IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Richard Lee Brown, et al.	:	
	:	No. 20-14210-H
	:	
Plaintiffs-Appellants,	:	
	:	
v.	:	
	:	
Sec. Alex Azar, et al.	:	
	:	
	:	
Defendants-Appellees.	:	

PLAINTIFFS-APPELLANTS' BRIEF-IN-CHIEF

INTERLOCUTORY APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1:20-cv-03702-JPB
THE HONORABLE J.P. BOULEE
DISTRICT JUDGE

Oral Argument Is Requested

December 21, 2020

New Civil Liberties Alliance
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Counsel for Plaintiffs-Appellants

CERTIFICATE OF INTERESTED PERSONS

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 Richardson, *Counsel for Amici Curiae*
6. Boulee, J.P., U.S.D.J., *United States District Court Judge*
7. Brown, Richard Lee, *Plaintiff-Appellant*
8. Children's Healthwatch, *Amicus Curiae*
9. Desmond, Matthew (Ph.D.), *Amicus Curiae*
10. Dunn, Eric, *Counsel for Amici Curiae*
11. Fulmer, Jennifer Ann, *Counsel for Amici Curiae*
12. Gainey, John Owen, *Counsel for Amici Curiae*
13. Georgia Chapter, American Academy of Pediatrics, *Amicus Curiae*

14. GLMA: Healthcare Professionals Advancing LGBTQ Equality, *Amicus Curiae*
15. Gonsalves, Gregg (Ph.D.), *Amicus Curiae*
16. Hawkins, James W., *Attorney for Plaintiffs-Appellants*
17. James W. Hawkins, LLC, *Law Firm for Plaintiffs-Appellants*
18. Jones, Sonya, *Plaintiff-Appellant*
19. Keene, Danya A. (Ph.D.), *Amicus Curiae*
20. Klein, Alissa, *Attorney for Defendants-Appellees*
21. Krausz, David, *Plaintiff-Appellant*
22. Kruckenberg, Caleb, *Attorney for Plaintiffs-Appellants*
23. Jerome N. Frank Legal Services Organization, Yale Law School, J.L. Pottenger, Jr., *Legal Organization for Amici Curiae*
24. Legal Services of Northern Virginia, *Amicus Curiae*
25. Leifheit, Kathryn M. (Ph.D.), *Amicus Curiae*
26. Levy, Michael Z. (Ph.D.), *Amicus Curiae*
27. Linton, Sabriya A. (Ph.D.), *Amicus Curiae*
28. Myers, Steven A., *Attorney for Defendants-Appellees*
29. National Apartment Association, *Plaintiff-Appellant*
30. National Hispanic Medical Association, *Amicus Curiae*

31. National Housing Law Project, *Amicus Curiae*

32. National Medical Association, *Amicus Curiae*

33. New Civil Liberties Alliance, *Legal Organization for Plaintiffs-Appellants*

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

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

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

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

38. Public Health Law Watch, *Amicus Curiae*

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

40. Rollins, Kara, *Counsel for Plaintiffs-Appellants*

41. Rondeau, Jeffrey, *Plaintiff-Appellant*

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

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

44. Siegel, Lindsey Meredith, *Counsel for Amici Curiae*

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

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

47. Southern Poverty Law Center, *Amicus Curiae and Legal Organization for Amici Curiae*

48. Springer, Brian J., *Attorney for Defendants-Appellees*

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

50. The George Consortium, *Amicus Curiae*

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

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

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

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

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

56. Wake Forest University School of Law, Emily A. Benfer (J.D., LL.M.), *Amicus Curiae* and *Counsel for Amici Curiae*'s *place of employment*

57. Walz, Katherine, *Counsel for Amici Curiae*, and

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

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

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested as it may assist this Court in ruling on the complex and important issues presented by this case. This case is one of first impression concerning an unprecedented agency order that significantly affects the operation of state courts nationwide.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

JURISDICTIONAL STATEMENT

In their Complaint Plaintiffs-Appellants argue that the order at issue in this case is unconstitutional under Article I, § 1, the Article IV Privileges and Immunities Clause, Article VI, Clause 2, the First Amendment Petition Clause, the Fifth and Fourteenth Amendments' Equal Protection Clause, and the Tenth Amendment of the U.S. Constitution. Appellants' Complaint also argues the Order violated the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A), (B), (C). Plaintiffs-Appellants moved for a preliminary injunction pursuant to 28 U.S.C. §§ 2201, 2202 and Rule 65(a) of the Federal Rules of Civil Procedure.

The district court had federal question jurisdiction in this case pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331 because Appellants challenged the statutory and constitutional validity of the order. This Court has jurisdiction to review "interlocutory orders of the district courts of the United States" "refusing … injunctions." 28 U.S.C. § 1292(a)(1).

INTRODUCTION

The COVID-19 pandemic has affected nearly everyone in the United States. Americans have willingly changed many fundamental aspects of their lives to slow the spread of this terrible disease. But public health concerns must not change how courts adjudicate constitutional issues. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354, at *3 (U.S. Nov. 25, 2020). In times of crisis, recognition of and respect for constitutional limits are needed the most.

Under the guise of the emergency, Defendants-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"), have far exceeded the constitutional and statutory limits of their authority to advance a destructive and unsuccessful foray into housing policy. Without any authorization by statute or regulation, CDC has struck out into an area about which it has no expertise and issued a sweeping order suspending *state* law under the premise that doing so was "necessary" to control the COVID-19 pandemic. By trying to make law outside its grant of authority, CDC unconstitutionally acted beyond Congressional limits. CDC has also

failed to meet its obligation of proving, with substantial evidence, that such a breathtaking effort to manage the states was within CDC's mandate. Moreover, CDC's radical and unprecedented intrusion into state courts has deprived Americans across the country of their constitutional right to access the court system to resolve their disputes. CDC's effort to seize control of state law must be rejected.

As the CDC Order is fundamentally unlawful, the district court should have issued a preliminary injunction. In addition to its illegality, the Order is causing immeasurable harm to property owners across the nation. The appellants, Richard Lee (Rick) Brown, Jeffrey Rondeau, Richard Krausz, Sonya Jones, and the members of the National Apartment Association (collectively "Property Owners") all depend on the basic premise that state contract law will require tenants to uphold their end of a rental contract and pay rent. Property Owners expect that if their tenants do not pay rent, they can resort to the court system to evict their tenants so they can regain possession and provide that housing to tenants who would uphold their contractual obligations.

But CDC derailed those expectations, depriving the Property Owners of their constitutional rights to be governed only by legitimate

governmental acts, their basic right to resort to the court system to redress their grievances, and the economic value of their houses. CDC's Order has taken unique real property from these Property Owners without any remedy.

A preliminary injunction would halt CDC's lawless actions and protect the Property Owners' interests against irreparable harm. The public's interest, especially in a time of need, favors adherence to the rule of law, and enforcing basic limits on an agency's power. This Court should reverse the district court and enter a preliminary injunction.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Property Owners present the following issue for review:

Whether the district court erred in denying a preliminary injunction to property owners deprived of their unique real property and denied access to state landlord-tenant courts to resolve their disputes by an administrative order that CDC issued without statutory or regulatory authority and did not support with substantial evidence.

STATEMENT OF THE CASE

Appellants are individual property owners and a national trade association whose members CDC's order has harmed.[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.).

On September 1, 2020, Defendant-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 issued an order entitled "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*." 85 Fed. Reg. 55292 (Sept. 4, 2020).

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. The Order also said,

[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 brief.

"[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.

The Order 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.

The Property Owners 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 properties 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, so 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.

Appellant the National Apartment Association 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. *See* ECF No. 45-1 at ¶ 1 (Pinnegar Supp. Decl.). NAA has members throughout the United States who are entitled to writs of possession and eviction in states without eviction moratoria. Management Services Corporation (MSC) and Berkshire Residential Investments (Berkshire) are just two of those harmed members. Pinnegar Supp. Decl. at ¶¶ 2-11. Unable to use state legal process, these members cannot retake possession of their properties and are deprived of any use of their properties for the duration of the CDC Order. Pinnegar Supp. Decl. at ¶¶ 2-11. 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. ECF No. 18-6 at ¶¶ 1-5 (Pinnegar Decl.).

Mr. Brown filed a Complaint for declaratory and injunctive relief on September 9, 2020, see ECF No. 1, followed by an Amended Complaint joined by the remaining Plaintiffs-Appellants on September 18, 2020. *See* ECF No. 12. Appellants also moved for a preliminary injunction. *See* ECF No. 18. The district court denied Appellants' request in a written order on October 29, 2020. *See* ECF No. 48. Appellants filed a notice of interlocutory appeal on November 9, 2020. ECF No. 50. That same day, they filed a motion for an injunction pending appeal with the district court, followed by a motion for injunction pending appeal with this Court. This Court denied the motion, and the district court motion remains pending.

SUMMARY OF THE ARGUMENT

The district court erred in several respects, each of which warrants reversal of the decision below and issuance of a preliminary injunction.

The Property Owners were likely to succeed on the merits, as the CDC Order is unlawful for three independent reasons. First, the CDC

Order vastly exceeds CDC's limited grant of authority to take "necessary" action to prevent the spread of disease in controlled ways concerning infected and diseased people and effects. Rather than following the limits envisioned by Congress, CDC and the district court both treated CDC's authority as being essentially limitless. No fair reading of the statute and regulation can justify such an extreme grant of power, and CDC's attempt to void state law was thus unlawful.

Second, CDC failed to justify its Order with either a reasoned explanation or substantial evidence showing the necessity of CDC's unprecedented intrusion on the sovereignty of state housing courts. CDC has never presented any substantial evidence that closing the courthouse doors across the country is a necessary step in stopping the spread of disease.

Third, the Order violates the basic constitutional guarantee of access to the courts. The Property Owners have only one means of retaking possession of the property that is unquestionably theirs—employing state court eviction proceedings. Yet CDC—a mere federal agency—claimed to make it a federal crime for the Property Owners to

use state courts in the manner the individual state legislatures have provided.

Next, a preliminary injunction is necessary to prevent irreparable harm. The Property Owners are all entitled to retake possession of their real property, but CDC's lawless Order preventing them from accessing state courts has denied them any opportunity to do so. While they have certainly suffered from irreparable economic injuries, for which they have shown they are unlikely ever to be repaid, the CDC Order has also denied the Property Owners something much more fundamental—their constitutional right to be governed only by legitimate government action and their constitutional right to access state courts. The Order has also indefinitely denied them the use of their unique real property. Any one of these injuries justifies a preliminary injunction; taken together, they compel one.

Finally, the equities favor an injunction. CDC's Order is unlawful, and the public interest always favors upholding the law and protecting constitutional rights. Moreover, CDC has never proven, nor even reasonably suggested, that the Order, rather than any other state

mitigation strategy, is an essential step in safeguarding the public against disease.

ARGUMENT

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

This Court reviews the denial of a preliminary injunction for "abuse of discretion." *Jones v. Governor of Fla.*, 950 F.3d 795, 806 (11th Cir. 2020) "In so doing, [the Court] review[s] the district court's underlying legal conclusions *de novo* and its findings of fact for clear error." *Id.*

"In the constitutional realm … the calculus changes. There, [the Supreme Court has] often held that the role of appellate courts in marking out the limits of a standard through the process of case-by-case adjudication favors *de novo* review even when answering a mixed

question [that] primarily involves plunging into a factual record." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 n.4 (2018). Even in review of preliminary injunctions this Court should "review *de novo*" "core constitutional fact[s]." *ACLU v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). Indeed, while this Court has traditionally limited this heightened standard of review to First Amendment cases, see *id.* at 1203, the Supreme Court has recently recognized that the "constitutional fact" doctrine applies across different areas of constitutional protections. *See U.S. Bank*, 138 S.Ct at 967 n. 4. (discussing review of, among others, Fourteenth Amendment Due Process Clause and Fourth Amendment).

For the following reasons, Appellants have satisfied all four elements of this test, and the district court erred in denying the injunction.

A. Appellants Have Demonstrated a Substantial Likelihood of Success on the Merits for Three Independent Reasons

1. CDC's Order Lacks 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).

"[N]o matter how important, conspicuous, and controversial the issue … an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Id.* (citations omitted). And "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354, at *3 (U.S. Nov. 25, 2020); *see also Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934) ("The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not

altered by emergency."). Ignoring these limits "is almost a guarantee that, in wartime or other emergencies, rights will give way to power." Philip A. Hamburger, *The Inversion of Rights and Power*, 63 Buff. L. Rev. 731, 794 (2015).

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 it claims 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.

i. The Statute Must Be Read with Appropriate Limits

"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).

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 somehow *does* empower CDC's egregiously liberty-depriving actions, albeit ambiguously, then it must apply the rule of lenity and limit the scope of the Order accordingly. "[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).

Nevertheless, the district court wrongly refused to read the statute's and regulation's limiting phrases as having any bearing on the scope of CDC's authority. ECF No. 48 at 20-21. 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), which CDC has never invoked, 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. On the contrary, as 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 is 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." ECF No. 48 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 catch-all 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 "without a limiting principle" were to follow clearly from the text—which it does not—then this Court would have to adopt a limited reading based on the examples provided. *See id.*

The case primarily relied upon by the district court, *United States v. Powell*, 423 U.S. 87, 91 (1975), makes this point clear. In *Powell*, the Court interpreted the term "firearms" and was asked to limit it only to "pistols and revolvers," which were listed as examples. The Court had no trouble concluding that a sawed-off shotgun was a "firearm," because, as might be obvious, the statute still had appropriate limiting principles. But the district court's reliance on this precedent to reject *any* limiting

construction here of the catch-all term "other measures" cannot be supported. *See* 42 U.S.C. § 264(a).

ii. An Eviction Moratorium Is Incompatible with CDC's Limited Grant of Authority

Neither § 264(a) nor § 70.2 authorizes CDC to issue a nationwide eviction moratorium. While the text speaks in term of "measures" *like* "fumigation," "pest extermination," and "destruction of animals … found to be so infected," 42 U.S.C. § 264(a), 42 C.F.R. § 70.2, rewriting property laws nationwide bears no relationship with the disease-control measures envisioned in the text. At most, those provisions allow limited orders related to certain disease-control measures in specific places with respect to specific properties, but they do not justify a wholesale ban on legal eviction proceedings.

First, the provisions deal only with measures directed at already infected articles, not healthy people. The statute envisions "measures" related to "animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings." 42 U.S.C. § 264(a). The regulation similarly applies to "animals or articles believed to be sources of infection." 42 C.F.R. § 70.2. They *do not* discuss, or even

contemplate restrictions on *healthy people*. Indeed, a subsequent statutory section, 42 U.S.C. 264(d), which is not invoked by CDC, contemplates restrictions on "*persons reasonably believed to be infected*." (emphasis added).

But the CDC Order applies to everyone, regardless of whether they are sources of disease. It operates in a blanket fashion to shut down housing courts, in every state, regardless of infection rates in general, or specific sources of infection. Rather than provide limited exemptions from state legal processes for those tenants who have contracted COVID-19, for example, CDC has dramatically expanded whatever authority granted to it to intrude into the lives of *every* landlord and tenant.

Second, CDC's authority is limited to discrete actions related to specific sources of infection, not ongoing policy determinations. All contemplated actions in the statute and regulation, "inspection, fumigation, disinfection, sanitation, pest extermination [and] destruction of animals or articles," 42 U.S.C. § 264; 42 C.F.R. § 70.2, are single acts directed to diseased (or suspected) articles. Perhaps CDC may impound goods for inspection, or disinfect a diseased location, but it cannot impose blanket policies of general applicability. Otherwise, the statute would

have granted authority for acts like blanket import bans, or nationwide stay-at-home orders. But CDC's Eviction Order applies for months on end, across the country, to the sick and the well, regardless of the specific circumstances facing the affected parties. That vastly exceeds CDC's limited power to take specific actions.

Third, CDC is authorized to take affirmative action related to specific items, not prohibit local authorities from acting. While the statute is silent on state or local action, the regulation allows CDC to step in, with respect to specific items, if the local authority's actions "are insufficient to prevent the spread of any of the communicable diseases from such State [.]" 42 C.F.R. § 70.2. In other words, Congress envisioned that CDC might step in when, for instance, a state failed to destroy diseased goods. Congress did not contemplate, however, that CDC would *forbid* a state from acting in an area wholly unrelated to disease-mitigation strategies.

Fourth, neither the statute nor regulation clearly authorize such an expansive grant of agency power. A "textual commitment" to agency authority "must be a clear one," and "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary

provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). But CDC has forbidden all the states from using their own court systems, no matter what other mitigation strategies they might employ generally, or in the court system itself. Had Congress intended such an unprecedented intrusion into state sovereignty, it would have said so clearly.

iii. State Mitigation Strategies Are Not Insufficient, a Necessary Prerequisite to CDC Action

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 and not state specific. 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. And CDC apparently paid no attention to what mitigation

strategies might exist under various states' laws to prevent evictions from leading to such dire results. 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 implicit 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 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 a disease that has already spread nearly everywhere, 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 glib conclusion commits a logical fallacy. Even if an eviction moratorium *could* prevent infections, that hardly proves every 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.

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 (breathtakingly) "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.

Ultimately, the district court's legal conclusion rests largely on the "far-reaching effects" of the COVID-19 pandemic. ECF No. 48 at 1 (quoting *Swain v. Junior*, 961 F.3d 1276, 1280 (11th Cir. 2020)). Indeed, the district court emphasized its view that the pandemic "has changed everything," even "the way that courts hear and *decide* cases." *Id*. (citing *Swain*, 961 F.3d at 1280 (emphasis added)). But as the Supreme Court

recently stressed, "even in a pandemic, the Constitution cannot be put away and forgotten" the way the district court did in this case. *Roman Catholic Diocese of Brooklyn*, 2020 WL 6948354, at *3. It is unconstitutional for an agency to act "beyond the point where Congress indicated it would stop." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 161. No court may disregard the textual limits Congress put on CDC's authority merely because of the exigencies facing this country during the pandemic. Now, more than ever—precisely when the agency is tempted to overstep—this Court must enforce the limitations on CDC's power. Otherwise, "because government interests are apt to seem especially compelling during emergencies," the district court has given "the government what is nearly an emergency power above constitutional rights." *See* Hamburger, *The Inversion of Rights and Power*, 63 Buff. L. Rev. at 810.

2. The CDC Order Is Arbitrary and Capricious

A court must set aside "arbitrary and capricious" agency action. 5 U.S.C. § 706(2)(A). This requires a "searching and careful" review to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."

Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996) (citation omitted). An agency's action is arbitrary and capricious "if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Further, when an agency fails to adequately explain its authority for a certain action, its actions are arbitrary and capricious. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911-12 (2020).

In determining whether the agency acted arbitrarily and capriciously, a court asks if the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1288 (11th Cir. 2015) (quoting *State Farm*, 463 U.S. at 43). While a court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned … [it] may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* at 1288 (citations

omitted). A court must also find "substantial evidence" for the agency action. *Adefemi v. Ashcroft*, 386 F.3d 1022, 1027 (11th Cir. 2004) (en banc). Accordingly, the agency decision must be "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Perez-Zenteno v. U.S. Att'y Gen.*, 913 F.3d 1301, 1306 (11th Cir. 2019) (citation omitted). Moreover, reasoned decisionmaking requires the agency to "examine the relevant data" and precludes the agency from offering "an explanation … that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

Even in light of the COVID-19 pandemic, this Court must carefully examine the evidence presented by CDC. As the Supreme Court recently emphasized, unsupported assertions that challenged government action "will harm the public" must not be taken at face value. *See Roman Catholic Diocese of Brooklyn*, 2020 WL 6948354, at *3. Indeed, in enjoining a gathering limitation in New York of much less ambitious scope than CDC's nationwide eviction moratorium, the Court stressed that "the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease. And the State has not

shown that public health would be imperiled if less restrictive measures were imposed." *Id*. That same level of scrutiny must apply here.

i. CDC Has No Evidence that State Mitigation Efforts Are Insufficient

The CDC Order is arbitrary and capricious because it is not supported by a rational determination drawn from substantial evidence. As a threshold, CDC has not met its baseline obligation of showing that specific local jurisdictions are taking "insufficient" measures to prevent the spread of COVID-19. Recall that 42 C.F.R. § 70.2 purports to grant authority to CDC when the agency "determines that the measures taken by health authorities of any State … are insufficient to prevent the spread of any of the communicable diseases[.]" But CDC hardly bothers to suggest that states have undertaken "insufficient" measures by simply allowing eviction processes, irrespective of other mitigation strategies. Indeed, CDC just asserts that because a nationwide halt to evictions could help spread the disease, jurisdictions "that do not meet or exceed these minimum protections are insufficient to prevent the interstate spread of COVID-19." 85 Fed. Reg. at 55296. But CDC presents no meaningful data to support its contention.

CDC's Order relies on the bald assertion that COVID-19 infection rates are concerning in homeless populations and that somehow this shows the inadequacy of state measures. 85 Fed. Reg. at 55295. But CDC's Order does not prove even that minimal claim. CDC only points to a single study suggesting that 15% of residents at a single homeless shelter subjectively believed eviction was the primary cause of their homelessness. *Id*. Its claim that "[e]xtensive outbreaks of COVID-19 have been identified in homeless shelters" comes from reports from Seattle, Washington and Boston, Massachusetts, from May and April, respectively. *Id*. Of course, both localities *had eviction moratoria* in place at both times. *See* Gov. Jay Inslee, *Proclamation 20-19.3, Evictions and Related Housing Practices* (July 24, 2020); *COVID-19 Emergency Regulations*, 400 CMR 5.0 (Apr. 24, 2020). CDC has no citations and no authority for its essential claim that "[i]n the context of the current pandemic, large increases in evictions could have at least two potential negative consequences. One is if homeless shelters increase occupancy in ways that increase the exposure risk to COVID-19. The other is if homeless shelters turn away the recently homeless, who could become unsheltered, and further contribute to the spread of COVID-19." *CDC*

Order, 85 Fed. Reg. at 55295. Nor does CDC even attempt to argue that the data supports yet another inferential leap—that the moratorium on evictions will *reduce* total infections. *See id*.

CDC's inadequate explanation breaks down even more when considering what it omits. Nowhere does CDC even mention (or demonstrate that it has considered) any of the efforts taken by *any* jurisdiction to combat COVID-19. Nowhere does it explain why allowing eviction proceedings, more than any other purported lacuna in prevention strategies, represents the line that states may not cross. CDC has cited *no* evidence that any infection has arisen because of an eviction proceeding. This Court simply has nothing with which it can conclude that CDC "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," concerning state efforts, and thus the Order is invalid on this point alone. *See Black Warrior Riverkeeper, Inc.*, 781 F.3d at 1288.

ii. There Is No Evidence that an Eviction Moratorium, Instead of Any Other Federal Policy, Is Necessary for Disease Mitigation

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

substantial evidence. In fact, CDC is careful never to actually say that the moratorium is necessary—the best it says is that "[i]n the context of a pandemic, eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of communicable disease." 85 Fed. Reg. at 55294. But even this tepid statement has no real evidentiary support. As discussed, CDC relies on hyperbole—saying that "mass evictions" and "homelessness" might increase the likelihood of COVID-19, and thus that that the *only* appropriate course of action is to halt evictions nationwide. *See* 85 Fed. Reg. at 55294-96. CDC does not explain sufficiently why this would be so, which by itself warrants rejection of the rule as being inadequately reasoned. *See Perez-Zenteno*, 913 F.3d at 1306.

Moreover, CDC does not explain why other remedial measures are inadequate. To be sure, attending school in person and patronizing bars might increase the risk of infection. Yet CDC's Order addresses only evictions as if they were the sole—or even a significant—factor in the spread of the disease. Because CDC did not examine the relevant data, the Order is invalid.

iii. The District Court Relieved CDC of Any Burden of Proof

The district court concluded otherwise, but it did so based on a completely hands-off review of the agency's evidence. Citing a deferential standard of review, the district court noted, uncontroversially, that "despite measures such as border closures, travel restrictions and stay-at-home orders, COVID-19 continues to spread, and further action is needed." ECF No. 48 at 33. It then said, "Without an eviction moratorium, evidence relied upon by the CDC shows that as many as thirty to forty million people in the United States—an unprecedented number—could be at risk of eviction." *Id*. (citing *CDC Order*, 85 Fed. Reg. at 55295). The district court concluded that the CDC Order might reduce the number of individuals living in "congregate settings" or "homeless shelters." ECF No. 48 at 35. Even if the Order was not "the only measure that will prevent the spread of COVID-19 or [even] the most pressing concern," the district court decided it was close enough. *Id*.

But, even aside from the fact CDC is not a housing agency, there is one obvious gap in this reasoning—there is no evidence that the Order will reduce infections. The district court cited only evidence of the problem—COVID-19 remains a danger, and those in shared housing

might be at risk. *See* ECF No. 48 at 33-35. But how does the Order improve outcomes? What evidence exists to suggest that the moratorium will stop any appreciable spread of disease? CDC has offered none. Such breathtakingly drastic measures taken by an administrative agency as being "necessary" for public health should be premised on *some* data. "[E]ven in a pandemic" courts demand *some* evidence of need. *See Roman Catholic Diocese of Brooklyn*, 2020 WL 6948354, at *3.

The district court's defense of CDC's conclusion that state measures were insufficient is likewise flawed. The district court noted, "Although the Order does not discuss non-eviction related mitigation efforts taken by the various states and local governments, the CDC did analyze each state's eviction restrictions, and the evidence suggested that in the absence of eviction moratoria, tens of millions of Americans could be at risk of eviction on a scale that would be unprecedented in modern times." ECF No. 48 at 37 (citing *CDC Order*, 85 Fed. Reg. 55295-96, n. 36). But the Order merely says that many states do not have eviction moratoria in place. It never mentions what *else* those states are doing to help public health. Without evidence that an eviction order actually prevents the spread of disease, merely asserting that states lack such moratoria does

nothing to prove that they are taking "insufficient" measures to protect public health. Besides, the district court's call to action should be directed at state legislatures or Congress—not the CDC. The situation *does* call out for action. But that does not justify a federal administrative agency's acting beyond its authority.

This Court must hold CDC to a genuine burden of showing the necessity of its Order. Because the Order implicates constitutional interests—both concerning the scope of CDC's authority to intrude on state property law and its ability to close the courts—this Court should be willing to apply "*de novo* review even when answering a mixed question [that] primarily involves plunging into a factual record." *See U.S. Bank Nat. Ass'n, LLC*, 138 S. Ct. at 967 n.4. CDC's dubious evidence surely cannot survive a genuine review. But even applying a deferential standard, any meaningful review of CDC's asserted evidence reveals that the Order is invalid.

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

"The Constitution promises individuals the right to seek legal redress for wrongs reasonably based in law and fact." *Harer v. Casey*, 962

F.3d 299, 306 (7th Cir. 2020); *see also Christopher v. Harbury*, 536 U.S. 403, 415 (2002).

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). Just as one state may not deny access to its courts to citizens of other states, so too the federal government may not deny citizens' access to state courts.

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

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

Perhaps the most famous case involving the right to access is also the most applicable here. In *Boddie v. Connecticut*, 401 U.S. 371, 372, 374, 380 (1971), the Supreme Court invalidated a state law requiring prepayment of filing fees for divorce proceedings because it foreclosed the "sole means … for obtaining a divorce" for indigent litigants. "[G]iven the basic position of the marriage relationship in this society's hierarchy of

values and the concomitant state monopolization of the means for legally dissolving [the marriage] relationship" "due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Id*. at 374; *see also Christopher*, 536 U.S. at 413 (citing *Boddie* as an access-to-courts case).

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

governmental control over the process for defining rights and obligations is exclusive." *Lecates*, 637 F.2d at 908-09. Indeed, even a limited property interest in continuing employment as a teacher was of equal weight as the interest in obtaining a divorce in *Boddie*. *Rankin*, 876 F.2d at 841.

i. The CDC Order Deprived the Property Owners of Their Only Legal Means of Retaking Possession of Their Properties

Here, the CDC Order has unlawfully stripped the Property Owners of their constitutional right to access the courts. Mr. Brown, Mr. Krausz and Ms. Jones have undisputed rights to evict their tenants under state law but have been totally barred by the Order from exercising those rights. Mr. Brown and Ms. Jones are entitled to eviction for nonpayment but have been shut out of court to obtain that relief. Brown Decl. at ¶ 6; Jones Decl. at ¶¶ 3-4. And Mr. Krausz actually obtained an eviction order because of his tenant's nonpayment of rent. Krausz Decl. at ¶ 10. So too did NAA members Berkshire and MSC. Pinnegar Supp. Decl. ¶¶ 6, 11. They have therefore met the initial requirement of showing the merit of their underlying claims. *See Christopher*, 536 U.S. at 413.

Moreover, the Order constitutes a "complete foreclosure of relief" because it denies the Property Owners the *only* lawful means of regaining

possession of their property. *See Harer*, 962 F.3d at 311-12. Mr. Brown ordinarily would be entitled to terminate the rental agreement and retake possession through eviction proceedings for his tenant's nonpayment. Va. Code §§ 55.1-1245(f), 55.1-1251. But a residential landlord is forbidden from re-taking possession of his own property via self-help such as changing the locks when the tenant is away. Va. Code § 55.1-1252. In fact, "[i]f a landlord unlawfully removes or excludes a tenant from the premises … the *tenant* may obtain an order from a general district court to recover possession … [and] recover the actual damages sustained by him and reasonable attorney fees." Va. Code. § 55.1-1243(a) (emphasis added).

For Mr. Krausz and Ms. Jones, the rules are largely the same. In South Carolina, a landlord must also utilize a court eviction process and obtain a writ of ejectment from a judge. *See* S.C. Code § 27-40-710. The writ must be executed by a state official, and a landlord may not attempt to evict a tenant through self-help. S.C. Code § 27-40-760.

Georgia also requires residential landlords to use court eviction proceedings, and it only permits eviction by a sheriff's execution of a writ of possession. *See* Ga. Code § 44-7-55(d). Without being issued such a

writ, a landlord may not retake possession of her residential property. *See id.* A landlord who resorts to self-help evictions faces criminal punishment. *See* Ga. Code § 44-7-14.1.

This process is the same in essentially the same form across the country. "[T]he growing modern trend holds that self-help is never available to dispose of a tenant." Shannon Dunn McCarthy, *Squatting: Lifting the Heavy Burden to Evict Unwanted Company*, 9 U. Mass. L. Rev. 156, 178 (2014). "Most states have eliminated the ability of homeowners to use self-help in the residential housing context." *Id.* Thus, eviction proceedings are the sole means for nearly all NAA's 85,485 member landlords to retake possession of their property.

The CDC Order has thus deprived the Property Owners of their only path for recovering 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, the Property Owners' rights to access the courts have been violated.

ii. Delaying Access to the Court Deprives the Property Owners of Their Constitutional Rights

The district court did not challenge any of these facts or general legal principles—it just wrongly determined that criminalizing the use of state eviction procedures was constitutionally permissible. *See* ECF No. 48 at 39-40. First, the district court determined that the only real deprivation that the Property Owners suffered was "the mere delay to filing a lawsuit" when they would "at some point, regain access to legal process." *Id*. at 44 (citation omitted).

This argument misstates the deprivation and relies on an incorrect legal standard. To be sure, some courts in other circuits have suggested that delays in access to the courts, on their own, are not necessarily a constitutional deprivation. *See Gentry v. Duckworth*, 65 F.3d 555, 558 (7th Cir. 1995). But even in those cases, if a person suffers "some quantum of detriment caused by the challenged conduct of state officials resulting in the interruption and/or delay of plaintiff's pending or contemplated litigation" then he *has* suffered a constitutional violation. *Id*. (citation omitted). More significantly, this Court has long recognized that the right to access the courts is injured even when the detriment is abstract and flows from theoretical consequences of the intrusion. *See Al-*

Amin v. Smith, 511 F.3d 1317, 1329 (11th Cir. 2008). Indeed, in *Al-Amin*, this Court recognized a violation of the right to access the courts when a prison opened prisoners' legal mail outside of their presence, even without a showing that the injury actually caused detriment to their attorney-client relationship. *See id.* at 1329-31 (reaffirming *Taylor v. Sterrett*, 532 F.2d 462, 470 (5th Cir. 1976), which held that the constitutional injury was theoretical frustration with attorney-client relationship). This Court even disagreed with other courts that had limited the constitutional analysis to situations where opening legal mail "caused [a person] to miss court deadlines or … prejudice his legal actions," because the constitutional detriment is much broader than that. *See id.*

Here, the Property Owners have not merely been delayed in seeking causes of action against their tenants. They have been forbidden from seeking ejectment of tenants in wrongful possession until the Order's expiration. The detriment is not that the ultimate lawsuit will be prejudiced, it is that the Property Owners cannot access their own property in the interim, despite an unequivocal right to do so under state

law. This is a concrete and irremediable detriment, and one that constitutes a constitutional injury. *See Al-Amin*, 511 F.3d at 1329-31.

Next, the district court erroneously concluded that the Property Owners will someday be able to seek relief from their tenants because "[n]othing in the Order prohibits a landlord from collecting these fees or past due rent via a breach of contract action or other similar remedy available under state law." ECF No. 48 at 41. But the record refutes that notion. The CDC Order only applies to tenants who claim they cannot make payments toward their rent despite their "best efforts" to do so. *See CDC Order*, 85 Fed. Reg. at 55293. If they are completely insolvent now, there is no reason to think they will suddenly become solvent later. And, in any event, damages do not address the loss of property that the Property Owners are facing now. Even if they one day receive some amount of back rent, they will never be fully compensated for the losses they have incurred in the interim period by providing free housing to their tenants.

Finally, the district court's observation that the Property Owners "can immediately start eviction proceedings now and are only delayed in enforcing any eviction order they might obtain," is factually inaccurate,

and, in any event hardly resolves the constitutional injury. *See* ECF No. 48 at 46. Factually, two of the Property Owners, Mr. Brown and Ms. Jones, have tenants who have failed to pay rent and are "covered persons" under the CDC Order but have been unable to even *begin* the eviction process under state law because their local jurisdictions have shut down entirely as a result of their reading of CDC's Order. *See* ECF No. 12 at ¶¶ 50-55, 78-83, Brown Decl. at ¶¶ 8-12; Jones Decl. at ¶¶ 5-8. The district court's conclusion that they can "start eviction proceedings now" is simply untrue.

Moreover, even if the district court were correct, the Property Owners are still forbidden from retaking possession of their own homes. It does not matter that they can seek meaningless orders from their local courts, which cannot be executed. Mr. Krausz, Berkshire and MSC all have such orders. Yet they are still unable to execute them solely by operation of CDC's Order.

B. Appellants Will Suffer Irreparable Harm Without Preliminary Relief

To satisfy the irreparable harm requirement, the Property Owners 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).

"An injury is 'irreparable' only if it cannot be undone through monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (citation omitted).[2] This is because the constitutional injuries cannot be made whole. *See id.*

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

[2] *See also Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("When constitutional rights are threatened or impaired, irreparable injury is presumed."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("The district court properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights."); *Davis v. D.C.*, 158 F.3d 1342, 1346 (D.C. Cir. 1998) ("A prospective violation of a constitutional right constitutes irreparable injury.").

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 RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (citing authorities); *Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) ("Because real property is at issue and because [the plaintiff] cannot raise its claim for injunctive relief to prevent the taking of its property in the valuation proceeding, [the plaintiff] has shown a threat of irreparable injury."). "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) ("unauthorized interference with a real property interest constitutes irreparable harm as a matter of law"); *Shvartser v. Lekser*, 308 F. Supp. 3d 260, 267 (D.D.C. 2018) (same); *Del Monte Int'l, GMBH v. Ticofrut S.A.*, No. 16-23894-CIV, 2017 WL 3610582, at *9 (S.D. Fla. Mar. 7, 2017) (same); *Kharazmi v. Bank of Am., N.A.*, No. 1:11-CV-2933-AT, 2011 WL 13221071, at *3 (N.D. Ga. Sept. 2, 2011) (same).

The Property Owners have suffered and will continue to suffer from irreparable harm in three forms: (1) violation of their constitutional rights; (2) noncompensable loss of the value of their property; and (3) deprivation of their unique real property.

1. The Property Owners Suffered Irreparable Constitutional Injuries

First, as discussed, the CDC Order is unconstitutional, and thus the Property Owners have suffered an intangible violation that cannot be compensated later. *See Northeastern Fla. Chapter of the Assoc. of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Indeed, it is unconstitutional in two distinct ways—it unconstitutionally

exceeds the limited grant of authority Congress bestowed on CDC, and it illegally deprives the Property Owners of their constitutionally-guaranteed access to the courts. *See Bond v. United States*, 564 U.S. 211, 222 (2011) (recognizing "an injured person's standing to object to a violation of a constitutional principle that allocates power within government" where "individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations"); *Boddie*, 401 U.S. at 376 (discussing access to courts).

The district court's conclusion that "the rationale for finding irreparable injury for certain constitutional violations does not apply in this case" misreads relevant precedent. *See* ECF No. 48 at 50 (citing *General Contractors*, 896 F.2d 1283). While this case does not involve "free speech []or invasion of privacy," it does involve the intangible loss of access to the courts and the right only to be subject to laws issued by Congress. *See* ECF No. 48 at 50. And in discussing the irreparable nature of certain constitutional violations, this Court said, "The rationale behind these decisions was that chilled free speech and invasions of privacy, because of their intangible nature, could not be compensated by monetary damages; in other words, *plaintiffs could not be made whole*." *Assoc. of*

Gen. Contractors, 896 F.2d at 1285 (emphasis added). That is no less true here where the Property Owners cannot recover any damages from being locked out of the courts or subjected to ultra vires agency orders. Their intangible constitutional injuries are likewise irreparable.

2. The Property Owners Will Not Recover Damages from Their Insolvent Tenants

Second, the Property Owners cannot recover any of the economic damages they continue to incur because tenants covered by the CDC Order, by definition, are insolvent—and thus judgment-proof. The Order 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 back rent, yet they have incurred the costs of maintaining their properties and they have 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—and one provided under state law in all 50 states.

NAA's members suffer these same harms on a nationwide scale. NAA's 85,485 members have been forced to cover millions in costs for defaulting tenants, with no hope of any recovery from either the tenants or any of the defendants. *See* Pinnegar Decl. at ¶¶ 1-5. Many of NAA's member businesses are unlikely ever 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 the Property Owners 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, the Property Owners 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.

While many courts, including this Court, have often found financial harm to be irreparable if "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.*, 17 F.3d at 694

(emphasis added), the district court would render this precedent meaningless by making the *current* insolvent status of tenants irrelevant to the irreparability inquiry. Indeed, this Court recognized that "most courts sensibly conclude that a damage judgment against an insolvent defendant is an inadequate remedy." *Askins & Miller Orthopaedics, P.A.*, 924 F.3d at 1359 (citation omitted). Thus, even as courts acknowledge that this circumstance might involve "narrow" relief, there generally need only be a "*danger* of dissolution and depletion" for a court to issue an injunction that is "carefully tailored … to preserve the plaintiff's opportunity to receive an award of money damages at judgment." *See id.* (citing cases) (emphasis added). Precedent never requires a party seeking an injunction to prove, without a doubt, that he will *never* obtain any future financial relief.

The district court erred because it placed an impossible burden of proof on the Property Owners 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.*

The Property Owners 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. One also wonders how these tenants, presently unable to pay any rent at all, will be able to not only pay future rent obligations but also cover back rent someday for the many months that they could not pay anything to the Property Owners. 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 the Property Owners. No one can "clearly" prove that they will "never" receive any remediation from their losses from their tenants. But the Property Owners have submitted significant evidence

that suggests they will not. At this stage of the proceeding, this suffices to warrant intervention.

3. The Property Owners Have Been Irreparably Denied Access to Their Unique Real Property

The Property Owners 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* Pinnegar Decl. at ¶¶ 1-5. This deprivation constitutes "irreparable harm as a matter of law." *See Brooklyn Heights Ass'n, Inc.*, 777 F. Supp. 2d at 435.

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 the Property Owners do not "reside in the properties" and suggested that they somehow have a lesser interest in their own property. *Id*.

This conclusion, however, is without evidentiary foundation and runs counter to the record before the district court. For example, many property owners rent houses that they use for second homes during part of the year, use for other family members to live in, or, in the case of Mr. Rondeau, a home in which he hopes to spend his retirement. *See* ECF No. 18-3 at ¶ 3 (Rondeau Decl.). If they lose those unique homes because they are unable to pay a second mortgage while collecting nothing from a delinquent tenant, that loss (and often the equity in that second home) is not recoverable. Having suffered this financial harm, they may never again be able to afford to acquire a retirement home. NAA's nearly 90,000 members constitute property owners of all sizes, including many individuals with deeply personal connections to the rental properties.

This just shows that real property is unique on its own, without requiring any particular showing that it is *special*. *See Shvartser*, 308 F. Supp. 3d at 267 (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 the property 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"). The Property Owners 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.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (citation omitted); *see also Melendres v. Arpaio*, 695 F.3d 990,

1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Republican Party of Minn. v. White*, 416 F.3d 738, 753 (8th Cir. 2005) ("It can hardly be argued that seeking to uphold a constitutional protection … is not per se a compelling state interest.")

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 *legislative* response to the COVID-19 pandemic, the Order advances one specific policy solution that violates core limits on CDC's authority. CDC's Order is a ham-fisted effort to address the pandemic in a strained, illogical, and myopic way. The equities therefore require that the CDC Order be preliminarily enjoined. *See Roman Catholic Diocese of Brooklyn*, 2020 WL 6948354, at *3.

The district court wrongly concluded that the public interest weighed against the Property Owners based on its assumption that they 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.

D. This Case Presents a Case or Controversy Because CDC Can Extend the Soon-to-Be Expired Eviction Order at Any Time

This Court has jurisdiction to review only "cases and controversies," and will not consider "moot" issues. "There is an exception to this general rule, however. [This Court] may entertain a moot case if it arises from a situation that is 'capable of repetition, yet evading review.'" *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

"The 'capable of repetition, yet evading review' exception to the mootness doctrine applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1343 (11th Cir. 2014).[3]

[3] This Court has also articulated a third "requirement"—"if there exists some alternative vehicle through which a particular policy may effectively be subject to a complete round of judicial review, then courts will not generally employ this exception to the mootness doctrine." *Bourgeois*, 387 F.3d at 1308. In this case there is no alternative method

Concerning the first element of the test, this Court has held "that one year is an insufficient amount of time for a district court, circuit court of appeals, and Supreme Court to adjudicate the typical case." *Bourgeois*, 387 F.3d at 1309. Indeed, the Supreme Court has recognized "that a period of *two years* is too short to complete judicial review." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (emphasis added).

"The second prong of the capable of repetition exception requires a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (citations omitted). This standard requires "far less than absolute certainty" of repetition. *Bourgeois*, 387 F.3d at 1309. The onus is also on the party suggesting mootness—"Only when the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated are federal courts precluded from deciding the case on mootness grounds." *Christian Coalition v. Cole*, 355 F.3d 1288, 1291 (11th Cir. 2004). Indeed, it carries

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for Appellants to challenge the CDC Order. Thus, this requirement is inapplicable.

a "heavy burden" "in demonstrating" that the party seeking relief's expectation of recurrence "is fanciful or unreasonable." *Bourgeois*, 387 F.3d at 1309.

Perhaps the best evidence that a policy might recur is whether a party continues to defend its "past wrongs." *Bourgeois*, 387 F.3d at 1310 (citation omitted). When a party maintains that it acted lawfully with its challenged policy, "and has continued to implement it even in the face of ongoing litigation" the public should expect the party to return to that policy in the future. *Id.*

As a threshold issue, of course, the CDC Order *has not* expired. At the time of this filing, the Order remains in full effect, and the Property Owners anticipate that it will be extended as the Order contemplates. *See CDC Order*, 85 Fed. Reg. at 55297 (Order expires December 31, 2020 "unless extended").[4]

Even if the Order expires, this is an issue capable of repetition yet evading review, and this case is not moot. First, the challenged action was too short in duration to be fully litigated prior to expiration. The

[4] At the time of filing Congress has also not weighed in on this issue, and despite competing proposals, no law has been signed by the President.

Order applied only from September 1, 2020 until December 31, 2020, a period of four months, which was well within the presumptive one-year period. *See Bourgeois*, 387 F.3d at 1309. Indeed, the Property Owners diligently prosecuted this matter, filing the Complaint a mere 9 days after the Order was announced, and the first business day after its effective date. ECF No. 1. They then sought a preliminary injunction, and an injunction pending this interlocutory appeal. *See* ECF No. 18. The first element of the test is therefore satisfied.

Second, CDC cannot meet its "heavy burden" of "demonstrating" "there is no reasonable expectation that the wrong will be repeated[.]" *See Christian Coalition*, 355 F.3d at 1291. CDC said plainly that it could "extend[]" the Order at any time. *See CDC Order*, 85 Fed. Reg. at 55297. And given that the COVID-19 pandemic was the putative basis for the Order, and the pandemic has not abated, the Property Owners have good reason to think it will be extended. *See id.* at 55294-96. Moreover, CDC has continued to argue that the Order is valid, "and has continued to implement it even in the face of ongoing litigation[.]" *See Bourgeois*, 387 F.3d at 1310. Thus, the Property Owners face a reasonable expectation

that the controversy will recur, and the second element of the test is satisfied.

CONCLUSION

The judgment of the district court should be reversed, and this Court should enter a preliminary injunction.

December 21, 2020 Respectfully,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because this motion contains 12,969 words, excluding accompanying documents authorized by Fed. R. App. P. 32(f).

This brief 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 Century Schoolbook font.

December 21, 2020

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 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.

December 21, 2020 Respectfully,

/s/ Caleb Kruckenberg
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