IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiffs-Appellants' Motion for Injunction Pending Appeal

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

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

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

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

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

I. FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. ARGUMENT

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

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

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

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

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

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

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

CDC's Order is purportedly authorized by 42 U.S.C. § 264 and 42 C.F.R. § 70.2, but neither provision grants the agency the broad authority to unilaterally void state laws across the country. Section 264(a) says that the Surgeon General may "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from … one State or possession into any other State or possession." And in particular, the statute allows for "such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Appellants Will Suffer Irreparable Harm Without Preliminary Relief

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

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

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

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

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

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

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

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

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

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

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

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

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

The district court's rejection of these principles was without any legal basis. The district court simply said, "After review, this Court is unpersuaded that the loss of real property, without some other unique factor attributed to the property, is a per se irreparable injury." ECF No. 48 at 60. Additionally, the district court noted that Appellants do not "reside in the properties" and suggested that they somehow have a lesser interest in their own property. *Id.*

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

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

C. The Injunction Is Equitable and in the Public Interest

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

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

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

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

III. CONCLUSION

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

November 12, 2020

Respectfully,

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants certify that the following is a complete list of interested persons as required by Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1:

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

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

16. Jones, Sonya, *Plaintiff-Appellant*

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

18. Krausz, David, *Plaintiff-Appellant*

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

20. Legal Services of Virginia, *Amicus Curiae*

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

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

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

24. National Apartment Association, *Plaintiff-Appellant*

25. National Hispanic Medical Association, *Amicus Curiae*

26. National Housing Law Project, *Amicus Curiae*

27. National Medical Association, *Amicus Curiae*

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

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

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

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

32. Public Health Law Watch, *Amicus Curiae*

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

34. Rondeau, Jeffrey, *Plaintiff-Appellant*

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

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

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

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

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

40. Southern Poverty Law Center, *Amicus Curiae*

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

42. The George Consortium, *Amicus Curiae*

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

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

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

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

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

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

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

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

Dated: November 12, 2020

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

CERTIFICATE OF COMPLIANCE

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

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionately spaced typefaces using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: November 12, 2020

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

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system which sent notification of such filing to all counsel of record.

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

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

Dated: November 12, 2020

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