IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KC TENANTS, *Plaintiff*, v. DAVID M. BYRN, in his official capacity as the Presiding Judge for the 16th Judicial Circuit Court, Jackson County, Missouri, MARY A. MARQUEZ, in her official capacity as the Court Administrator for Jackson County, Missouri, *Defendants*, and, HELLA SHRIVER; JAMES GORHAM; NATIONAL ASSOCIATION OF RESIDENTIAL PROPERTY MANAGERS, *Proposed Intervenors-Defendants*.	)	Case No. 20-000784-CV-W-HFS

PROPOSED INTERVENORS' [PROPOSED] SUGGESTIONS IN OPPOSITION TO PLAINTIFF KC TENANTS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTRODUCTION 1
BACKGROUND 2
I. THE CDC ORDER 2
II. ADMINISTRATIVE ORDER NO. 2020-154 4
III. PLAINTIFF'S CLAIMS AND PROPOSED INTERVENORS' INTERESTS IN THIS LITIGATION 6
ARGUMENT 10
I. PLAINTIFF HAS NOT SHOWN A PROBABILITY IT WILL SUCCEED ON THE MERITS 11
A. The CDC Order Is Unconstitutional Because It Violates Proposed Intervenors' Right to Access the Courts 11
B. The Remedy Plaintiff Seeks Is Unconstitutional and Cannot Be Granted 14
C. The CDC Order Violates the Supremacy Clause of the U.S. Constitution 15
D. The CDC Order Is an Exercise of Legislative Power and thus Invalid 22
II. PLAINTIFF HAS NOT SHOWN THREAT OF IRREPARABLE HARM 23
III. THE PUBLIC INTEREST FAVORS DENYING PLAINTIFF'S REQUESTED RELIEF 26
CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 24
Boddie v. Connecticut, 401 U.S. 371 (1971) 12, 14
CDI Energy Srvs., Inc. v. West River Pumps, Inc., 567 F.3d 398 (8th Cir. 2009) 11
Chambers v. Balt. & Ohio R.R., 207 U.S. 142 (1907) 11
Chlorine Inst., Inc. v. Soo Line R.R., 792 F.3d 903 (8th Cir. 2015) 24
Christensen v. Harris County, 529 U.S. 576 (2000) 15
Christopher v. Harbury, 536 U.S. 403 (2002) 9, 11, 12
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 18
Coteau Properties Co. v. Dep't of Interior, 53 F.3d 1466 (8th Cir. 1995) 24
Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109 (8th Cir. 1981) 10, 11, 15
Ebert v. Poston, 266 U.S. 548 (1925) 19
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 16
Fuller v. Norman, 936 F. Supp. 2d 1096 (W.D. Mo. 2013) 26
Gelco Corp. v. Coniston Partners, 811 F.2d 414 (8th Cir. 1987) 23
Gen. Motors Corp. v. Harry Brown's, LLC, 563 F.3d 312 (8th Cir. 2009) 24
Harer v. Casey, 962 F.3d 299 (7th Cir. 2020) 11, 12, 13
Home Instead, Inc. v. Florance, 721 F.3d 494 (8th Cir. 2013) 11
Hudson v. Palmer, 468 U.S. 517 (1984) 12
In re Ferro, 228 B.R. 700 (Bankr. W.D. Mo. 1999) 14
Iselin v. United States, 270 U.S. 245 (1926) 19
La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) 16
Lecates v. Justice of Peace Court No. 4 of State of Del., 637 F.2d 898 (3d Cir. 1980) 13, 14
Local Union No. 884, United Rubber, Cork, Linoleum, & Plastic Workers of Am. v. Bridgestone/Firestone, Inc., 61 F.3d 1347 (8th Cir. 1995) 24
Loving v. United States, 517 U.S. 748 (1996) 16
Mazurek v. Armstrong, 520 U.S. 968 (1997) 10
McBoyle v. United States, 283 U.S. 25 (1931) 18
McCray v. State of Md., 456 F.2d 1 (4th Cir. 1972) 12
Moskal v. United States, 498 U.S. 103 (1990) 20
Novus Franchising, Inc. v. Dawson, 725 F.3d 885 (8th Cir. 2013) 24
Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir. 2008) 26
Phyllis Schlafly Revocable Tr. v. Cori, 924 F.3d 1004 (8th Cir. 2019) 10
Rankin v. Indep. Sch. Dist. No. I-3, Noble Cty., Okla., 876 F.2d 838 (10th Cir. 1989) 13
Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005) 26
S.J.W. ex rel Wilson v. Lee's Summit R–7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012) 24
Sanborn Mfg. Co., Inc. v. Campbell/Hausfeld Scott Fetzer Co., 997 F.2d 484 (8th Cir. 1993) 10
United States v. Bass, 404 U.S. 336 (1971) 20
United States v. Cavins, No. 05-3095-01-CR-S-RED, 2007 WL 9747574 (W.D. Mo. Mar. 14, 2007) 20
United States v. Parker, 762 F.3d 801 (8th Cir. 2014) 20
Wayman v. Southard, 23 U.S. 1 (1825) 22
Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008) 10
Yates v. United States, 574 U.S. 528 (2015) 19, 20

Constitutional Provisions

U.S. Const. amend. I 9
U.S. Const. amend. V 9
U.S. Const. amend. XIV 9
U.S. Const. art. I, § 1 22
U.S. Const. art. IV, § 2 9
U.S. Const. art. VI, cl. 2 16

Statutes

18 U.S.C. § 3559 ..... 3, 4
18 U.S.C. § 3571 ..... 3, 4
42 U.S.C. § 243 ..... 3, 4
42 U.S.C. § 264 ..... passim
42 U.S.C. § 268 ..... 3, 4
42 U.S.C. § 271 ..... 3, 4
Mo. Rev. Stat. § 535.010 ..... 6, 13

Rules and Regulations

42 C.F.R. § 70.18 ..... 3, 4
42 C.F.R. § 70.2 ..... passim
85 Fed. Reg. 55292 (Sept. 4, 2020) ..... passim
Administrative Order No. 2020-154 (Sept. 4, 2020) 4, 5, 6, 25

Other Authorities

Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (Thompson/West 2012) 18, 19
HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 Frequently Asked Questions (Oct. 9, 2020) 3, 4, 15

INTRODUCTION

When Proposed Intervenors, Hella Shriver, James Gorham, and the members of the National Association of Residential Property Managers ("NARPM®") 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 Jackson County, Missouri court system to enforce their contracts and evict their tenants, so that they could regain possession of their property and lease it to tenants who would meet their contractual obligations. Proposed Intervenors upheld their end of the bargain. They provided a habitable home to their tenants and have continued to pay for maintenance, utilities, taxes, and other upkeep expenses. When their tenants breached their agreement, some well before the COVID-19 pandemic took hold, Proposed Intervenors should have been able to follow the lawful processes laid down by Missouri law for retaking possession of their homes.

Proposed Intervenors failed to anticipate, however, that the U.S. Centers for Disease Control and Prevention ("CDC"), a federal agency, would issue an unprecedented, unilateral order suspending *state* law under the unsupported premise that doing so was "necessary" to control the COVID-19 pandemic. CDC's sweeping actions are not authorized by statute or regulation. But even if they were, they comprise an unheard-of affront to core constitutional limits on federal power.

Plaintiff has premised its motion for preliminary relief solely on the legality of CDC's Order. Indeed, Plaintiff has argued that Jackson County's purported failure to fully implement the Order is itself unlawful. But because the CDC Order is unlawful, Plaintiff's requested relief would exacerbate an ongoing constitutional injury suffered by Proposed Intervenors. Accordingly, this Court should deny Plaintiff's motion for a preliminary injunction, while also entering an order invalidating the CDC Order.

BACKGROUND

I. THE CDC ORDER

On September 1, 2020, Acting Chief of Staff for the CDC, Nina Witkofsky, issued an order entitled, "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*." 85 Fed. Reg. 55292 (Sept. 4, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf ("CDC Order"). Upon its September 4, 2020 publication, the CDC Order became effective and remains so until December 31, 2020 "unless extended." *Id.* at 55297.

The CDC Order is allegedly based on a series of justifications and "findings." *Id.* at 55294-96. Because "[e]victed renters must move," the Order jumped to conclude that 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 provides that "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.* at 55292. Under the Order, "'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.

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 CDC Order including nonpayment of rent. *Id.* at 55293. The attestation must state that the tenant: (1) "has 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) was not required to report any income in 2019 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment [under] … the [Coronavirus Aid, Relief, and Economic Security ("CARES") Act, P.L. 116-316];" (3) "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) "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 55293.

The CDC Order *criminalizes* violations of the Order, which is enforced by the U.S. Department of Justice. *See id.* at 55296; *see also* 18 U.S.C. §§ 3559, 3571; 42 U.S.C. §§ 243, 268, 271; 42 C.F.R. § 70.18; *HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 Frequently Asked Questions* (Oct. 9, 2020) *available at* https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf ("CDC Order Guidance"). In full, the Order states: "[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[.]" 85 Fed. Reg. at 55296.

CDC's Order is purportedly authorized by 42 U.S.C. § 264 and 42 C.F.R. § 70.2. *Id.* at 55297. The Order claims 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.

On October 9, 2020, the CDC issued its CDC Order Guidance, which purportedly clarifies that the 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." CDC Order Guidance at 1 (emphasis in original).

II. ADMINISTRATIVE ORDER NO. 2020-154

In response to the CDC's Order, the 16th Judicial Circuit for Jackson County, Missouri issued Administrative Order No. 2020-154 ("Administrative Order"). *In re: Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 in Response to Centers for Disease Control and Prevention Order Published on September 4, 2020*, Administrative Order No. 2020-154 (Sept. 4, 2020). The Administrative Order is in effect from "September 4, 2020 and continuing until December 31, 2020, unless modified by any subsequent Administrative Order." *Id.* at 2, ¶ 1.

The Administrative Order states that "the CDC Order does not contain specific language preventing the filing of or processing of legal actions in the Missouri State Courts or in any other jurisdiction." *Id.* The Administrative Order requires a party with a legal right to pursue an eviction "to file a 'Verification' with the Court … under penalty of perjury, which verifies that the party seeking the writ of execution has not been provided with an executed copy of a Declaration Form from the persons against whom the eviction is sought, or that the party seeking the writ of execution is evicting the persons on grounds not precluded by the CDC Order." *Id.* at 2-3, ¶ 1. The Verification must be filed with the Court "prior to the issuance and/or service of any existing, pending, previously filed or

newly filed writ of execution seeking to remove or cause the removal of a person from a residential property, or seeking to recover possession of any residential property for the nonpayment of rent." *Id.* at 2, ¶ 1.

An "executed copy of the Verification" must also be provided to the tenants against whom the eviction is sought. *Id.* at 3, ¶ 2. The Verification must inform the tenants that if they "contest or challenge the accuracy or veracity of the statements in the Verification" that they "shall" file "a notice or request for a hearing" regarding the "accuracy or veracity of the statements in the Verification." *Id.* The party pursuing the eviction must include a "certification, under penalty of perjury" in the Verification filed with the Court stating that they have complied with these additional notice requirements. *Id.*

The Administrative Order precludes service or execution of any "writ of execution to remove or cause the removal of a person from a residential property or to recover possession of any residential property for the nonpayment of rent" unless a Verification form has been properly completed and filed pursuant to the Administrative Order. *Id.* at 3, ¶ 3. If a tenant challenges the veracity or accuracy of the Verification and files a notice or request seeking a hearing on such, the Court must hold a hearing and enter "a finding/Order/Judgment." *Id.* Under such circumstances, "no writ of execution to remove or cause the removal of a person from a residential property or to recover possession of any residential property for the nonpayment of rent will be served and/or executed unless and until" the Court makes a determination about whether the "writ may be served and/or executed." *Id.*

The Administrative Order "does not preclude a landlord, owner of a residential property, or other person or entity with a legal right to pursue eviction or a possessory action from filing a rent and possession action and pursuing that action to judgment." *Id.* at 3, ¶ 4. In entering a judgment for such an action during the pendency of the Administrative Order, the Judge "shall state in the judgment

the grounds for the judgment and whether those grounds are subject to the provisions of the Order or are outside the parameters of the Order." *Id.* at 3, ¶ 6.

The Administrative Order permits those with a legal right to pursue eviction or a possessory action who have been provided a Declaration Form pursuant to the CDC Order to request an evidentiary hearing if they "wish[] to challenge the accuracy or veracity of any statements in the Declaration Form." *Id.* at 3, ¶ 7. However, in circumstances where the CDC Order is deemed to apply and the tenant is a "covered person," the Administrative Order still precludes those with a legal right to pursue eviction or a possessory interest from receiving full relief under the law. *See* Mo. Rev. Stat. § 535.010 ("In all cases in which lands … are … rented or leased, and default shall be made in the payment of the rents at the time or times agreed upon by the parties, it shall be lawful for the landlord to dispossess the tenant and all subtenants and recover possession of the premises rented or leased, in the manner herein provided.").

III. PLAINTIFF'S CLAIMS AND PROPOSED INTERVENORS' INTERESTS IN THIS LITIGATION

Plaintiff KC Tenants alleges that the Administrative Order "expressly permit[s]" activities that the CDC Order prohibits and adds what it perceives to be "invasive evidentiary hearings." ECF No. 1, ¶¶ 79-80 ("Complaint"). Plaintiff argues that implementation of the Administrative Order "directly and fundamentally conflict[s] with federal agency action [*i.e.*, the CDC Order] and the statute and regulation that authorize it, in violation of the Supremacy Clause" and that the Administrative Order "is preempted by federal law." *Id.* at ¶ 81. Plaintiff also maintains that it and its members "have a state-created liberty interest in temporary immunity from any action to remove or cause the removal of a tenant from a residential property … that the CDC extends when the tenant has submitted a declaration under penalty of perjury claiming protection under" the CDC Order and that its "state-

created liberty interest" is harmed by "[t]he Administrative Order and its implementation." *Id.* at ¶¶ 87-88.

The Proposed Intervenors are housing providers and a property management organization representing housing providers who own and operate properties in Jackson County who have been denied the ability to seek otherwise lawful evictions because of the CDC Order.

Proposed Intervenor Hella Shriver owns a residential property in Independence, Missouri that she rented to two tenants in October 2019 for $795 per month. Declaration of Hella Shriver (Oct. 22, 2020) ¶ 3 (attached as Exhibit 1 to Proposed Intervenors' Suggestions in Support of Motion to Intervene, filed contemporaneously) ("Shriver Decl."). As of the date of this filing, the tenants have not paid any rent since August 2020. Shriver Decl. ¶ 5. Ms. Shriver is entitled to an eviction for nonpayment of rent, but when she finally accessed the Jackson County court system, her tenants presented her with a declaration consistent with the CDC Order, and the presiding judge stayed her case until January 2021, and denied her request for an eviction order based on the tenants' damage to her property. Shriver Decl. ¶¶ 7-9. Ms. Shriver was not given an opportunity to challenge the accuracy of the affidavits, nor was she provided a copy of the affidavits. Shriver Decl. ¶ 10. On information and belief, Ms. Shriver has a good-faith basis to believe the tenants' affidavits are false. *Id.* By the time Ms. Shriver's case is allowed to proceed, her tenant will owe her some $4,225 in unpaid rent, but Ms. Shriver will continue to incur monthly maintenance costs, ordinary wear and tear to her property, and the lost opportunity to rent or use the house at the fair market value of at least $795 per month. Shriver Decl. ¶ 12. Because her tenants have attested in their CDC Declaration that they are insolvent, Ms. Shriver has no hope of recovering the lost rent and fees.

Proposed Intervenor James Gorham owns a residential property in Kansas City, Missouri that he rented in October 2019 for $685 per month. Declaration of James Gorham ¶¶ 3-4 (Oct. 20, 2020)

(attached as Exhibit 2 to Proposed Intervenors' Suggestions in Support of Motion to Intervene, filed contemporaneously) ("Gorham Decl."). Mr. Gorham managed the property through Swift Realty & Property Management ("Swift RPM"), which is a member of the National Association of Residential Property Managers. Gorham Decl. ¶ 5. The tenant stopped paying rent almost immediately, and as of December 2019, was already delinquent for November and December rent and owed $1,370 plus late fees. Gorham Decl. ¶ 6. On December 12, 2019, Swift RPM served the tenant with a notice to vacate the apartment for nonpayment of rent. Gorham Decl. ¶ 7. The tenant thereafter made partial payments toward the outstanding balance. Gorham Decl. ¶ 8. On April 22, 2020, Swift RPM again served the tenant with a notice to vacate for nonpayment of rent, but the eviction filings could not be accomplished because of court closures in Jackson County, Missouri. Gorham Decl. ¶ 10. Throughout 2020, the tenant continuously paid rent late and eventually stopped paying altogether. Gorham Decl. ¶¶ 9-13.

In September 2020, through his new property management company, TREH Property Management ("TREH KC, LLC"), Mr. Gorham again sought to evict his tenant, now owing more than $4,600 in unpaid rent and late fees. Gorham Decl. ¶¶ 12-13. However, the tenant served TREH KC, LLC with a declaration consistent with the CDC Order. Gorham Decl. ¶ 13. As a result, Mr. Gorham has not been able to obtain a court hearing in Jackson County, Missouri to pursue the eviction process. Gorham Decl. ¶ 15. Mr. Gorham will continue to incur monthly maintenance costs, ordinary wear and tear to his property, and the lost opportunity to rent or use the house at the fair market value of at least $685 per month. Gorham Decl. ¶ 17. Because his tenant has attested in her CDC Declaration that she is insolvent, Mr. Gorham has no hope of recovering the lost rent and fees.

Proposed Intervenor National Association of Residential Property Managers ("NARPM®") is a member organization representing 5,425 residential property managers nationwide. Declaration

of Gail S. Phillips (Oct. 20, 2020) ¶ 1 (attached as Exhibit 3 to Proposed Intervenors' Suggestions in Support of Motion to Intervene, filed contemporaneously) ("Phillips Decl."). NARPM® members manage more than 2 million rental units across the country. Phillips Decl. ¶ 2. At least 14 of NARPM® members manage 2,194 residential units in Jackson County, Missouri. Phillips Decl. ¶ 3. NARPM® member Myeisha Wright owns TREH KC, LLC, a property management company in Kansas City, which manages rental properties in Jackson County, Missouri. Phillips Decl. ¶ 4. At least one of TREH KC, LLC's managed properties has a tenant who has failed to pay rent for more than one month, and the company is entitled to seek eviction for nonpayment of rent under Missouri law. Phillips Decl. ¶ 5. However, the tenant has provided Ms. Wright with a declaration consistent with the CDC Order, and, as a result, the company is unable to seek an eviction using the Jackson County court system. Phillips Decl. ¶¶ 6-7.

Plaintiff's requested relief improperly asks this Court to enter an Order that mandates enforcement of CDC's unlawful Order, thus violating Proposed Intervenors' constitutional rights. If Plaintiff prevails and the preliminary relief it seeks is granted, Proposed Intervenors will be stripped of their fundamental constitutional right of access to courts under the U.S. Constitution. Plaintiff's preliminary relief—seeking "preliminary and permanent injunctions prohibiting violation of the CDC's nationwide eviction moratorium," Complaint at 25—necessarily and impermissibly denies Proposed Intervenors from accessing the only lawful means of evicting a delinquent tenant. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002); *see also* U.S. Const. art. IV, § 2 (Privileges and Immunities Clause), amend. I (Petition Clause), amend. V (Due Process Clause), amend. XIV (Equal Protection and Due Process Clauses).

Perhaps more fundamentally, Plaintiff assumes the underlying validity of the CDC Order. However, the Order is an invalid exercise of CDC's limited authority and is void.

This Court should deny Plaintiff's motion for preliminary injunctive relief.

ARGUMENT

Plaintiff's motion for preliminary injunction should be denied because Plaintiff has not carried its heavy burden to demonstrate that it has met the four factors necessary to warrant the extraordinary and drastic injunctive relief it seeks. Not only has Plaintiff failed to show an irreparable injury warranting intervention, more fundamentally, it seeks enforcement of an unlawful order that violates the constitutional rights of Proposed Intervenors. Rather than grant an injunction shutting down access to the Jackson County courts any further, this Court should rule that the CDC Order is invalid.

Whether a district court should issue a preliminary injunction is determined by weighing four factors: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

A preliminary injunction is "an extraordinary and drastic remedy" and the movant bears the "heavy" burden of making a "clear showing" that it is entitled to such relief. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *see also Sanborn Mfg. Co., Inc. v. Campbell/Hausfeld Scott Fetzer Co.*, 997 F.2d 484, 485-96 (8th Cir. 1993); *Phyllis Schlafly Revocable Tr. v. Cori*, 924 F.3d 1004, 1009 (8th Cir. 2019) (noting that "more recent Supreme Court opinions emphasiz[e] the movant's burden to show that "irreparable injury is *likely* in the absence of an injunction.") (quoting *Winter*, 555 U.S. 22).

I. PLAINTIFF HAS NOT SHOWN A PROBABILITY IT WILL SUCCEED ON THE MERITS

"While 'no single factor is determinative," the probability of success factor is the most significant." *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (internal citations omitted) (quoting *Dataphase Sys., Inc.*, 640 F.3d at 113); *CDI Energy Srvs., Inc. v. West River Pumps, Inc.,* 567 F.3d 398, 402 (8th Cir. 2009) ("[T]he absence of a likelihood of success on the merits strongly suggests that preliminary injunctive relief should be denied.").

Plaintiff assumes the validity of the CDC Order, which is fatal to its ability to succeed on the merits for several reasons. The CDC Order is unconstitutional because it impermissibly bars parties, like Proposed Intervenors, from accessing the courts and receiving full relief. The CDC Order also violates the Supremacy Clause of the U.S. Constitution. Finally, the CDC Order is an exercise of legislative power that Congress did not—and could not—delegate to CDC, and it is thus invalid.

A. The CDC Order Is Unconstitutional Because It Violates Proposed Intervenors' 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. "[D]ue 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., Okla.*, 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 Proposed Intervenors of their constitutional right to access the courts. Ms. Shriver and Mr. Gorham have undisputed rights to evict their tenants under Missouri law but have been barred from exercising those rights because of the CDC Order which Plaintiff seeks to enforce through this action. Ms. Shriver has a valid lease agreement and has provided habitable premises to her tenant. Shriver Decl. at ¶11. Yet her tenants have refused to pay their rent, now owing her over *three times* the monthly rent—a total of $2,535. Shriver Decl. at ¶¶ 3,5. Mr. Gorham's tenant has also fallen behind and owes $4,600 of back rent. Gorham Decl. at ¶ 13. If not for CDC's Order, Proposed Intervenors would be fully entitled to have their tenants ejected from their properties so that they could either use them or seek tenants willing to abide by their rental obligations.

The CDC Order constitutes a "complete foreclosure of relief" because it denies Proposed Intervenors the *only* lawful means of regaining possession of their property. *See Harer*, 962 F.3d at 311-12. Both Ms. Shriver and Mr. Gorham are entitled under Missouri law to retake possession through eviction proceedings for their tenants' nonpayment. Mo. Rev. Stat. § 535.010; *see also In re Ferro,* 228

B.R. 700, 707 (Bankr. W.D. Mo. 1999) ("A landlord may not use self-help measures to take possession of a tenant's personal property as security for past due rent; the remedy is to sue the tenant for rent and possession under Chapter 535 of the Missouri Revised Statutes, or seek to attach the personal property for unpaid rent pursuant to Mo. Rev. Stat. § 441.240."). Likewise, eviction proceedings are the sole means for nearly all of NARPM®'s 14 members' property management companies to exercise their legal right to pursue evictions or possessory actions on behalf of their clients. *See* Phillips Decl. at ¶¶ 3-6.

The CDC Order has thus deprived Proposed Intervenors 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, Proposed Intervenors' rights to access the courts have been violated. This harm will be compounded if Plaintiff's prevail and the preliminary injunction they seek is issued.

B. The Remedy Plaintiff Seeks Is Unconstitutional and Cannot Be Granted

Plaintiff seeks a preliminary injunction "prohibiting violation of the CDC's nationwide eviction moratorium" which necessarily requires shutting the courthouse doors on Proposed Intervenors and other housing providers in Jackson County who have a legal right to pursue lawful eviction or a possessory action under Missouri law—a wholly unconstitutional remedy. Proposed Intervenors and other housing providers have a fundamental constitutional right to access the courts. *See supra* III.A.

According to Plaintiff, the CDC's Order is an absolute bar to permitting Defendants or Proposed Intervenors from taking *any* steps that would advance an eviction or possessory action.[1] Thus, a preliminary injunction that "prohibit[s] violation of the CDC's nationwide eviction moratorium," Complaint at 25, would require this Court to order Defendants to stop processing evictions or possessory actions in any way. Plaintiff's Motion for Preliminary Injunction is somewhat narrower than what appears to be contemplated in the Complaint. *See* ECF No. 25, ¶ 3 ("Plaintiff asks the Court to preliminarily enjoin Defendant Marquez from accepting filings of new rent and possession actions or unlawful detainer actions based on nonpayment of rent until the expiration of the CDC's Moratorium until further order of this Court."). Regardless, Plaintiff's requested relief still seeks to cut off Proposed Intervenors' constitutional right to access the courts and the only lawful means to regain possession of their property. Such an order would prevent Proposed Intervenors from contesting the validity of any false or fraudulent affidavits for no good reason. Finally, such an order would prevent Proposed Intervenors from beginning process now in order to prevent a massive case backlog come January that would further injure them.

On balance, the clear violation of Proposed Intervenors' constitutional rights that will occur if the preliminary injunction is granted outweighs the speculative harms alleged by Plaintiff.[2]

C. The CDC Order Violates the Supremacy Clause of the U.S. Constitution

Article VI, Clause 2 of the United States Constitution provides:

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[1] This position contradicts the CDC Order Guidance which states that "The 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." CDC Order Guidance at 1. However, the CDC Order Guidance does not have the force of law. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

[2] This analysis also mirrors the analysis required under the second *Dataphase* factor, that the movant must establish that "the state of the balance between [the irreparable] harm and the injury that granting the injunction will inflict on other parties litigant" favors granting the preliminary injunction. *Dataphase Sys., Inc.*, 640 F.2d at 113.

> 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.

The Supremacy Clause grants "supreme" status only to the "*Laws* of the United States." *Id.*

Under the Supremacy Clause, Congress has the power to preempt state laws and regulations. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986). Preemption is not limited to actions taken by Congress itself, "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Id.* at 368-69. The inverse is also true. When a federal agency acts outside the scope of its congressionally delegated authority, it cannot preempt state law or regulation. *Id.* at 374 ("[I]t is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority.").

Thus, the preliminary inquiry to determine whether a federal law preempts a state regulation must be whether the federal law is a "law" made in pursuance of "[t]his Constitution." *See* U.S. Const. art. VI, cl. 2.

"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, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n*, 476 U.S. at 374. "[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 broad authority to unilaterally void state laws across the country. To the contrary, 42 U.S.C. § 264 contains an *explicit preemption provision*, 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). This provision coupled with the lack of statutory and regulatory authority for the CDC's Order should end the inquiry.

The text of the law and regulation do not support the broad authority CDC relied on in issuing its Order. 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 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. 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 anyone 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). The operative statute and the regulation say nothing 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). Reading these provisions so broadly would be a breathtaking expansion of what Congress clearly meant to allow.

Moreover, reading either provision to allow CDC to create a substantive criminal law for violating a federal eviction moratorium would violate the constitutionally required rule of lenity. *See Yates*, 574 U.S. at 548. "The 'venerable rule' of lenity flows in large part from 'the fundamental principle that no citizen should be … subjected to punishment that is not clearly prescribed.'" *United States v. Parker*, 762 F.3d 801, 806 (8th Cir. 2014). Lenity is a rule of statutory construction that requires courts to "resolve ambiguity in the defendant's favor." *Id.*; *United States v. Bass*, 404 U.S. 336, 348 (1971).

Two constitutional principles underlie lenity: due process and the separation of powers. *Bass*, 404 U.S. at 348; *Parker*, 762 F.3d at 806-07. The rule "'is founded on the tenderness of the law for the rights of individuals.'" *Id.* at 807 (quoting *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.)). "Lenity is reserved for 'those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to "the language and structure, legislative history, and motivating policies" of the statute.'" *United States v. Cavins*, No. 05-3095-01-CR-S-RED, 2007 WL 9747574, at *2 (W.D. Mo. Mar. 14, 2007), *aff'd*, 543 F.3d 456 (8th Cir. 2008) (emphasis in original) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990) (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. 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 to imprison citizens for *following and invoking state law* based on the thinnest reed of being "necessary" for disease control violates lenity.

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 extravagant 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? In issuing its Order, CDC did not establish a factual basis for its assumption that newly evicted individuals will mingle with others in a way more dangerous to public health than other activities it did not bar, like dining in restaurants or attending school. 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, school attendance, grocery shopping, and even in-person bar service but has decreed that using ordinary property laws to allow evictions of delinquent tenants is "insufficient."

In issuing its Order, CDC also failed to show that the Order was "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 in issuing the Order made little effort to show the *necessity* of its eviction ban.

In short, CDC's Order cannot be justified by its alleged statutory and regulatory authority. Thus, the CDC Order is not the "supreme" law and cannot validly preempt the Administrative Order. Because the CDC Order is invalid, Plaintiff cannot succeed on the merits.

D. The CDC Order Is an Exercise of Legislative Power and thus Invalid

Article I, § 1 of the U.S. Constitution states, "*All* legislative Powers herein granted shall be vested in a Congress of the United States." *Id.* (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). 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.*

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 meagerly supported finding suffices to justify the massive-scale moratorium decreed here, then § 264(a) imposes no discernible limits on CDC's regulatory authority.

For example, CDC has paid little or no attention to what kinds of alternative or subsidized housing arrangements are available in different states where evictions might occur. Landlord-tenant law is a traditionally state and local concern, and states could create (and have created) a wide variety of different regimes for coping with consequences of any evictions—and would have the power to do so in the event of a spike in evictions. This is not a policy issue committed by Congress to CDC's ken.

Alternatively, if § 264(a) supplies a sufficient intelligible principle under current interpretation, then the doctrine must be re-examined to adhere to the proper limits contained in the Vesting Clause of Article I, § 1. As interpreted by the CDC Order, § 264(a) could also authorize CDC to prohibit even healthy citizens from attending church services, assembling for the purpose of expressing their political views, or 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. 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. Because § 264(a) is unconstitutional as applied here, CDC lacks any statutory authority to adopt the Order.

II. PLAINTIFF HAS NOT SHOWN THREAT OF IRREPARABLE HARM

Failing to show irreparable harm is "sufficient ground upon which to deny a preliminary injunction." *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987); *Local Union No. 884, United Rubber, Cork, Linoleum, & Plastic Workers of Am. v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347, 1357

(8th Cir. 1995) ("[F]ailure to establish irreparable harm is fatal to [Plaintiff's] request for a preliminary injunction."). This is because "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506-07 (1959).

Harm is irreparable "when a party has no adequate remedy at law." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). "In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Novus Franchising, Inc. v. Dawson,* 725 F.3d 885, 895 (8th Cir. 2013) (internal quotation marks omitted). Speculative harm is insufficient to support a preliminary injunction. *S.J.W. ex rel. Wilson v. Lee's Summit R–7 Sch. Dist.,* 696 F.3d 771, 779 (8th Cir. 2012). Likewise, "[m]erely demonstrating the 'possibility of harm' is not enough." *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015); *Coteau Properties Co. v. Dep't of Interior*, 53 F.3d 1466, 1484 (8th Cir. 1995) (Heaney, J. dissenting) ("[M]erely hypothetical threats of future harm are insufficiently immediate to justify the granting of preliminary relief.").

Plaintiff's claim of irreparable harm fails for several reasons. First, the only harm specifically alleged in its Complaint appears to be perceived economic harm based on the alleged diversion of organizational resources from planned projects to actions in response to the Administrative Order. *See* Complaint ¶¶ 62-69. Plaintiff is a tenants' rights organization that, among other things, conducts community outreach and education and manages a tenant hotline. *Id.* at ¶ 2. The resource diversion identified in its Complaint is driven by issues related to its organizational mission. That there is some cost associated with responding to a change in the law or regulation is not sufficient to establish irreparable harm. The resource diversions Plaintiff complains of are voluntary, Defendants did not compel the Plaintiff to act, and even if they did, that still is insufficient to establish irreparable harm.

This type of voluntary diversion of resources is not irreparable harm; it is the cost of operating an organization at a time when that organization's resources are in demand.

Second, KC Tenants' members do not suffer irreparable harm, because there is an adequate remedy at law—the ability to participate in court proceedings against them. The Administrative Order and the laws of Missouri both permit tenants to challenge eviction and possessory actions in court. The Administrative Order does not strip tenants of that ability.

If anything, the Administrative Order adds additional levels of tenant protections by requiring those seeking a writ of execution to first verify with the Court, *under penalty of perjury*, "that that the party seeking the writ of execution has not been provided with an executed copy of a Declaration Form from the persons against whom the eviction is sought, or that the party seeking the writ of execution is evicting the persons on grounds not precluded by the CDC Order." Administrative Order at 2-3, ¶ 1. This Verification must be provided to the tenant against whom the eviction is sought with notice of the tenant's ability to "contest or challenge the accuracy or veracity of the statements in the Verification" *Id.* at 3, ¶ 2. The party filing the Verification must certify to the court, *again under penalty of perjury*, that it provided the Verification and notice to the tenant. *Id.* at 3, ¶ 2. Likewise, the tenant can participate in an evidentiary hearing if the party with the legal right to pursue eviction or possessory action challenges the veracity of their Declaration Form. *Id.* at 3-4, ¶ 7. These additional protections under the Administrative Order provide an adequate remedy at law for the tenant to avail themselves of, and cannot be deemed irreparable harm.

Third, Plaintiff has not identified a single member who has been harmed because of the Administrative Order or Defendants' actions in carrying out the terms of that Order. Nor has it identified a member who has submitted a declaration, let alone been required to participate in an evidentiary hearing. Nor has Plaintiff identified a member who has submitted a truthful declaration

that a court deemed false, or who was evicted when a truthful declaration did not provide a complete defense against eviction due to the Administrative Order. A delinquent tenant does not suffer a legally cognizable harm under the CDC Order when a court finds the tenant's affidavit to be untrue, when a court evicts a tenant for reasons other than non-payment of rent, or when a court commences an eviction proceeding and takes all the steps short of the final step of eviction. Indeed, if courts do not commence such proceedings now, then a significant backlog of cases will have accumulated by January 1, 2021 that will have the effect of extending the inability to evict tenants beyond the CDC Order's December 31, 2020 expiration date.[3]

Plaintiff's harm is speculative and insufficient to establish irreparable harm.

III. THE PUBLIC INTEREST FAVORS DENYING PLAINTIFF'S REQUESTED RELIEF

No one, including Proposed Intervenors, disputes the harm caused by the pandemic. However, such harm does not warrant shuttering courthouse doors because an agency has grossly exceeded its statutory authority. "[T]he Eighth Circuit has made clear that 'it is always in the public interest to protect constitutional rights.'" *Fuller v. Norman*, 936 F. Supp. 2d 1096, 1098 (W.D. Mo. 2013) (quoting *Phelps-Roper v. Nixon,* 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012)). And "[i]t can hardly be argued that seeking to uphold a constitutional protection … is not per se a compelling state interest." *Republican Party of Minn. v. White*, 416 F.3d 738, 753 (8th Cir. 2005).

Proposed Intervenors, and any other persons with the legal right to pursue eviction or a possessory action in Jackson County, have a recognized fundamental constitutional right to access the courts. *See supra* III.A. To be sure, Plaintiff alleges harms as well. In addition to challenging the

[3] The CDC Order is in effect until December 31, 2020 "unless extended." 85 Fed. Reg. at 55297.

Administrative Order for violating the Supremacy Clause, Plaintiff also alleges violation of its and its members' claimed "state-created liberty interest in temporary immunity from any eviction action."—an alleged procedural due process violation. *See* Complaint at ¶¶ 82-88. But that harm is not constitutional in nature, and it presupposes the validity of the CDC Order. As the Order is invalid, Plaintiff has no countervailing, cognizable interest in seeing it enforced. Defendants, of course, also have an interest in the orderly administration of the local court, which directly benefits the public and helps balance the rights of both property owners and tenants in accordance with Missouri law. Taken together, the balance tips in favor of denying the preliminary injunction because the CDC Order is unconstitutional and the public has an interest in the right to access the courts and the orderly administration of court processes.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion for preliminary injunctive relief and instead enter an order declaring the underlying CDC Order invalid.

Dated: October 27, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 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.

Respectfully,

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