailers, 969 F.2d 989, 995 (11th Cir. 1992). This Court finds that although the tenants may not currently be able to afford their rent due to a substantial loss of household income, loss of compensable hours of work or extraordinary out-of-pocket medical expenses, Plaintiffs have not shown that they will likely never be able to collect a judgment. Here, Plaintiffs have failed to disprove that there is a real possibility that "adequate compensatory or other corrective relief will be available" to them later, in the ordinary course of litigation. Jefferson Cnty., 720 F.2d at 1520. That alone "weighs heavily against a claim of

irreparable harm." Id. Without more evidence concerning Plaintiffs' tenants' ability to pay rent or a future judgment, this Court finds that Plaintiffs' conclusory arguments that their tenants will never pay is "too nebulous and speculative" to meet Plaintiffs' burden of establishing irreparable harm. FHR TB, 865 F. Supp. 2d at 1213-14 (rejecting as unsupported by the evidence the plaintiffs' concerns that the defendant might not have the assets to satisfy a money damages judgment); see also HAPCO v. City of Philadelphia, No. 20-3300, 2020 WL 5095496, at *16-18 (E.D. Pa. Aug. 27, 2020) (finding no irreparable harm suffered from a COVID-19 eviction moratorium where the plaintiffs did nothing more than speculate that the "obvious result of a landlord's inability to immediately collect all payments owed under the lease [would] lead to foreclosure"); Amato v. Elicker, No. 3:20-cv-464 (MPS), 2020 WL 2542788, at *6 (D. Conn. May 19, 2020) (finding no irreparable harm where the plaintiffs only speculated that their business would be forced to permanently shut down as a result of a COVID-19 restriction).

Two other considerations bolster this Court's view that Plaintiffs have not clearly shown an irreparable injury. First, the Order has protections for the landlords. Specifically, landlords are not precluded from charging or collecting fees, penalties or interest as a result of the failure to pay rent on a timely basis. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-

19, 85 Fed. Reg. at 55,292. Landlords can also continue to seek arrears and tenants are required to make partial payments when able. Id. at 55,293.

Second, it is conceivable that the passage of time alone may repair Plaintiffs' injuries if either Plaintiffs' tenants or Plaintiffs themselves obtain government assistance. In particular, the tenants may obtain rental assistance from the federal government or receive a disbursement of unemployment benefits. [Doc. 33-1, p. 7]. And, Plaintiffs may obtain funds pursuant to the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136), which aids individuals and businesses adversely affected by COVID-19.[11]

The above finding that Plaintiffs have failed to present enough evidence to show an irreparable harm is not meant to discount the fact that Plaintiffs are currently being harmed. Because of the Order, Plaintiffs are forced to provide housing to non-paying tenants. Not only are they harmed from the tenants' failure to pay rent and other fees, Plaintiffs must also pay monthly maintenance costs and endure damage to their property from wear and tear, and they have lost the

[11] Plaintiffs' counsel stated during oral argument that while none of the individual plaintiffs had received government assistance, some of the members of Plaintiff NAA may have applied for assistance under the CARES Act. [Doc. 47, pp. 39-40]. See HAPCO, 2020 WL 5095496, at *17 (discussing numerous programs available to landlords).

opportunity to rent their properties at fair market value.[12] [Doc. 18, p. 9]. While these harms are both concerning and significant to the Court, Plaintiffs simply have not met their burden to make a clear showing that their injury is noncompensable, and thus irreparable.

3. Deprivation of Residential Property

Plaintiffs assert that they have been wrongly deprived of access to their unique property and have thus been irreparably harmed because "courts across the country have recognized that being deprived of residential property is a *per se* irreparable injury." [Doc. 38-1, pp. 11-12]. None of the cases cited by Plaintiffs, however, compel a categorical finding that Plaintiffs have suffered an irreparable harm. Plaintiffs' cases are inapposite because all involve permanent deprivation or destruction of property. For instance, in one of the cases, if an injunction did not issue, the moving party would have been forced to sell the subject property—a church. Third Church of Christ, Scientist v. City of New York, 617 F. Supp. 2d 201, 215 (S.D.N.Y. 2008). In another case, the moving party would have been forced to sell the family farm. Watson v. Perdue, 410 F. Supp. 3d 122, 131 (D.C.

[12] Robert Pinnegar, who is the CEO of Plaintiff NAA, explained in his affidavit that "the vast majority of rental housing in the United States is owned by small investors who use the rental income to supplement retirement plans and social security payments" and that the rental income is "disappearing." [Doc. 18-6, p. 2].

Cir. 2019). In that case, the court noted that "losing a family farm is more than just an economic loss. It involves the loss of generations of family history, sweat-equity, and memories." Id.

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." Muck Miami, LLC v. United States, No. 14-24870-Civ-COOKE/TORRES, 2015 WL 12533140, at *3 (S.D. Fla. Feb. 13, 2015). "As it pertains to real estate, an 'irreparable injury is suffered when one is wrongfully ejected from his home.'" Id. at *4 (citation omitted). That situation is not alleged here. Each of the individual plaintiffs provided an affidavit showing that they owned property that they leased to tenants. There is no evidence before the Court that any of the individual plaintiffs reside in the properties or are in danger of losing those properties. In the situation alleged here, where the residential property is used as a rental property, Plaintiffs have not clearly shown that monetary damages will not afford adequate relief.

As explained above, Plaintiffs raise three possible irreparable injuries. After considering those alleged injuries, this Court finds that Plaintiffs have not met their burden to clearly show an irreparable injury. Solely on this ground, this Court finds injunctive relief improper, even if Plaintiffs were able to satisfy any

of the other prerequisites. See Siegal, 234 F.3d at 1176 (finding that the absence of a substantial likelihood of an irreparable injury, standing alone, prohibits preliminary injunctive relief).

C. The Threatened Injury and the Harm the Preliminary Injunction Would Cause to the Non-Movant and the Public Interest

This Court will analyze the final two factors together: harm to the opposing party and the public interest. "[W]here the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest." Swain v. Junior, 958 F.3d 1081, 1091 (11th Cir. 2020). Thus, the Court proceeds with analyzing whether the threatened injury to Plaintiffs outweighs the harm that the preliminary injunction would cause Defendants and the public.

Plaintiffs devote very little time to analyzing whether their threatened injury outweighs the harm that the preliminary injunction would cause Defendants and the public. This is important because it is Plaintiffs who bear the burden of clearly showing that the threatened injury outweighs the harm an injunction might cause. Plaintiffs contend that the balance of equities weighs heavily in their favor because a strong public interest exists that constitutional rights are not violated. [Doc. 15-1, p. 38]. This Court has already explained, however, that Plaintiffs have not clearly shown a substantial likelihood of success

on the merits as to their claims that their constitutional rights are violated. See discussion infra Part II.A.3. Plaintiffs further contend that the CDC has "no evidence, much less any convincing argument, that its Order has *any* effect on the pandemic or would prevent even a single infection." [Doc. 45, p. 25]. This argument has also already been addressed, and rejected, by the Court. See discussion infra Part II.A.2.i-ii.

In evaluating whether the threatened injury of various state-mandated COVID-19 restrictions would outweigh the damage to the public's interest if they were overturned, federal courts across the country have routinely concluded that undoing orders deemed necessary by public health officials and experts to contain a contagious and fast-spreading disease would result in comparatively more severe injury to the community. For example, while the Sixth Circuit acknowledged in League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer that "[s]haping the precise contours of public health measures entails some difficult line-drawing" and that the plaintiffs bore "the very real risk of losing their businesses," it ultimately granted an emergency stay of a lower court decision that had invalidated a COVID-19 executive order. 814 F. App'x 125, 129-30 (6th Cir. 2020). The court reasoned that "the Governor's interest in combatting COVID-19

[was] at least equally significant," where "the disease ha[d] infected thousands of [residents], and it ha[d] shown the potential to infect many more." Id.

Likewise, in Roman Catholic Diocese v. Cuomo, the court emphasized that its refusal to issue an injunction was not intended "to downplay the seriousness of [the] [plaintiff's] constitutional harm,[13] which [was] unlikely to be remedied" and explained that, rather, improperly enjoining an order designed "to contain a deadly and highly contagious disease" could lead to "avoidable death on a massive scale." No. 20-cv-4844, 2020 WL 6120167, at *11 (E.D.N.Y. Oct. 16, 2020). See also Auracle Homes, LLC v. Lamont, No. 3:20-cv-00829, 2020 WL 4558682, at *21 (D. Conn. Aug. 7, 2020) (finding that "the balance of the equities and the public interest favor[ed] denying a preliminary injunction" that would block an eviction moratorium entered to address the COVID-19 pandemic); TJM 64, Inc. v. Harris, No. 2:20-cv-02498, 2020 WL 4352756, at *8 (W.D. Tenn. July 29, 2020) (determining that an injunction reversing a restriction on the operation of gyms would be contrary to the public interest because "[p]reventing [the] [d]efendants from enforcing the [o]rder would present a risk of serious public harm and foster the continued spread [of the] COVID-19 virus"); World Gym, Inc. v. Baker, No. 20-cv-11162, 2020 WL 4274557, at *5 (D. Mass. July 24, 2020) (finding that the

[13] Curtailed in-person church services.

public interest outweighed the plaintiffs' threatened economic loss because the respective orders were necessary to combat a "devastating" "global health crisis" that had taken numerous lives); Xponential Fitness v. Arizona, No. cv-20-01310, 2020 WL 3971908, at *11 (D. Ariz. July 14, 2020) (deciding that "the public's interest in controlling the spread of COVID-19 outweigh[ed] its interest in preventing the constitutional violations alleged" and declining to issue an injunction because "otherwise avoidable human suffering" would result).

Here, Defendants have shown that COVID-19 is an easily transmissible, potentially serious and sometimes fatal disease. See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,292. As of October 8, 2020, the United States had documented over 7.5 million cases and 211,000 deaths, and the evidence presented shows that mass evictions could have dire consequences in this circumstance. [Doc. 33-1, p. 17]. This includes evidence of an anticipated surge in infections because displaced tenants may be forced into crowded living quarters or homeless shelters, where compliance with public health guidelines, including social distancing and self-quarantining, is impossible. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55,294. In other words, the consequences of eviction (overcrowding, homelessness and housing instability)

undermine crucial strategies for containing COVID-19. And the deleterious effect is not limited to the millions who might be evicted, it extends to the community at large.

On the other hand, Plaintiffs have alleged two harms: (1) constitutional harm in the form of a violation of the right to access the courts; and (2) economic harm, which includes unpaid rent. As to the constitutional harm, Plaintiffs failed to show that they were substantially likely to succeed on that claim. Even if Plaintiffs did show a constitutional violation, the showing would not be enough to outweigh the public interest. Although Plaintiffs have shown an economic harm, that economic harm pales in comparison to the significant loss of lives that Defendants have demonstrated could occur should the Court block the Order. Accordingly, the Court finds that the public's interest in controlling the spread of COVID-19 in not outweighed by Plaintiffs' interests in preventing the constitutional violation and economic harm alleged here.[14]

[14] Like the court in League of Independent Fitness Facilities, this Court sympathizes with the persons affected by the Order. As that court explained, "[c]rises like COVID-19 can call for quick, decisive measures to save lives. Yet those measures can have extreme costs—costs that often are not borne evenly. The decision [on how] to impose [and allocate] those costs rests with the [other] branches of government, in this case, [the CDC,]" and not with this Court. 814 F. App'x at 130.

CONCLUSION

Although this pandemic has adversely affected Plaintiffs' rental businesses—as it has much of the nation's economy—Plaintiffs have failed to satisfy the standards necessary for obtaining a preliminary injunction as a matter of law. After thoroughly reviewing the record and the evidence cited therein, this Court finds that Plaintiffs have not clearly established their burden of persuasion as to any of the four prerequisites. Accordingly, Plaintiffs' Motion for Preliminary Injunction [Doc. 18] is **DENIED**.

SO ORDERED this 29th day of October, 2020.

J. P. BOULEE
United States District Judge