Exhibit A

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

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

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Richard Lee (Rick) Brown moves for a temporary restraining order or 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 suspending lawful residential evictions as applied to Mr. Brown.

When Mr. 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 CDC, 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. This Court should therefore issue a TRO or a preliminary injunction.

I. FACTS

Mr. Brown owns a residential property at 325 Highland Ave Winchester VA 22601 ("the property"). (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.)

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.)

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.)

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 August 7, 2020, a majority of the Supreme Court of Virginia, issued an order (of dubious constitutional legitimacy), 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). 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.

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 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.

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 was not effective so long as a local jurisdiction applied similar eviction restrictions. *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. (Rick Brown Decl. at ¶ 7.) Mr. Brown is also entitled to a writ of possession and a writ of eviction. (Rick Brown Decl. at ¶ 7.)

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) on the tenant. (Rick Brown Decl. at ¶ 8.) 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. (Rick Brown Decl. at ¶ 8.) 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. (Rick Brown Decl. at ¶ 8.)

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 CDC's order, and will provide a relevant affidavit if Mr. Brown initiates eviction procedures against her. (Rick Brown Decl. at ¶ 10.) 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. (Rick Brown Decl. at ¶ 11.) 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. (Rick Brown Decl. at ¶ 12.) Mr. Brown continues to provide habitable premises to the tenant, and his tenant has no defense to eviction under Virginia law. (Rick Brown Decl. at ¶ 13.)

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. (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.)

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 "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). It also requires courts to set aside action that is "in excess of statutory jurisdiction[.]" 5 U.S.C. § 706(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 Mr. Brown's

Rule 65(a) of the Federal Rules of Civil Procedure allows a court to issue a preliminary injunction after notice has been provided to an adverse party. It also may enter a temporary restraining order "without notice … to the adverse party" under Rule 65(b). "The standard for granting a preliminary injunction and a TRO are virtually identical." *Bouldin v. Mortg. Elec. Registration Sys., Inc.*, No. 1:14-CV-3214-TCB, 2014 WL 12495268, at *1 (N.D. Ga. Oct. 9, 2014); *accord Morgan Stanley DW, Inc. v. Frisby*, 163 F. Supp. 2d 1371, 1374 (N.D. Ga. 2001).

A TRO is appropriate 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. Mr. Brown Has 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

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

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).

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. § 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 that is hardly justification for a wholly unrelated ban on legal eviction proceedings. Traditional canons of construction such as *ejusdem generis*, *expressio unius*, *noscitur a sociis*, *casus omissus*, and non-surplusage show that CDC lacks the authority it needs to hold out its 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). Indeed, these canons show that the link between the relevant federal statutes and CDC's eviction moratorium order is so weak and attenuated that CDC cannot lawfully deprive Mr. Brown of the state-court eviction process.

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 U.S.C. § 70.2, which are far afield from *eviction procedures under state law*. And the *ejusdem generis* canon suggests that both provisions must be limited to actions taken in keeping with these examples. *Ejusdem generis*,

therefore, 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 the statutory phrasing and thus would read 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 this reading. This canon has greater force the more specific the enumeration. Scalia & Garner at 108. Here, the enumeration given 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 that far. Evictions, property law,

landlord-tenant law, and law relating to non-impairment of contracts are well beyond the genus of the enumeration 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 the words have something in common so 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 that are similar to the measures enumerated, such as "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 in not supplying "judicial legislation." *Ebert v. Poston*, 266 U.S. 548, 554 (1925). Indeed, "[t]o 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) and 42 C.F.R § 70.2. To read these provisions so broadly would be a breathtaking expansion of what Congress clearly meant to allow.

The non-surplusage canon also holds that "no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion). Construing 42 U.S.C. § 264(a) or 42 C.F.R. § 70.2 as authorizing CDC to superintend the entire United States economy and population would render as mere surplusage almost the entire United States Code. In understated terms, broadly construing the phrase "other measures" to cover eviction moratoriums would make the preceding enumeration mere surplusage.

Finally, 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

"protects the balance of power among the three branches of government by reserving to the legislature the task of determining what conduct to prohibit and what punishment to impose." *Id.*; *see U.S. 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)). "[C]riminal laws are for courts, not for the Government, to construe." *Abramski v. U.S.*, 573 U.S. 169, 191 (2014).

If this Court were to disregard the restrictive phrasing "inspection, fumigation, disinfection," etc., to allow the eviction moratorium, it would allow CDC to consolidate both legislative and executive functions in a single branch and create new criminal law where none existed before. Indeed, CDC is explicit that those who violate its order face criminal consequences, including up to a year in prison. 85 Fed. Reg. at 55296. But processing evictions under state law is undoubtedly lawful in the exercise of legislative judgment under state law. And it is certainly not *criminal* in the eyes of Congress. Vesting the unilateral authority to say otherwise and imprison citizens for *following state law* based on the thinnest reed of being "necessary" for

disease control would violate the fundamental rule of lenity. *See Wright*, 607 F.3d at 719 (Pryor, J., concurring). This Court should not sanction such outrageous conduct by a federal agency.

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 here 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 homeless individuals might mingle with others in a way more dangerous to public health than dining in restaurants or attending church services. Indeed, 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 acts as though states that allow in-person dining, indoor worship, and even in-person bar service are acting perfectly reasonably but using ordinary property laws to allow isolated evictions are "insufficient."

CDC also fails to show that the eviction 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. And there is no reason to think that the eviction order is any more "necessary" than other disease control measures. There are simply too many leaps in logic and evidence to be able to support such an overwhelming show of federal authority. CDC has made little serious effort to show the *necessity* of its eviction ban.

In short, CDC's order cannot be justified by its statutory and regulatory source. Mr. Brown is likely to succeed on his claim that it is an invalid agency action.[2]

[2] Because CDC has no statutory basis to issue the order, it also violates the Supremacy Clause because it is not adopted in pursuance of the Constitution. Under the Supremacy Clause of the U.S. Constitution, only "Laws of the United States which shall be made in Pursuance [of the Constitution] … shall be the

2. The CDC Order Violates Mr. Brown's 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. Baltimore & Ohio Railroad, 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

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supreme law of the land." U.S. Const. art. VI, cl. 2. As "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it," and CDC has no lawful basis for its order, it violates the Supremacy Clause. *See New York v. FERC*, 535 U.S. 1, 18 (2002).

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 at 414.

Most 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, a plaintiff's right to access the courts has been denied. *Harer*, 962 F.3d at 311-12. As the Fourth Circuit said nearly 50 years ago, "Of 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 the courts case).

The *Boddie* decision has been applied to ensure that classes of litigants are not locked out of the courthouse. Thus, a law requiring a litigant to post a bond before being able 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).

Moreover, 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.

Here, the CDC order has unlawfully stripped Mr. Brown of his constitutional right to access the courts. As a threshold, Mr. Brown has an undisputed right to a writ of eviction but has been barred totally by the order. Mr. Brown has a valid lease agreement and has provided habitable premises to his tenant. (Rick 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. (Rick Brown Decl. at ¶ 6.) Were the courts open to him, Mr. Brown would be fully entitled to avail himself of the statutorily-mandated process to evict his tenant so that he could either use his property or attempt to rent it to another person at a fair market rent of at least $925 per month. Mr. Brown has therefore met the initial requirement of showing the merit of his underlying claim. *See Christopher*, 536 U.S. at 413.

Moreover, the order constitutes a "complete foreclosure of relief" because it denies Mr. Brown the *only* lawful means of regaining possession of his property. In Virginia, when a tenant owes unpaid rent "and the tenant fails to pay rent within five days after written notice is served on him notifying the tenant of his nonpayment, and of the landlord's intention to terminate the rental agreement … the landlord may terminate the rental agreement and proceed to obtain possession of the premises." Va. Code § 55.1-1245(f). The landlord is then entitled to "possession and [] rent" of

his property. Va. Code § 55.1-1251. To re-acquire possession, the landlord must seek a writ of possession for unlawful detainer by filing a "motion for judgment in the circuit court alleging that the defendant is in possession and unlawfully withholds from the plaintiff the premises in question." Va. Code § 8.01-124. Once a landlord obtains a judgment in his favor in an unlawful detainer action, he is entitled to a writ of eviction. Va. Code § 8.01-471.

An unlawful detainer action is a 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; *cf.* Va. Code § 55.1-1415 ("The right to evict a tenant whose right of possession has been terminated in any *nonresidential* tenancy under this chapter may be effectuated by self-help eviction without further legal process so long as such eviction does not incite a breach of the peace.") (emphasis added). 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). 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).

The CDC Order has deprived Mr. Brown of his only path for recovery of his property. The "only effective means of resolving the dispute at hand" has been closed, and thus Mr. Brown's right to access the courts has been violated. *See Boddie*, 401 U.S. at 376. Just as with laws limiting divorce actions and even use of courts of record, the "governmental control over the process for defining rights and obligations" for evictions in Virginia "is exclusive" and therefore Mr. Brown's rights have been violated. *See Lecates*, 637 F.2d at 908-09.

3. CDC's Order Does Not Validly Preempt State Law

Mr. Brown is also likely to succeed on the merits because the CDC order does not validly preempt state law. There is nothing in the relevant statutes and regulations, 42 U.S.C. § 264 and 42 C.F.R. § 70.2, that purports to give CDC the authority to issue a nationwide eviction-moratorium order that preempts state law. There is also nothing in the relevant statutes or regulations that purports to give CDC the authority to supersede the Contracts Clause of Article I, Section 10 of the United States Constitution, and preempt the Contracts Clause of the Virginia Constitution (Va. Const. art. I, § 11) or states' laws protecting from impairment the obligations of private contracts that are in force.

CDC ordered a nationwide moratorium "to temporarily halt residential evictions to prevent the further spread of COVID-19." 85 Fed. Reg. at 55292. Yet, CDC's authority, as previously explained—and as this Court is required to construe using all available traditional tools of interpretation—is confined and narrow. To be sure, "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 preemption analysis is therefore the same whether the court is evaluating the preemptive force of a federal statute or a federal regulation. CDC's order cannot be construed to preempt state law here.

Midatlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986), is instructive. New Jersey law prohibited the abandonment of property of the estate on which toxic wastes had been dumped unless the site had been completely decontaminated. The federal bankruptcy law expressly allowed the trustee in a bankruptcy to "abandon any property that is burdensome to the estate or that is of inconsequential value to the estate." *Midatlantic*, 474 U.S. at 509 (quoting 11 U.S.C. § 554(a)). These provisions might appear to be in conflict: federal law allowed abandonment of the property while state law prohibited it.

The Supreme Court found that there was no preemption of the state law. The Court concluded that "Congress did not intend for the Bankruptcy Code to preempt

all state laws that otherwise constrain the exercise of a trustee's power." *Id.* at 505. The Court also looked to federal environmental laws and said that they evidence a congressional "goal of protecting the environment against toxic pollution." *Id.* In other words, even in the face of a clear conflict between federal and state law, the Court rejected a preemption claim.

The CDC order on its face imposes an eviction moratorium, while there is no current Virginia eviction moratorium in place. It is difficult to see how Congress could have intended 42 U.S.C. § 264 to preempt state property and landlord-tenant law. Further, like *Midatlantic*'s review of federal environmental law to decide the preemption question, here, Article I, Section 10 of the Constitution evidences a strong federal policy that States should not impair the obligation of contracts, and landlord-tenant law has traditionally been within the "virtually exclusive province" of the states under the Tenth Amendment. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018) (stating that the Tenth Amendment reserves all legislative power to the States; whereas Congress has "not plenary legislative power but only certain enumerated powers"). It cannot be said, therefore, that a current Virginia policy that prevents impairment of contractual obligations is preempted by Section 264 or the CDC Order.

The savings clause of 42 U.S.C. § 264(e) underscores Plaintiff's argument against preemption. Congress has directed that Section 264 should *not* be construed

"as superseding any provision under State law … , except to the extent that such a provision conflicts with an exercise of Federal authority under this section." Another obstacle in CDC's path to claiming preemption is the well-recognized "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Hillsborough County*, 471 U.S. at 715. In other words, CDC is statutorily expressly *deauthorized* from issuing orders such as the eviction-moratorium order that would supersede state law.

Moreover, the relevant state laws do not conflict with CDC's authority to regulate "inspection, fumigation, disinfection, sanitation, pest extermination" and such other germicidal or decontamination actions. 42 U.S.C. § 264(a). To the contrary, CDC's order displaces inherent state authority over residential evictions in defiance of the Tenth Amendment's textual reservation of that body of law virtually exclusively to the states. The Supremacy Clause "is not an independent grant of legislative power to Congress"; instead "it simply provides a rule of decision." *Murphy*, 138 S. Ct. at 1479.

For CDC to show that its order validly conflict-preempts (*see also* 42 U.S.C. § 264(e)) state law, it must satisfy two requirements. First, the CDC order "must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do." *Murphy*, 138 S. Ct. at 1479. Second, "since the Constitution confers upon Congress the power to regulate individuals, not

States," CDC must show that its order is "best read as one that regulates private actors." *Id.* CDC's order points *only* to 42 U.S.C. § 264 and 42 C.F.R. § 70.2 to show it meets the first *Murphy* prong. Ordinary statutory construction, as explained above, reveals that these two provisions cannot carry the burden of showing CDC has invoked some power conferred on Congress by the Constitution other than the Supremacy Clause. As to the second factor, CDC is regulating state actors as much as, if not more than, private individuals. To be sure, the CDC order dangles the prospect of exorbitant fines and long periods of incarceration over landlords that seek evictions. But more importantly, CDC compels, controls, and deputizes local sheriffs and state courts to do CDC's bidding. In *Murphy*, as here, therefore, "there is no way in which [the CDC order] can be understood as a regulation of private actors." 138 S. Ct. at 1481. Mr. Brown is, thus, likely to succeed on the merits of his non-preemption argument.

4. CDC Is Unconstitutionally Commandeering State Resources and State Officers to Achieve its Policy Objectives or Execute Federal Laws

The anticommandeering doctrine "is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475. The Supreme Court has "always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts,

it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 1477. Congress "[can]not conscript state governments as its agents." *Id.* The federal government also cannot "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997).

Yet such commandeering is precisely what the CDC order does. It commandeers state courts and state officers (like sheriffs) to execute federal laws, namely, the CDC eviction-moratorium order. In other words, CDC cannot order state court judges and other relevant state actors to not process summary evictions. Neither Congress nor CDC can "compel the States to … administer a federal regulatory program." *New York v. United States*, 504 U.S. 144, 188 (1992). It follows, therefore, that neither Congress nor CDC can "halt" pending or forthcoming state adjudicatory proceedings. 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.

Put differently, while the Supreme Court can review state-court decisions (*Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816)) and reverse or uphold state-court evictions, Congress or CDC cannot step in to provide a rule of decision and deputize state courts and state officers to apply it, nor can Congress or CDC

strip state courts of jurisdiction to process eviction cases—not without violating the anti-commandeering doctrine.

5. The CDC Order Is an Invalid Exercise of Legislative Power in Violation of Article I, § 1 of the U.S. Constitution

Mr. Brown is also likely to succeed on his claim that the Order is invalid because it is the product of an unconstitutional delegation of legislative power to CDC. If, as the order contends, § 264 grants CDC virtually unbounded authority to re-write state property law, then it violates Article I, § 1 of the Constitution—which prohibits Congress from delegating away its legislative power.

Article I, § 1 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 means that Congress may not divest (or transfer to others) "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1925). The nondelegation doctrine "holds that 'Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested.'" *United States v. Ambert*, 561 F.3d 1202, 1213 (11th Cir. 2009) (quoting *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935)).

The Supreme Court has repeatedly stressed the importance of this Article I Vesting Clause in maintaining the proper separation of powers among the three

branches of government. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (the doctrine that Congress may not delegate its legislative powers to the President or anyone else "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) ("in carrying out that constitutional division into three branches it is a breach of the fundamental law if Congress gives up its legislative power and transfers it to the President"); *Gundy v. United States*, 139 S. Ct. 2116, 2023 (2019) (plurality); *id.* at 2133 (Gorsuch, J., dissenting) ("The framers understood, too, that it would frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals. Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone.") (citation omitted).

In determining whether federal legislation improperly delegates legislative power to others, the Court applies the "intelligible principle" test. Under that test, "if Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix [administrative rules] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

As interpreted by CDC, the Public Health Service Act provides no such "intelligible principle" to which CDC "is directed to conform"—and thus unconstitutionally delegates legislative power to the Executive Branch. If CDC's interpretation is correct, then there is *no* action that CDC is not authorized to take in the name of preventing "the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a). 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.

Tellingly, CDC has failed to identify any administrative actions it could *not* take under the Public Health Service Act if, in its judgment, the actions would help to "prevent the introduction, transmission, or spread of communicable diseases." If, as CDC contends, its authority is not circumscribed by the types of actions explicitly mentioned in the next-to-last clause of § 264(a) ("inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of danger or infection to human beings"), then the statute provides no standards by which a court could determine

the limits of CDC's power. As the Supreme Court has explained, a statute violates the Article I Vesting Clause if "there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). Under CDC's expansive understanding of the Public Health Service Act, there are no actions that CDC is unauthorized to take (however extreme) once it unilaterally determines that the actions are necessary to curb the spread of communicable diseases—thereby rendering the Act invalid as an unconstitutional delegation of Congress's exclusive legislative power.

6. CDC Has No Authority to Waive, Dispense, or Suspend State Eviction Laws

Mr. Brown is also likely to succeed on his claim that that CDC lacks the authority to waive, dispense, or suspend Virginia's eviction laws. Evictions are a function of local law. Pursuant to their police power, the several states can and do pass laws governing when and under what circumstances a property owner may evict a tenant and regain possession of his or her property. *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 comprehensive statutory scheme governs landlord's rights and remedies following a material breach of a rental agreement, including the right to an eviction

and the recovery of possession based on nonpayment of rent. Va. Code §§ 8.01-470, 55.1-1245 *et seq.*

CDC's order purports to waive or suspend the duly enacted laws that govern evictions in the State of Virginia. CDC, however, has no authority to waive, dispense, 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."); *see also 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 How.) 1, 69 (1849) (Woodbury, J., dissenting)).

To the contrary, the United States Constitution forbids the Executive Branch from suspending the law. As described by prominent Columbia University Law School Professor Philip Hamburger, 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.").[3] Suspension of laws by the Executive Branch is "a power exercised not through and under the law, but above it." *Id.*

By placing the Suspension Clause in Article I of the United States Constitution, the Founders continued the English common-law tradition of vesting the suspension power 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 any other emergency. U.S. Const., art. I, § 9, cl. 2. 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.

CDC has not identified any act of Congress that delegated authority to impose eviction moratoriums across the United States. § 264(a) authorizes CDC only to

[3] Professor Hamburger is the Chairman of the Board and President of the New Civil Liberties Alliance, which is counsel to Mr. Brown.

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."

CDC has no authority to suspend Virginia's eviction laws absent a specific grant of statutory authority to do so. *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."). Because CDC has identified no such statutory authority—because none exists—CDC could not lawfully waive, dispense, or suspend the application of Virginia's laws governing a landlord's right to evict a tenant and regain possession of his property. *See* Va. Code §§ 8.01-470, 55.1-1245 *et seq.* Mr. Brown is therefore substantially likely to prove that CDC's order was unlawful.

C. Mr. Brown Will Suffer Irreparable Harm Absent a TRO

To satisfy the irreparable harm requirement, Mr. Brown need only demonstrate that absent a preliminary injunction, he is "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).

"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); *see also Michigan 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"). This is because the constitutional injuries cannot be made whole. *See Kikumura*, 242 F.3d at 963.

Constitutional harm aside, 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) (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) and collecting cases).

Mr. Brown has suffered and will continue to suffer from irreparable harm in two forms: (1) violation of his constitutional rights; and (2) noncompensable loss of the value of his property. As discussed, the CDC order is unconstitutional, and thus Mr. Brown need not show any harm beyond that fundamental violation of his rights. *See Assoc. of Gen. Contractors*, 896 F.2d at 1285.

Moreover, Mr. Brown cannot recover any of the economic damages he continues to incur because his tenant, by definition, is insolvent. To date, the tenant owes Mr. Brown more than $8000 in unpaid rent. (Rick Brown Decl. at ¶ 6.) That says nothing of the costs Mr. Brown has incurred from maintaining the of the property, or of the lost revenue he could generate were he able to place the property on the market. (Rick Brown Decl. at ¶ 14.) Undoubtedly his tenant does not have the money to satisfy this obligation, which is why eviction is such an essential remedy. Indeed, the CDC order expressly applies only to *insolvent* tenants, who are "unable to pay the full rent." 85 Fed. Reg. at 55293. Eviction is the only remedy that could allow Mr. Brown to place his property on the market and seek rent from a solvent

lessee, and it is the only one that would relieve him of his unilateral obligation to maintain the property for a tenant in breach. A TRO is necessary to secure Mr. Brown's opportunity to recover the value of his property as to both the "insolvent" tenant and the "loss of valuable business opportunities" that the order has denied him. *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 Mr. Brown

A TRO 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 TRO. Whatever the need for a government response to the

COVID-19 pandemic, the order seeks to advance one specific policy solution in violation of the constitutional interests of property holders across the nation. As discussed above, the order presumes that even a single lawful eviction under state law will result in "mass evictions" and mass homelessness, which in turn will increase the spread of disease to an unacceptable level. Nevermind other aspects of ordinary life that CDC thinks are permissible—mass gatherings, in-person dining, church service, etc. 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 temporarily restrained.[4]

III. CONCLUSION

For the reasons set out above, the Court should enter a temporary restraining order or 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 Mr. Brown is entitled to evict his tenant, and the TRO would do nothing more than restore the judicial process wrongly denied to him. The CDC can hardly incur damages by following the federal constitution and a process created by Virginia law.

September 8, 2020

Respectfully,

/s/ James W. Hawkins
James W. Hawkins
Georgia State Bar No. 338767
JAMES W. HAWKINS, LLC
5470 Blair Valley Run
Cumming, GA 30040
V: 678-697-1278
F: 678-540-4515
jhawkins@jameswhawkinsllc.com

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
caleb.kruckenberg@ncla.legal
(202) 869-5210
Motion to Appear Pro Hac Vice Forthcoming

Counsel for Plaintiff

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

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 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/ James W. Hawkins
James W. Hawkins
Counsel for Plaintiff