IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

PLAINTIFF-APPELLANTS' REPLY BRIEF

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

March 12, 2021

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CERTIFICATE OF INTERESTED PERSONS

Plaintiffs-Appellants certify that the following is a complete list of interested persons omitted from the first brief as required by Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1-2(b):

1. Cochran, Norris, *Defendant Appellee*

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

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INTRODUCTION

National crises call out for national responses by our elected leaders. But they also prove tempting for *unelected* authorities to exceed their mandates and violate cherished constitutional rights. Defendant-Appellees Acting Secretary Norris Cochran,[1] 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"), are using a limited Congressional grant of authority as a free pass to advance a destructive, unconstitutional, and ill-considered foray into housing policy that bears no relationship to CDC's public health mandate. The appellants, Richard Lee (Rick) Brown, Jeffrey Rondeau, Richard Krausz, Sonya Jones, and the members of the National Apartment Association (collectively "Housing Providers"), are the victims of CDC's attempted invocation of unlimited authority—its September 4, 2020 Order entitled, "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*." 85 Fed. Reg. 55292 ("Eviction Order" or "Order"). Rather than allay these legitimate fears of unchecked power, CDC simply shrugs

[1] Norris Cochran is now Acting Secretary as HHS Secretary Alex Azar has resigned.

its shoulders. It claims its power is not "unbounded," but declines to articulate *any* limit. *See* CDC Br. at 11. This Court must not bless CDC's power grab, and it should reverse the district court and enter a preliminary injunction.

ARGUMENT

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

1. Contrary to CDC's View, the Agency Does Not Have Unlimited Authority to Engage in Any Action It Can Imagine

CDC insists that the source of its statutory authority, 42 U.S.C. § 264, "confers broad authority on the Secretary," in fact, so broad, that CDC can overrule any action by any State or locality, as long as the Secretary subjectively "deems [it] 'necessary' to avert contagion." CDC Br. at 10. But the statute cannot credibly be stretched so far, and if it could, this would constitute a truly dangerous and unlawful grant of power to an agency.

Indeed, as another court concluded in a very recent decision setting aside the Eviction Order,

> Such a broad reading of the statute … would authorize action with few, if any, limits—tantamount to creating a general federal police power. It would also implicate serious

> constitutional concerns[.] … But the text does not authorize such boundless action or depend on the judgment of the Director of the CDC or other experts for its limits. The eviction moratorium in the CDC's orders exceeds the statutory authority Congress gave the agency.

Skyworks Ltd. v. CDC, No. 5:20-cv-2407, 2021 WL 911720, at *10 (N.D. Ohio Mar. 10, 2021).

As the Housing Providers argued in their opening brief, the statutory and regulatory text that CDC has invoked speaks of CDC's authority 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. The *Skyworks* court recognized that this language shows that "Congress direct[ed] the agency to act on specific animals or articles which are themselves infected or a source of contagion that present a risk of transmission to other people," but not "other measures beyond those specified." 2021 WL 911720 at *9.

But CDC claims, implausibly, that this list of measures bears *no* relation to a limit on its authority. *See* CDC Br. at 13. In support, CDC rejects the venerated *noscitur a sociis* and *ejusdem generis* canons of construction out of hand, because, according to CDC, "[s]uch canons come into play only when the meaning of statutory text is not apparent on its

face." CDC Br. at 13. Relatedly, CDC dismisses the rule of lenity for the same reason—saying the statute *plainly* authorizes it to intrude into state court operations and housing policy, as *plainly* as it allows CDC to engage in pest extermination. *See* CDC Br. at 13.

CDC's argument falls apart because it ignores the most relevant precedent and would render 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 action* at all. *See McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016). Indeed, conspicuously absent in CDC's brief is a *single* mention of the Supreme Court's decision in *Yates v. United States*, 574 U.S. 528 (2015), yet that opinion, which was appealed from this circuit, essentially decides this case.

The Court in *Yates* dealt with a strikingly similar statute that criminalized destruction of "any record, document, or tangible object[.]" 574 U.S. at 531. Yates, a fisherman, was charged with violating the statute by throwing an undersized fish back into the Gulf of Mexico. *Id*. There was no doubt that a fish was a "tangible object," because, *literally* read, the statute encompassed "any and every physical object" including

fish. *Id.* at 543, 545. But the Court rejected that facile approach to statutory construction because the key determinant was *not* that the statute was "ambiguous" in the sense that it may or may not *literally* encompass the conduct at issue but was whether "the broader context of the statute as a whole" made sense. *Id.* at 537 (citation omitted). This is what the relevant canons of construction really mean—is it rational to read a statutory term without any consideration for context, normal language and common sense? *See id.* Or, as the Court said in another case, if a statute, when "considered in isolation," appears to support a "broad interpretation," would that interpretation result in "no limits [] placed on the text," and a statute that is "essentially indeterminate" and "stop[s] nowhere[?]" *Maracich v. Spears*, 570 U.S. 48, 59-60 (2013) (citation omitted). Loath to allow the "tangible object" language to "render" the other terms "superfluous," and mindful of the criminal consequences that compelled a lenient reading, the Court rejected the Government's absurdly broad reading. *Yates*, 574 U.S. at 543, 548.

Statutes are not lines of code—they are not read by machines. But CDC would have this Court read Section 264(a) without any appreciation for human language. "[T]o read the words 'other measures' as [CDC]

propose[s] would divorce them from their context and take them in isolation without regard for what came before." *Skyworks*, 2021 WL 911720 at *10. CDC does not, for instance, argue—nor could it plausibly—that overriding state court operations and housing laws bears a relationship to the enumerated measures. *See* CDC Br. at 9-11. But if the list of permissible actions under the statute truly has no relationship to the phrase "other measures," then why list them at all? The statute would simply "stop nowhere." *See Maracich*, 570 U.S. at 60.

Indeed, CDC's own classification of its authority proves the invalidity of its interpretation. While CDC *says* the "statute and regulation do not confer unbounded authority, as plaintiffs suggest," it declines to say why they do not. CDC Br. at 11. CDC also refuses to articulate any outer limit, aside from CDC's own subjective "judgment" that the action "may be necessary." CDC Br. at 10-11. But if one runs afoul of CDC's subjective judgment, one faces *federal prison*. Reading the statute in context, and resolving any ambiguity to *reject* criminal liability, this Court must reject CDC's unlimited view of its authority to create new criminal liability. *See Yates*, 574 U.S. at 538, 548. Thus, as the *Skyworks* court said, "[T]he text does not authorize such boundless

action or depend on the judgment of the Director of the CDC or other experts for its limits." 2021 WL 911720 at *10.

The only other textual defense of its position that CDC offers, reference to other statutory provisions, makes little sense. *See* CDC Br. 12. CDC points out that the remaining sections of the statute, Sections 264(b), (c), and (d), "place restrictions on the circumstances in which the agency may provide for the 'apprehension, detention, examination or conditional release of individuals." CDC Br. at 12. CDC then, bizarrely, concludes that Congress "plain[ly]" meant to suggest that Section 264(a) "is not confined to the specific intrusions on private property" delineated in the statute in any meaningful way. CDC Br. at 12. 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 Sections 264(b), (c), and (d) it addresses a much different type of action—"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 Sections 264(b), (c), and (d) impose limits on *detention* of infected *people*, it does not follow that there would be *no other*

limits at all for CDC to take actions that impact uninfected people.

Indeed, given the limits placed on CDC when dealing with infected people, the more logical reading is that CDC has far less power when it comes to dealing with uninfected people. CDC's reasoning would convert Congress' obvious hesitancy to grant vast powers of *detention* into an implicit suggestion that any other action is fair game. "While these provisions confirm that CDC has broad authority to act under the statute to prevent the transmission of communicable diseases, the additional subsections do not supplant the reach of the first or create other grounds justifying the orders at issue." *Skyworks*, 2021 WL 911720 at *10.

2. CDC's Order also Fails the Statutory Requirements of Being a "Reasonably Necessary" Measure to Counter "Insufficient" Local Action

Aside from its incorrect reading of the statute and regulation, CDC also never engages with the Housing Providers' argument that, even under its broad reading, CDC's actions fail the textual limits of being "reasonably necessary" in the face of "insufficient" state action. As the Housing Providers argued in their opening brief, 42 C.F.R. § 70.2, requires CDC to first determine state measures "are insufficient to prevent the spread of any of the communicable diseases," and then that

its proposed conduct is "reasonably necessary" to "prevent [the] spread of [] diseases." *See* Appellant's Br. at 22-23. But CDC has not demonstrated that the drastic measure of an unprecedented intrusion into state court operations was a necessary measure because states were not taking adequate steps toward addressing COVID-19. Indeed, CDC has never provided any reason or proof that state actions were inadequate, nor that its *eviction moratorium* was the sole necessary act required to stop the spread of COVID-19.

Instead of carrying its burden, CDC just declares, glibly, that "substantial evidence demonstrated that state and local measures were inadequate to prevent the spread of disease … [because] despite the various measures that states and localities have put in place, 'COVID-19 continues to spread and further action is needed.'" CDC Br. at 17 (quoting Eviction Order, 85 Fed. Reg. at 55292). But CDC thereby ignores the fact that five months after CDC issued its Order, COVID-19 is still omnipresent in American life. Indeed, CDC notes that "December 2020 and January 2021 were the worst months to date," even though the Order was supposedly necessary to stop the pandemic. CDC Br. at 28. And this says nothing at all about why intrusion into state court operations,

instead of *any other* public health measure, was CDC's only resort to correct state inaction. After all, CDC has not taken *any other* action pursuant to the underlying statute and regulation. Why, of all things, was the unprecedented Eviction Order *necessary*, when nothing else was?

CDC's argument makes a mockery of the regulatory limits set out in Section 70.2. According to CDC, as long as COVID-19 "continues to spread," it can do anything and everything it can envision, whether it proves to be efficacious or not, and whether it bears any meaningful relationship to disease control. CDC's untenable view constitutes a limitless power grab.

In the end, CDC has no statutory or regulatory basis for its Order. All that is left is CDC's invocation of fear and danger from COVID-19. As the *Skyworks* court said, decisions upholding the Order "have the feel of adopting strained or forced readings of the statute, stretching to rationalize the governmental policy at issue. That is not a proper methodology of statutory interpretation. Nor is it the proper role of the courts." 2021 WL 911720 at *11.

B. Congress Did Not Ratify the CDC Order

CDC also argues in passing that Congress' temporary extension of the Eviction Order for the month of January through a single paragraph in a 2,000-page appropriations bill "confirms that the broad grant of authority in § 264(a)" justifies CDC's past and future actions. *See* CDC Br. 14. CDC reads far too much into the appropriations bill. As the *Skyworks* court concluded, "the Appropriations Act does not amount to a ratification in any sense in which Congress has historically ratified prior actions." 2021 WL 911720 at *12.

To be sure "Congress "ha[s] [the] power to ratify the acts which it might have authorized" as an initial matter. *United States v. Heinszen*, 206 U.S. 370, 384 (1907). But Congress' intent to ratify agency action must be unmistakable. Thus, in *Heinszen* the Court upheld a ratification because the text was "unambiguous, and manifests, as explicitly as can be done, the purpose of Congress to ratify." *Id.* at 382. Similarly, in *Thomas v. Network Solutions, Inc.*, 176 F.3d 500 (D.C. Cir. 1999), also cited by CDC, CDC Br. at 15, the court found ratification where the legislature's intent was unmistakable. Indeed, the new enactment said that it "hereby legalized and ratified and confirmed as fully to all intents

and purposes as if the same had, by prior act of Congress, been specifically authorized and directed." *Thomas*, 176 F.3d at 505.

When a purported ratification arises in the context of mere appropriations, Congress must be even more explicit. When ratifying an agency action through appropriation acts, "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Ex parte Endo*, 323 U.S. 283, 303 n. 24 (1944); *accord Schism v. United States*, 316 F.3d 1259, 1291 (Fed. Cir. 2002). Even when relevant "regulations and procedures were mentioned in committee hearings and reports, this alone [i]s not sufficient to demonstrate ratification; rather the appropriation itself ha[s] to 'plainly show a purpose to bestow the precise authority'" at issue. *Schism*, 316 F.3d at 1291 (quoting *Endo*, 323 U.S. at 303 n. 24).

This Court should also hesitate to find ratification where the agency has undertaken an action of great economic or political significance. Ratification exists so that the government is not "defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." *Graham v. Goodcell*, 282 U.S. 409, 430 (1931) (quoting *Charlotte Harbor & Northern Railway Co. v. Welles*, 260 U.S. 8, 11-12

(1922)). In other words, ratification can cure modest errors, not override "vested right[s] … linked to any substantial equity." *Graham*, 282 U.S. at 430. The doctrine allows Congress to address errors such as an expired tariff, *Heinszen*, 206 U.S. at 377-79, or taxes collected after a statute of limitations has run due to procedural delays, *Graham*, 292 U.S. at 414-18. It does not exist to wave through massive, unauthorized agency actions that amount to de facto legislation with serious political and economic ramifications. *See Van Emmerik v. Janklow*, 454 U.S. 1131, 1133 (1982) ("*Heinszen* … appear[s] to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively.") (White, J., dissenting from denial for lack of jurisdiction).

The text of the appropriation does not even purport to ratify the eviction order before Jan. 1, 2021, nor any extension of the order beyond Jan. 31, 2021, much less affirm CDC's broad reading of its statutory authority. Section 502 says in its entirety, "The order issued by the Centers for Disease Control and Prevention under section 361 of the Public Health Service Act (42 U.S.C. 264), entitled "Temporary Halt in

Residential Evictions To Prevent the Further Spread of COVID–19" (85 Fed. Reg. 55292 (September 4, 2020) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order." *Consolidated Appropriations Act*, 2021, Pub. L. No. 116-260, div. N, tit. V, 134 Stat. 1182 (2020). That language says nothing at all about CDC's interpretation of its authority, nor about the lawfulness of the past moratorium or future extensions. There is also no congressional record indicating that Members considered the scope of CDC's authority in "committee hearings and reports," which *themselves* would not be "sufficient to demonstrate ratification." *See Schism*, 316 F.3d at 1291. Thus, there is no basis to conclude that Congress broadly ratified CDC's power grab. If anything, by establishing a new, fixed end date for the "temporary halt in residential evictions," and not mentioning any ability for CDC to extend that end date further, Congress' action severely undercuts any CDC claim to legitimacy in moving that date to March 31—or beyond.

Any purported ratification says nothing about the larger constitutional problem with the Eviction Order. Congress must have been able to authorize the agency action "from the beginning;" "if it could

not have done so, it cannot ratify [agency] actions after the fact." *Thomas*, 176 F.3d at 507 (quoting *Heinszen*, 206 U.S. at 384). But here, of course, CDC's action is also unlawful as it deprives the Housing Providers of access to the courts. Thus, even if it were ratified, CDC's order is still unlawful.

C. The Eviction Order Lacks Sufficient Evidentiary Foundation

Even if the Eviction Order were statutorily authorized, CDC has wholly failed to meet its evidentiary burden. CDC's primary effort at justifying the Order is to undermine its burden of proof. Indeed, CDC suggests it need only provide a reason for its decision, no matter the underlying factual basis. *See* CDC Br. 19. But the facts do not justify CDC's action. Indeed, it has not provided any evidence that the Order is necessary to stop to the spread of COVID-19, or even that it has or will have any positive impact on the pandemic. The Order is therefore arbitrary and capricious.

An agency decision is arbitrary and capricious if it lacks "substantial evidence" supporting it. *Adefemi v. Ashcroft*, 386 F.3d 1022, 1027 (11th Cir. 2004) (en banc). An 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). "'Substantial evidence' means enough evidence 'to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn is one of fact for the jury.'" *Defs. of Wildlife & Ctr. for Biological Diversity v. Jewell*, 815 F.3d 1, 9 (D.C. Cir. 2016) (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)).

But CDC relies not on evidence but instead on pure speculation. The *data* that CDC invokes suggest that large numbers of people might be evicted during the pandemic, those who lived in "shared housing options" are more likely to "become infected" by a member of their household, and some cities have "reported outbreaks of COVID-19 in homeless shelters." CDC Br. at 16. CDC also notes, generally, that homeless individuals are at greater threat for all health problems. CDC Br. at 17.

But as argued in the Property Owner's opening brief, there are simply too many gaps in this analysis to conclude that the Order is *necessary* to counteract *inadequate* state responses to COVID-19. For instance, CDC never explains how processing evictions will necessarily

result in homelessness or shared housing, instead of tenants merely seeking more affordable housing. And observing that members of shared households often become infected by other members of the household proves nothing concerning absolute rate of infection, or, for that matter, any relationship to evictions more generally. CDC is simply guessing that evictions will cause homelessness, and that homeless individuals will contract the virus more easily than other individuals, *and then* that they might be at greater risk of complications.[2] CDC then speculates that, if all of its other guesses prove correct, then the Eviction Order would solve the problem. CDC's evidence is hardly sufficient to resist a directed verdict if this were a trial. *See Defs. of Wildlife*, 815 F.3d at 9.

Having failed on the record before CDC when it issued the September Order, CDC turns to *subsequent* research that it claims

[2] Subsequent research has refuted this notion, and suggests instead that infection rates among the homeless have been found to be on par with the general population, and in some communities, death rates are *lower* than the general population. Thomas Fuller, *Isolation Helps Homeless Population Escape Worst of Virus*, NY Times (Dec. 25, 2020) *available at* https://www.nytimes.com/2020/12/23/us/coronavirus-homeless.html. This is partly due to state remediation measures to allow physical distancing in temporary shelters and alternate rehousing efforts. *See id.* CDC had apparently assumed, however, that no remediation would be possible for homeless individuals, which has proven to be false.

turned out to justify its actions—a *post hoc* fallacy. *See* CDC Br. at 18. But it is "black-letter administrative law that in an [Administrative Procedure Act] case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). "[R]eview is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision," not "'post hoc' rationalizations." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

This Court should reject CDC's new evidence out of hand. CDC tries to justify its *past* actions by referencing "preliminary mathematical models" and non-peer-reviewed "observational data" that is has gathered since its original order was issued and challenged below. CDC Br. at 18. CDC's sources point to a rise in COVID-19 in September 2020, which coincided with the expiration of state eviction moratoria. CDC Br. at 18. But this Court should not allow CDC's post hoc rationalization of its past acts to carry CDC's burden of proof. *See Hill Dermaceuticals, Inc.*, 709

F.3d at 47. CDC's act-now, justify-later, policy is fundamentally incompatible with its legal obligations.

In any event, CDC's new support is strikingly thin. Even if this Court considered it, CDC's research is highly speculative and does not justify the Eviction Order. CDC's data notes a rise in infections in September 2020, but certainly cannot control for the myriad other reasons contributing to that rise. Indeed, as early as May 2020 scientists predicted "COVID-19's second wave" for the fall of 2020. *See* Len Strazewski, AMA-Association, *Harvard Epidemiologist: Beware COVID-19's Second Wave This Fall* (May 8, 2020) https://www.ama-assn.org/delivering-care/public-health/harvard-epidemiologist-beware-covid-19-s-second-wave-fall. And CDC's "observational data" simply notes that second wave occurred and finds an "association" between the second wave and expiring eviction moratoria. *See* Leifheit, Kathryn M. and Linton, Sabriya L. and Raifman, Julia and Schwartz, Gabriel and Benfer, Emily and Zimmerman, Frederick J and Pollack, Craig, *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality* (November 30, 2020), *available at* SSRN: https://ssrn.com/abstract=3739576. But the study even acknowledges

that it did not study "executed evictions," but merely performed surveillance studies of homeless individuals, and did not, and could not, control for other significant causes of COVID-19 infections. *See id.* at 5-6. Moreover, as mentioned, subsequent research refutes many of the assumptions made by CDC and the study authors, noting that infection rates among the homeless have been found to be on par with the general population, and in some communities, death rates are *lower* than the general population, because localities have adopted appropriate remediation measures for homeless individuals. *See* Fuller, *Isolation Helps Homeless Population Escape Worst of Virus*. CDC's new support is hardly substantial evidence of the Eviction Order's efficacy.

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

CDC insists that its order does not deprive the Housing Providers of their constitutional right to access the courts, but to get there it relies on demonstrably false assertions, simple guesses about future events and misstatements about the rights at issue. *See* CDC Br. at 20-21. CDC's arguments should not detain this Court for long.

Initially, CDC pretends that its Eviction Order, which explicitly makes it a federal crime to "evict any covered person from any residential

property in any jurisdiction," 85 Fed. Reg. 55292 somehow "posed no obstacle to plaintiffs' ability to initiate legal proceedings against their tenants." CDC Br. at 20. CDC even says that "the CDC Order did not affect any state judicial proceeding." CDC Br. at 20. But what does it think the Order does? By its own terms the order forbids "evicting" covered tenants. Even if this language allows courts' processes to commence, the Housing Providers cannot retake possession of their property without an eviction order. *See* Appellants Br. at 41-43. Indeed, several plaintiffs *have* eviction orders in hand, yet have been prevented from retaking their property *only* because of the CDC Order. *See* ECF No. 18-4 at ¶ 10 (Krausz Decl.); ECF No. 45-1 at ¶¶ 6, 11 (Pinnegar Supp. Decl.).

Moreover, while CDC proffers its belief that the expansive language in the Order ought to be read narrowly to allow the filing of eviction matters (but not evictions themselves), it has no answer to the fact that local jurisdictions have read the plain text of the order otherwise. *See* CDC Br. at 20. Perhaps CDC thinks local jurisdictions *shouldn't* take CDC's order literally, but as Plaintiff Jones alleged in a sworn declaration, her local jurisdiction has refused to allow any eviction

proceedings. ECF No. 18-5 at ¶7 (Jones Decl.). CDC inexplicably dismisses this evidence as irrelevant, and somehow "unsupported by plaintiff's citations," CDC Br. at 20, but as Plaintiff Jones attested, when she tried to seek an eviction *hearing* her local jurisdiction "continued all proceedings until January 2021 in purported compliance with CDC's eviction moratorium order." Jones Decl. at ¶7. Of course, CDC also has no contrary evidence. Regardless of how CDC *wants* jurisdictions to react to its Order, jurisdictions *have* shut down entirely.

Next, CDC says that "the CDC Order [does not] constitute a 'complete foreclosure of relief' on any claim" because the Housing Providers will one day be entitled to judgments against their tenants. CDC Br. at 21. That specious claim ignores the full deprivation at issue. Even if they can obtain damages for *lost rent*, the Housing Providers cannot retake their property until the Order expires. As argued in their opening brief, all of the Housing Providers are prohibited by law from retaking their properties without court process. *See* Appellants Br. at 42-43. And damages are not available to the Housing Providers for the losses they have incurred from their lack of *access* to the properties—they can attempt to recover only what the tenants have refused to pay in rent. The

Housing Providers have no remedy for the loss of access to their property, which is why they have no avenue of relief until the expiration of the Order.

Finally, CDC defends a completely unsupported idea that the constitutional violations are acceptable because they might not be permanent. CDC says that "because of the temporary nature of the measure, plaintiffs will be able to enforce any eviction order that they obtain following the expiration of the moratorium." CDC Br. at 21. Constitutional violations do not become any less unlawful just because they only deprive the Housing Providers of their property for seven, or more, months. CDC's belief that the Housing Providers might be able to one day retake what everyone acknowledges is their rightful property is cold comfort. But it is also legally insupportable. CDC cites no authority to suggest that a months-long violation is any less offensive to the Constitution, nor does it refute the notion that 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. *Gentry v. Duckworth*, 65 F.3d 555, 558 (7th Cir. 1995) (citation omitted).

The Housing Providers have not just been delayed in obtaining damages from their tenants. They have been forbidden from seeking ejectment of tenants in wrongful possession until the Order's expiration. And with no remedy available to them, Housing Providers have no means, now, of enforcing their lease agreements or ensuring that tenants will pay their rent even if they have the means to do so. Of course, the Order has already been extended *twice*, and the Housing Providers reasonably expect it to be extended yet again soon. But regardless, the detriment they face is not that the ultimate lawsuit will be prejudiced, it is that the Housing Providers cannot access their own property in the interim, despite an unequivocal right to do so under state law. That deprivation constitutes a constitutional injury, and the CDC Order is unconstitutional.

E. Appellants Will Suffer Irreparable Harm Without Preliminary Relief

CDC's suggestion that the Housing Providers have not suffered irreparable harm is premised on contradictory notions of burdens of proof and a caricature of the Housing Providers' arguments about their deprivation. On the one hand, CDC tried to defend the district court's imposition of an impossible burden of definitively proving a negative, by

speculating wildly about the availability and distribution of unexecuted relief packages. CDC Br. at 25. On the other, CDC parodies the Housing Providers' interest in their properties as being unworthy of redress because they do not reside within them. CDC Br. at 25-26. These arguments must fail.

First, CDC assails the Housing Providers for lacking definitive proof, at the preliminary injunction stage, that their tenants would be permanently unable to repay their back rent. CDC Br. at 23. But as argued in their opening brief, the Housing Providers 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; ECF No. 18-4 at ¶ 14 (Krausz Decl.); Jones Decl. ¶ 10. After all, the Order applies only to *insolvent* tenants, who are "unable to pay the full rent." 85 Fed. Reg. at 55293. What better evidence is there of insolvency than sworn declarations *from the* tenants that they are unable to pay *anything* toward their rental obligations? CDC would require the

Housing Providers to disprove even the possibility of repayment, which would not only be impossible at any stage, but is completely inappropriate at this stage of the litigation.

Of course, CDC also tries to undercut the sworn evidence presented by the Housing Providers with rank speculation about future events. CDC says that "plaintiffs' assertion that the unpaid rent will be uncollectible, Br. 55-56, is further undermined by Congress's recent appropriation of billions of dollars of rental assistance." CDC Br. at 24. There are too many missing links here to even take this argument seriously. Congress appropriated federal funding to be distributed to the states, who in turn may (or may not) provide some assistance to cover rental expenses. Would this cover back rent, would it apply to all covered tenants, would it make the Housing Providers whole? CDC cannot say. It cannot even speculate. Refuting *facts* with notions of future relief cannot carry the day.

Next, CDC mischaracterizes the non-economic deprivations that the Housing Providers have suffered. According to CDC the Housing Providers have "contend[ed] that any interference with access to their property, no matter how slight, automatically qualifies as irreparable

harm." CDC Br. at 25. CDC also accuses the Housing Providers of invoking "categorical contentions" about real property. CDC Br. at 25. Whatever the strength of CDC's arguments against this straw man, CDC's view of the relevant argument has no connection to the issues here. Rather than an abstract, categorical, and "no matter how slight," intrusion, the Housing Providers have all been entirely dispossessed from their properties since September 2020, solely by CDC's Order. Whether they reside in the properties or not, the Housing Providers have a significant interest in their unique properties and using them for whatever purposes they desire. CDC has irremediably deprived them of that right, and thus subjected them to irreparable harm. *See 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").

Finally, CDC dismisses the irremediable harm the Housing Providers have suffered from their constitutional violations because they are not based on "free speech [or] invasions of privacy." CDC Br. 27 (quoting *Northeastern Florida Chapter of Ass'n of General Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)). CDC

ignores the forest for the trees. The reason constitutional violations, like "chilled free speech" and "invasions of privacy," are irreparable is because they cannot "be compensated for by monetary damages." *General Contractors of Am.*, 896 F.2d at 1285; *see also Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987) ("An injury is 'irreparable' only if it cannot be undone through monetary remedies."). But CDC ignores the fact that the Housing Providers have no hope of being compensated for their loss of access to the courts. That violation is thus irreparable.

F. The Injunction Is Equitable and in the Public Interest

CDC's arguments concerning the balance of equities depend entirely on the agency's success in defending its action on the merits. Indeed, CDC does not dispute that it is always in the public interest to stop unlawful agency action. *See Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (citation omitted). Instead, it just says that the Order was lawfully enacted, and that the conceded harm to the Housing Providers "pales in comparison to the significant loss of lives that *could* occur if the temporary eviction moratorium were enjoined." CDC Br. at 27 (citation omitted, emphasis added). But, as discussed, the order is not legally justified, and indeed is not supported by sufficient evidence. In

fact, CDC has no evidence that its unlawful Order would have or has had any meaningful impact on the spread of COVID-19. Indeed, instead of taking other, more appropriate and measured steps, like allocating vaccines to the homeless or to people being evicted, or providing protective equipment to needy communities, CDC has taken an unprecedented and unjustifiable detour by interfering with—and in many cases shutting down—state court operations. Thus, the equities favor an injunction against CDC's harmful actions here.

CONCLUSION

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

March 12, 2021 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 brief contains 5937 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.

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2021, 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.

March 12, 2021 Respectfully,

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