No. 20-14210

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD LEE BROWN, et al.,

Plaintiffs-Appellants,

v.

NORRIS COCHRAN, Acting Secretary of Health and Human Services, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

BRIEF FOR THE APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1(a)(1), counsel for the federal defendants-appellees certify that the following have an interest in the outcome of this appeal:

American Medical Association

Atlanta Legal Aid Society, Inc.

Beckenhauer, Eric

Benfer, Emily A.

Berger, Sherri A.*

Bliss, Charles Richardson

Boulee, Honorable J.P., U.S. District Court Judge

Boynton, Brian M.*

Brown, Richard Lee

Children's Healthwatch

Cochran, Norris*

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National Hispanic Medical Association

National Housing Law Project

National Medical Association

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STATEMENT REGARDING ORAL ARGUMENT

To curb the spread of COVID-19, the Centers for Disease Control and Prevention issued a temporary moratorium on the eviction of certain individuals who otherwise would likely become homeless or move into congregate settings, such as crowded shelters, thereby increasing the spread of COVID-19. Plaintiffs challenged the temporary moratorium and moved for a preliminary injunction. The district court denied their motion, concluding that plaintiffs had failed to establish any of the factors necessary to obtain the extraordinary remedy of a preliminary injunction. Plaintiffs then moved in this Court for an injunction pending appeal, which this Court denied. *See* 12/17/2020 Order (Wilson, Jordan, Newsom, Circuit Judges).

The district court did not abuse its discretion in denying a preliminary injunction. Its order should be affirmed without oral argument for the reasons set out in the district court's opinion. The government stands ready to present oral argument, however, if this Court would find it useful.

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 5 U.S.C. § 702 and 28 U.S.C. § 1331. Dkt. No. 12, at 4. The district court denied plaintiffs' motion for a preliminary injunction on October 29, 2020. Dkt. No. 48, at 66. Plaintiffs filed a notice of appeal on November 9, 2020. Dkt. No. 50. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

To curb the spread of COVID-19, the Centers for Disease Control and Prevention (CDC) issued a temporary moratorium on the eviction of certain individuals who otherwise would likely become homeless or move into congregate settings, such as crowded shelters, thereby increasing the spread of COVID-19. The question presented is:

Whether the district court abused its discretion in determining that plaintiffs had failed to establish the factors necessary to obtain the extraordinary remedy of a preliminary injunction.

STATEMENT OF THE CASE

I. Statutory And Regulatory Background

The statute at issue here was enacted in 1944 as section 361 of the Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (1944). In relevant part, it authorizes the Secretary of Health and Human Services to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission,

or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." 42 U.S.C. § 264(a); *see also* H.R. Rep. No. 78-1364, at 24 (1944) (noting that this provision codified the federal government's "basic authority to make regulations to prevent the spread of disease into this country or between the States").[1]

The Secretary's implementing regulations delegate enforcement authority to the CDC, a division of the Department of Health and Human Services (HHS). The applicable regulation provides that when the CDC Director "determines that the measures taken by health authorities of any State . . . are insufficient to prevent the spread of any of the communicable diseases" between or among States, the CDC Director may "take such measures to prevent such spread of the diseases as he/she deems reasonably necessary." 42 C.F.R. § 70.2.[2]

[1] Although the statute assigned authority to the Surgeon General, these statutory powers and functions were later transferred to the Secretary of Health, Education, and Welfare, now the Secretary of Health and Human Services. *See* Reorganization Plan No. 3 of 1966, 31 Fed. Reg. 8855 (June 25, 1966), *reprinted in* 80 Stat. 1610 (1966); *see also* 20 U.S.C. § 3508(b).

[2] The regulation that is in force today has remained substantively unchanged since at least 1947. *See, e.g.*, 12 Fed. Reg. 3189, 3190 (May 16, 1947) (codified at 42 C.F.R. § 12.3 (1947)); 12 Fed. Reg. 6132, 6210-11 (Sept. 16, 1947) (recodified at 42 C.F.R. § 72.3 (1947)). The regulation was re-promulgated without material alteration in 2000 to transfer authority to the CDC. *See* Control of Communicable Diseases; Apprehension and Detention of Persons with Specific Diseases; Transfer of Regulations, 65 Fed. Reg. 49,906, 49,907 (Aug. 16, 2000).

II. The CDC's Temporary Moratorium On Certain Evictions

A. To curb the spread of COVID-19, "Federal, State, and local governments have taken unprecedented or exceedingly rare actions, including border closures, restrictions on travel, stay-at-home orders, mask requirements, and eviction moratoria." Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020) (CDC Order or Order). This appeal involves one such public-health measure—a temporary moratorium on the eviction of certain individuals who otherwise would likely become homeless or move into congregate settings, such as crowded shelters, thereby increasing the spread of COVID-19. *Id.* at 55,294-96.

The CDC issued the temporary eviction moratorium on September 4, 2020, pursuant to the agency's authority under 42 U.S.C. § 264(a) and 42 C.F.R. § 70.2. *See* 85 Fed. Reg. at 55,292. While the moratorium remains in effect, landlords may not evict covered persons from residential properties for the nonpayment of rent. *Id.* at 55,292, 55,297. The moratorium applies only to individuals who, if evicted, would likely become homeless or be forced to "live in close quarters in a new congregate or shared living setting." *Id.* at 55,293. To qualify as a "covered person," a tenant must provide a sworn declaration to her landlord indicating that she (1) "has used best efforts to obtain all available government assistance for rent or housing"; (2) satisfies certain income requirements; (3) "is unable to pay the full rent . . . due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or

extraordinary out-of-pocket medical expenses"; (4) "is using best efforts to make timely partial payments that are as close to the full payment as . . . permit[ted]"; and (5) "has no other available housing options" and therefore would likely become homeless or be forced to "live in close quarters in a new congregate or shared living setting" if evicted. *Id.* (footnote omitted).

Although the CDC Order temporarily prohibits evictions of covered persons for failure to pay rent, it does not excuse their obligations to pay rent or to comply with other obligations of their lease. 85 Fed. Reg. at 55,294. Moreover, landlords may evict tenants based on circumstances other than nonpayment of rent, including criminal activity, property damage, and other lease violations. *Id.* And even if a tenant qualifies as a covered person, the CDC Order does not bar a landlord from commencing a state court eviction proceeding, provided that actual eviction does not occur while the Order remains in effect. *See id.* at 55,293 (defining "evict" as "to remove or cause the removal of"); *see also* CDC, *HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19: Frequently Asked Questions* 1, https://go.usa.gov/x7dhb (last visited Feb. 19, 2021) (*Frequently Asked Questions*) (stating that landlords are not prevented from "starting eviction proceedings, provided that the actual eviction of a covered person for non-payment of rent does NOT take place during the period of the Order").

In issuing the Order, the CDC relied on data showing that eviction moratoria reduce the risk of COVID-19 transmission by facilitating self-isolation and social

distancing, reducing the need for congregate housing, and helping to prevent homelessness. 85 Fed. Reg. at 55,294-95. Based on the administrative record, the CDC determined that the Order was reasonably necessary to prevent the spread of COVID-19 and that state and local measures that did not meet or exceed its protections were insufficient to do so. *Id.* at 55,296. The Order was set to expire on December 31, 2020. *Id.* at 55,297.

B. Subsequently, as part of legislation signed into law on December 27, 2020, Congress extended the CDC's Order through January 31, 2021, and also appropriated $25 billion in emergency rental assistance designed to reach landlords whose tenants have fallen behind in rent. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. V, §§ 501(a)(1), (c)(2), 502, 134 Stat. 1182, 2070, 2072-73, 2078-79 (2020) (2021 Appropriations Act).

On January 29, 2021, the CDC extended the Order through March 31, 2021. *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021). The extension was based on additional evidence showing that the pandemic had worsened significantly in recent months; scientific studies showing that eviction moratoria are effective in slowing the spread of COVID-19; and data showing that evictions would likely proceed quickly and in large numbers if the Order were lifted prematurely. *See id.* at 8021-25.

III. Prior Proceedings

A. Plaintiffs are individual landlords and a trade association for rental housing managers. In September 2020, they filed this action in district court, challenging the CDC's temporary eviction moratorium on various statutory and constitutional grounds. As relevant here, they alleged that the Order exceeded the CDC's statutory and regulatory authority, that it was arbitrary and capricious, and that it denied plaintiffs access to the courts.

Plaintiffs moved for a preliminary injunction, which the district court denied. The district court determined that plaintiffs had failed to establish any of the factors necessary to obtain a preliminary injunction. *See* Dkt. No. 48, at 66. In concluding that plaintiffs were not likely to succeed on the merits, the court noted that "the implementing statute (and derivative regulation) demonstrate Congress' unambiguous intent to delegate broad authority to the CDC to enter an order such as the one at issue here." *Id.* at 26. The court rejected plaintiffs' argument that various canons of construction overcome the plain text of the applicable provision. *See id.* at 26-29. The court concluded that plaintiffs' arbitrary-and-capricious challenge to the CDC Order had little chance of success because the agency had detailed the reasons why a temporary eviction moratorium was reasonably necessary to prevent the spread of COVID-19 in light of inadequate state measures. *See id.* at 32-39. And the court concluded that plaintiffs had not shown a violation of their right to access the courts because the CDC Order temporarily prohibited actual evictions but left plaintiffs free

to begin eviction proceedings or to pursue other legal avenues to collect unpaid rent, such as a breach of contract action. *Id.* at 45-46.

Addressing the remaining preliminary-injunction factors, the district court concluded that plaintiffs' asserted harms were far outweighed by the harm that a preliminary injunction would pose for third parties and the public interest. Dkt. No. 48, at 49-65. The court noted that plaintiffs had identified two tenants who could have been evicted for nonpayment of rent but that plaintiffs failed to substantiate their assertion that the tenants' debts would be uncollectible. *See id.* at 54-57. Because plaintiffs had not shown that their injuries were non-compensable, they did not show irreparable harm. *See id.* at 59. Furthermore, the district court concluded that plaintiffs' "harm pales in comparison to the significant loss of lives that . . . could occur" if the temporary eviction moratorium were enjoined. *Id.* at 65; *see also id.* at 64-65 (emphasizing "the public's interest in controlling the spread of COVID-19").

B. Plaintiffs appealed and moved in this Court for an injunction pending appeal. The government filed a brief in opposition to that motion. On December 17, 2020, this Court denied plaintiffs' motion for an injunction pending appeal. *See* 12/17/2020 Order (Wilson, Jordan, Newsom, Circuit Judges). Four days later, on December 21, plaintiffs filed their opening brief in this appeal, reiterating their contention that the denial of a preliminary injunction was an abuse of the district court's discretion.

IV. Standard Of Review

The denial of a preliminary injunction is reviewed for an abuse of discretion. *See Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001) (citing *Siegel v. Lepore*, 234 F.3d 1163, 1175 (11th Cir. 2000) (en banc)).

SUMMARY OF ARGUMENT

To curb the spread of COVID-19, the CDC issued a temporary moratorium on evictions in specified circumstances. The moratorium applies only to individuals who, if evicted, would likely become homeless or be forced to live in close quarters in a new congregate or shared living setting. Although the CDC Order temporarily bars the actual eviction of such individuals for nonpayment of rent, the Order does not excuse a tenant's obligation to pay rent or prohibit a landlord from pursuing other legal avenues to collect unpaid rent, such as a breach of contract action.

The district court denied plaintiffs' motion for a preliminary injunction, and, applying essentially the same standard, this Court denied plaintiffs' motion for an injunction pending appeal. *See Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000) (en banc) (setting out the four factors relevant to an injunction pending appeal). For the same reasons, this Court should now affirm the district court's order denying a preliminary injunction. As the district court explained in its comprehensive opinion, plaintiffs failed to establish any of the factors necessary to obtain the extraordinary remedy of a preliminary injunction. Plaintiffs are unlikely to succeed on the merits of their claims, and their asserted economic injuries are both compensable and far

outweighed by the public's interest in controlling the spread of COVID-19. Accordingly, the district court did not abuse its discretion in denying a preliminary injunction, and its order should be affirmed.

ARGUMENT

The District Court's Denial Of Plaintiffs' Motion For A Preliminary Injunction Was Not An Abuse Of Discretion

To obtain the "extraordinary and drastic remedy" of a preliminary injunction, plaintiffs had the burden to show: (1) that they had a substantial likelihood of success on the merits; (2) that a preliminary injunction was necessary to prevent irreparable harm; (3) that such harm outweighed the harm that a preliminary injunction would inflict on other parties; and (4) that a preliminary injunction was not contrary to the public interest. *Callahan v. U.S. Dep't of Health & Human Servs.*, 939 F.3d 1251, 1257 (11th Cir. 2019) (quotation marks omitted); *see also Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000) (en banc) (setting out the four factors relevant to a motion for an injunction pending appeal). "Failure to show any of the four factors is fatal . . . ." *American Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). The district court acted well within its discretion in concluding that plaintiffs failed to make the required showing.

I. Plaintiffs Failed To Demonstrate A Likelihood Of Success On The Merits Of Their Claims

A. The Temporary Eviction Moratorium Is Within The CDC's Statutory And Regulatory Authority

1. The temporary eviction moratorium falls well within the authority vested in the CDC by statute and regulation. Congress authorized the Secretary of Health and Human Services to "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." 42 U.S.C. § 264(a). That language, by its terms, confers broad authority on the Secretary to exercise his "judgment" as a public-health expert to take action that he deems "necessary" to avert contagion. As the district court explained, "Congress' intent, as evidenced by the plain language of [§ 264(a)], is clear: Congress gave the Secretary of HHS broad power to issue regulations necessary to prevent the introduction, transmission or spread of communicable diseases." Dkt. No. 48, at 19; *see Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006) (characterizing similar language authorizing "necessary" action as granting "an agency broad power to enforce all provisions" (quotation marks omitted)).

The regulations promulgated by the Secretary delegate authority to the CDC Director to act in the event that state health measures are insufficient to prevent the interstate spread of disease. In that circumstance, the CDC Director may "take such measures to prevent such spread of the diseases as he/she deems reasonably

necessary." 42 C.F.R. § 70.2. Like the statute itself, the regulation employs broad, flexible language to delineate the CDC Director's power. So long as the predicate of inadequate state measures is met, the CDC Director may enact preventative measures that the CDC Director "deems reasonably necessary."

The statute and regulation do not confer unbounded authority, as plaintiffs suggest, Br. 11, but they do provide substantial flexibility for the CDC to act to prevent the interstate spread of disease. *See* H.R. Rep. No. 78-1364, at 24 (codifying the federal government's "basic authority to make regulations to prevent the spread of disease into this country or between the States"). Courts must give effect to Congress's choice of broad language because "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). It is commonplace for "legislative options [to] be especially broad" in areas implicating "medical and scientific uncertainties." *Marshall v. United States*, 414 U.S. 417, 427 (1974).

The district court correctly rejected plaintiffs' argument that the broad grant of authority in the first sentence of § 264(a) is implicitly narrowed by that provision's second sentence. The second sentence indicates that, "[f]or purposes of carrying out and enforcing . . . regulations" promulgated under the first sentence, the Secretary "may provide for such inspection, fumigation, disinfection, sanitation, pest

extermination, destruction of [infected or contaminated] animals or articles . . . , and other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a).

Plaintiffs contend that the enumerated list is exhaustive, but that contention is foreclosed by other subsections of § 264 itself. For example, § 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." 42 U.S.C. § 264(c); *see id.* § 264(b), (d). These subsections make plain that the broad grant of authority in the first sentence of § 264(a) is not confined to the specific intrusions on private property described in the second sentence. As the district court observed, "[t]he presence of the additional subsections governing detainment of individuals means that the list contained in the first subsection is not an exhaustive list of the permissible measures available to the Secretary of HHS." Dkt. No. 48, at 21. Other courts have reached the same conclusion. *See Chambless Enters., LLC v. Redfield*, No. 20-CV-01455, 2020 WL 7588849, at *5 (W.D. La. Dec. 22, 2020) (concluding that § 264(a)'s second sentence is illustrative, not exhaustive), *appeal filed*, No. 21-30037 (5th Cir. Jan. 22, 2021); *Independent Turtle Farmers of La., Inc. v. United States*, 703 F. Supp. 2d 604, 619-20 (W.D. La. 2010) (same).

2. Plaintiffs never come to terms with the statutory language discussed above. Their invocation of various canons of statutory interpretation (Br. 17-22) cannot override that clear statutory text. The Supreme Court and this Court have emphasized that courts should not resort to such rules of thumb when the statute is

clear. *See Sebelius v. Cloer*, 569 U.S. 369, 381 (2013); *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1229 n.30 (11th Cir. 2005) (en banc).

Such canons come into play only when the meaning of statutory text is not apparent on its face. For example, the premise of the noscitur a sociis canon is that the statutory term at issue is "ambiguous when considered alone" but can be understood relative to neighboring terms. *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008); *see also McDonnell v. United States*, 136 S. Ct. 2355, 2368-69 (2016) (applying noscitur a sociis and other interpretive rules as a means to resolve ambiguity created by competing dictionary definitions). Likewise, the canon of ejusdem generis—which favors reading a general term together with specific terms earlier in a list—"is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." *United States v. Powell*, 423 U.S. 87, 91 (1975) (quotation marks omitted). And the rule of lenity is reserved for provisions imposing criminal penalties that contain a "grievous ambiguity or uncertainty." *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (quoting *Muscarello v. United States*, 524 U.S. 125, 139 (1998)).

Here, the plain text of § 264(a) is conclusive—it leaves no room for plaintiffs' narrow reading. Plaintiffs assert that § 264(a) "contemplate[s] actions taken with respect to *infected* articles and people." Br. 20 (plaintiffs' emphasis). But there is no such limitation in § 264(a), which authorizes the Secretary to "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." 42 U.S.C. § 264(a). Plaintiffs emphasize that under a different subsection of § 264, there are special requirements concerning the "apprehension and examination" of individuals who are "reasonably believed to be infected." Br. 23 (emphasis omitted) (quoting 42 U.S.C. § 264(d)(1)). But that subsection is irrelevant here, because the CDC Order does not authorize the apprehension or examination of individuals. The Order is an exercise of the authority to "prevent the introduction, transmission, or spread of communicable diseases," 42 U.S.C. § 264(a), which does not confine the agency to taking action only with respect to active infections. As the CDC explained, such a limitation would undermine the efficacy of the temporary eviction moratorium because individuals infected by COVID-19 may be pre-symptomatic or asymptomatic and appear the same as uninfected counterparts. *See* 85 Fed. Reg. at 55,292.[3]

3. Congress's recent legislation extending the eviction moratorium confirms that the broad grant of authority in § 264(a) means what it says. If Congress had doubts about the moratorium, it could have prohibited the CDC from extending it. Instead, the 2021 Appropriations Act continued the CDC's eviction moratorium

[3] Plaintiffs' arguments also cannot be squared with the syntactic structure of § 264(a)—that provision's freestanding first sentence must be given independent effect.

issued "under section 361 of the Public Health Service Act (42 U.S.C. 264)," 2021 Appropriations Act, div. N, tit. V, § 502, and thus ratified that exercise of authority. 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). And absent "interfere[nce] with intervening rights," a claim challenging agency action cannot be sustained where Congress intended to ratify the underlying action and could have authorized the action in the first instance. *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 506 (D.C. Cir. 1999) (quoting *Heinszen*, 206 U.S. at 384).

B. The Temporary Eviction Moratorium Was Not Arbitrary And Capricious

Plaintiffs' contention that the CDC Order was arbitrary and capricious is equally meritless. Agency action may not be overturned on that ground unless the agency failed to "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The CDC easily satisfied its obligation by providing rationales supported by substantial evidence for its judgment that the Order was "reasonably necessary" to prevent the spread of COVID-19 and that state measures were "insufficient" to do so. 42 C.F.R. § 70.2.

As the district court described, the CDC Order explained, "in detail, why a temporary eviction moratorium is reasonably necessary." Dkt. No. 48, at 32. The Order highlighted the severe impact of COVID-19, which has led to a global

pandemic and resulted in the infection of millions of individuals and the death of hundreds of thousands of individuals in the United States. 85 Fed. Reg. at 55,292. The Order identified eviction moratoria as effective preventative measures that "facilitate self-isolation" of ill or at-risk individuals and complement "stay-at-home and social distancing directives." *Id.* The CDC cited research suggesting that, absent an eviction moratorium, an unprecedented 30 to 40 million people in the United States could be at risk of eviction, with a significant portion likely forced to move into congregate housing or to become homeless. *Id.* at 55,294-95.

Because COVID-19 spreads easily among people in close contact, these living situations present higher transmission risks. Indeed, one study found that "household contacts are estimated to be [six] times more likely to become infected by an index case of COVID-19 than other close contacts." 85 Fed. Reg. at 55,294. Other shared housing options, like transitional housing and abuse shelters, are prone to "challenges of maintaining social distance" because "[r]esidents often gather closely or use shared equipment." *Id.* Similarly, multiple big cities have reported outbreaks of COVID-19 in homeless shelters. *Id.* at 55,295. Shelters may be unable to practice safe social distancing or provide necessary disinfectants, particularly as more individuals seek shelter in the cold winter months. *Id.* at 55,295-96. And these exposure risks would be heightened in the event of a large influx of individuals displaced by evictions. *Id.* at 55,294-95.

The risks facing the unsheltered homeless population are also serious. As the Order described, "[t]he unsheltered homeless are at higher risk for infection when there is community spread of COVID-19." 85 Fed. Reg. at 55,295. While it may be possible to "increase physical distance" between persons in such outdoor settings, these individuals lack adequate "access to hygiene, sanitation facilities, health care, and therapeutics." *Id.* And homelessness is associated with a greater predisposition to contracting and developing severe illness from COVID-19. *Id.* at 55,295-96. The CDC therefore fully justified the Order—which applied only to individuals whose alternative housing options are limited to congregate settings or homelessness—as a measure "reasonably necessary" to prevent the spread of COVID-19.

Likewise, substantial evidence demonstrated that state and local measures were inadequate to prevent the spread of disease. The Order explained that, despite the various measures that states and localities have put in place, "COVID-19 continues to spread and further action is needed." 85 Fed. Reg. at 55,292. The CDC cited a state-by-state analysis indicating that "eviction moratoria and other protections from eviction have expired or are set to expire in many jurisdictions." *Id.* at 55,296 n.36 (citing Eviction Lab, *COVID-19 Housing Policy Scorecard*, https://evictionlab.org/covid-policy-scorecard (last visited Feb. 19, 2021)). The district court noted, for example, that states with large rental populations (such as Alabama) and states where plaintiffs have rental properties (including Virginia, North Carolina, South Carolina, and Georgia) had "no state restrictions on evictions." Dkt. No. 48, at 38.

The CDC also identified research indicating that, without these state and local moratoria, tens of millions of Americans could face eviction on a scale unmatched in recent times. 85 Fed. Reg. at 55,295 & n.17. In light of the robust record showing that evictions increase the number of individuals in congregate housing where COVID-19 spreads more rapidly, the CDC reasonably determined that state and local measures "that do not meet or exceed" the Order's "minimum protections are insufficient to prevent the interstate spread of COVID-19." *Id.* at 55,296.

The evidence and explanation in the CDC's original order alone defeat plaintiffs' claim that the agency's action was arbitrary and capricious, and the CDC's recent extension of the order identified additional information that reinforced the agency's conclusions. For example, preliminary mathematical models have found that lifting eviction moratoria led to a 40 percent increased risk of contracting COVID-19 among evicted persons and family or friends with whom they shared housing after eviction. 86 Fed. Reg. at 8022. Furthermore, observational data comparing COVID-19 spread in states that lifted eviction moratoria with states that maintained eviction moratoria "showed significant increases in COVID-19 incidence and mortality approximately 2-3 months after eviction moratoria were lifted." *Id.* The authors estimated that "over 433,000 cases of COVID-19 and over 10,000 deaths could be attributed to lifting state moratoria." *Id.* Finally, the new order notes that eviction suits are presently being filed, and it is thus "expected that large numbers of evictions would be processed if the Order were to expire." *Id.* at 8025.

Plaintiffs' disagreement with the CDC's findings, and their assertion that other remedial options exist, Br. 33-34, misperceive the inquiry. Courts do not ask whether an agency's "decision is the best one possible or even whether it is better than the alternatives," *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016); instead, courts "ensure that the [agency] engaged in reasoned decisionmaking," *id.* at 784. The CDC detailed the bases for concluding "that an eviction moratorium for individuals likely to be forced into congregate living situations is an effective public health measure that prevents the spread of communicable diseases because it aids the implementation of stay-at[-]home and social distancing directives." Dkt. No. 48, at 36. Deference is especially warranted where, as here, officials entrusted with protecting public health and safety "undertake to act in areas fraught with medical and scientific uncertainties." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (alterations omitted) (quoting *Marshall*, 414 U.S. at 427).

C. The Temporary Eviction Moratorium Did Not Deprive Plaintiffs Of Access To The Courts

Plaintiffs also failed to establish a likelihood of success on their claim that the CDC Order violated their constitutional right to access the courts. Although judicial-access claims can be framed in various ways, plaintiffs here assert that "systemic official action [has] frustrate[d]" their efforts to "prepar[e] and fil[e] suits at the present time." Br. 39 (quoting *Christopher v. Harbury*, 536 U.S. 403, 413 (2002)). That

framework is an especially poor fit in this case, as the CDC Order posed no obstacle to plaintiffs' ability to initiate legal proceedings against their tenants.

The CDC Order did not prevent landlords from filing eviction actions in state court. There is no dispute that landlords could continue to evict tenants for reasons other than nonpayment of rent, including criminal activity, property damage, and other lease violations. *See* 85 Fed. Reg. at 55,294. And even in the category of cases involving nonpayment of rent, the CDC Order did not affect any state judicial proceeding. Rather, the CDC Order suspended only the remedy of "[e]viction"—that is, "remov[ing] or caus[ing] the removal of" a covered person. *Id.* at 55,293. Agency guidance made clear that landlords were not prohibited from "starting eviction proceedings, provided that the actual eviction of a covered person for non-payment of rent does NOT take place during the period of the Order." *Frequently Asked Questions* at 1; *see also id.* at 6 ("The Order does not preclude a landlord from challenging the truthfulness of a tenant's declaration in any state or municipal court."). In fact, one plaintiff obtained a writ of ejectment, which was then stayed in light of the eviction moratorium. Dkt. No. 18-4, ¶¶ 9-12.[4] Plaintiffs thus cannot maintain their comparison to the paradigmatic example in which an indigent plaintiff has no

[4] Even if it were relevant, the factual claim that two plaintiffs "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" is unsupported by plaintiffs' citations. Br. 47 (citing Dkt. Nos. 12, ¶¶ 50-55, 78-83; 18-2, ¶¶ 8-12; 18-5, ¶¶ 5-8).

access to a judicial forum because she cannot afford a filing fee. *See* Br. 39-40 (citing *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971)).

Nor did the CDC Order constitute a "complete foreclosure of relief" on any claim. *See* Br. 41-42 (quoting *Harer v. Casey*, 962 F.3d 299, 311-12 (7th Cir. 2020)). This case does not bear resemblance to plaintiffs' cited authority in which the litigants alleged that a police cover-up prevented the full disclosure of facts crucial to their causes of action. *See Harer*, 962 F.3d at 308. As plaintiffs concede, their "detriment is not that the ultimate lawsuit will be prejudiced." Br. 45. Nothing in the CDC Order precluded plaintiffs from filing breach of contract actions seeking to collect unpaid rent, or even from filing eviction actions. *See* Dkt. No. 48, at 45. And 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. *See* Dkt. No. 48, at 46 ("Plaintiffs can immediately start eviction proceedings now and are only delayed in enforcing any eviction order they might obtain.").

Plaintiffs' arguments miss the mark. They cite an inapposite case from this Court, Br. 44-45 (citing *Al-Amin v. Smith*, 511 F.3d 1317, 1331 (11th Cir. 2008)), confirming that inmates have a constitutional right to be present when prison officials open incoming legal mail from their attorneys. The Court's reasoning—that opening such mail outside the inmate's presence could chill attorney-client communications, *Al-Amin*, 511 F.3d at 1331—has no application here. The same is true of the out-of-circuit cases that plaintiffs cite, in which financial burdens interfered with litigants'

ability to invoke dispute-resolution processes. Br. 40 (citing *Lecates v. Justice of the Peace Court No. 4 of the State of Del.*, 637 F.2d 898, 908 (3d Cir. 1980), and *Rankin v. Independent Sch. Dist. No. I-3, Noble Cty.*, 876 F.2d 838, 841 (10th Cir. 1989)). Likewise, plaintiffs do not make headway by noting the potency of evictions or by claiming the insolvency of their tenants (which, for the reasons discussed below, plaintiffs' evidence did not substantiate anyway). Br. 41-43, 46-47. Plaintiffs' assertions about the efficacy of various remedies do not show that they have been denied a constitutional right of access to the courts.

II. The District Court Reasonably Found That The Balance Of Equities And The Public Interest Weighed Against A Preliminary Injunction

The district court likewise acted within its discretion in determining that plaintiffs' asserted harm was far outweighed by the harm that a preliminary injunction would pose for third parties and the public interest.

A. Plaintiffs Did Not Substantiate Their Assertion Of Irreparable Harm

1. As the district court explained, plaintiffs failed to substantiate their claim that their asserted harms would be non-compensable. Plaintiffs identified two tenants who could be evicted for nonpayment of rent, but plaintiffs did not show that the rent would be uncollectible. *See* Dkt. No. 48, at 10-11, 55-56. The CDC Order did not excuse the tenants' obligations to pay rent or to comply with other contractual terms, 85 Fed. Reg. at 55,294, and "[a]n injury is 'irreparable' only if it cannot be

undone through monetary remedies," *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990).

The sole evidence that plaintiffs mustered was that some tenants indicated that they were incapable of making full rent payments in the midst of the pandemic despite exercising best efforts. Br. 55. But as the district court noted, a temporary inability to pay did not mean that such tenants were or would remain insolvent. Dkt. No. 48, at 55. Moreover, plaintiffs did not produce any evidence regarding their collection efforts, "the occupation of any of the tenants, whether they are employed or unemployed (and, if unemployed, their prospect for reemployment), whether they are (or have been) sick, whether they have money in the bank, [or] whether they qualify for some type of government assistance." *Id.* at 55-56.

As the district court explained, these evidentiary deficiencies stand in sharp contrast to the showing made in *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348 (11th Cir. 2019). There, the government supported its request for injunctive relief with evidence that the defendant had willfully evaded its tax obligations for years and would continue its behavior, and with documentation that the government had "expended considerable resources making numerous—and unsuccessful—attempts to collect." *Id.* at 1360. This Court found irreparable harm because the record amply established that the government would continue to suffer losses and "that, in all likelihood, the government [would] never recoup these losses." *Id.* Here, plaintiffs do not suggest that they assembled a comparably robust record.

Nor do they attempt to refute the grounds on which the district court distinguished this case, including that plaintiffs did not show that various collection mechanisms would be unsuccessful and did not explain why "a debtor who has recently stopped paying will continue the history of non-payment indefinitely." Dkt. No. 48, at 53-54. Contrary to plaintiffs' insistence that the district court imposed an "impossible burden of proof," Br. 54-55, the court simply recognized that plaintiffs' meager evidence did not satisfy their obligation to demonstrate that "irreparable injury is *likely* in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

Moreover, 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. The 2021 Appropriations Act appropriated $25 billion for emergency rental assistance as a means of "provid[ing] financial assistance to eligible households, including the payment of (i) rent; [and] (ii) rental arrears." 2021 Appropriations Act, div. N, tit. V, § 501(a)(1), (c)(2)(A). This rental assistance was designed to work in tandem with the congressional extension of the CDC Order to "help ensure that millions of renters across America are not evicted while waiting to receive assistance." U.S. House Comm. on Fin. Servs., *COVID-19 Stimulus Package: Temporary Extension of the CDC Eviction Moratorium & Emergency Rental Assistance* 1, https://go.usa.gov/xsTDU (last visited Feb. 19, 2021). Landlords, like plaintiffs here, may apply on behalf of their renters and receive the payments for rent and rental

arrears directly. 2021 Appropriations Act, div. N, tit. V, § 501(f). Thus, the district court correctly anticipated that "the passage of time alone may repair [p]laintiffs' injuries if either [p]laintiffs' tenants or [p]laintiffs themselves obtain government assistance." Dkt. No. 48, at 58.[5]

2. Unable to show that their asserted economic injuries are non-compensable, plaintiffs retreat to categorical contentions. They contend that any interference with access to their property, no matter how slight, automatically qualifies as irreparable harm. Br. 56-58. But the out-of-circuit precedent on which they rely counsels against "assum[ing] the existence of irreparable harm [when] dealing with interests in real property" because "the Supreme Court has rejected the application of categorical rules in injunction cases." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009).

The district court correctly reasoned that it is insufficient for plaintiffs to rest solely on the abstract notion that real property is unique. Dkt. No. 48, at 60. Plaintiffs rely on cases where the irreparable harm stemmed from a permanent deprivation or destruction of property. *See, e.g.*, *Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (condemnation and taking of real property); *Watson v.*

[5] To the extent that plaintiffs claimed harm from "lost opportunity," they did not identify any prospective tenant who was willing and able to pay, and they seemed to accept that the monthly rent provides a quantifiable measure of damages in any event. *See* Dkt. Nos. 18-2, ¶ 14; 18-4, ¶ 14; 18-5, ¶ 10. Thus, this case is unlike those in which movants built an extensive record establishing that their damages were incalculable. *See, e.g., RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989) (explaining that the losses at issue "def[ied] precise dollar quantification").

Perdue, 410 F. Supp. 3d 122, 131 (D.D.C. 2019) (loss of family farm); *Shvartser v. Lekser*, 308 F. Supp. 3d 260, 267 (D.D.C. 2018) (foreclosure sale); *Kharazmi v. Bank of Am., N.A.*, No. 11-CV-02933, 2011 WL 13221071, at *3 (N.D. Ga. Sept. 2, 2011) (foreclosure sale); *Brooklyn Heights Ass'n v. National Park Serv.*, 777 F. Supp. 2d 424, 435 (E.D.N.Y. 2011) (damage to national historic landmark). These examples are a far cry from the temporary eviction moratorium for nonpayment of rent at issue here.

The district court correctly concluded that "where the residential property is used as a rental property, [p]laintiffs have not clearly shown that monetary damages will not afford adequate relief." Dkt. No. 48, at 60. Plaintiffs presented no evidence that they "reside in the properties or are in danger of losing [their] properties." *Id.*; *cf. Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774, 789 (11th Cir. 1984) ("[I]rreparable injury is suffered when one is wrongfully ejected from his home."). Plaintiffs cannot fill that gap by pointing to one plaintiff's aspiration to move into the leased property upon retirement—particularly when that plaintiff lacks standing because his tenant has already "left the property," Br. 5 n.1—or by speculating about how unnamed property owners may use their properties. *See* Br. 57.

Plaintiffs' alternative contention—that any alleged constitutional violation automatically qualifies as irreparable harm—is similarly unavailing. To the contrary, the principal case on which plaintiffs rely holds that "[t]he only area of constitutional jurisprudence where [this Court] ha[s] said that an on-going violation constitutes irreparable injury is the area of first amendment and right of privacy jurisprudence."

General Contractors of Am., 896 F.2d at 1285; *see also Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000) (en banc) (rejecting argument that "a violation of constitutional rights always constitutes irreparable harm"). This Court reasoned that "chilled free speech and invasions of privacy, because of their intangible nature, could not be compensated for by monetary damages." *General Contractors of Am.*, 896 F.2d at 1285. Here, by contrast, the harm that plaintiffs asserted was "chiefly, if not completely, economic." *Id.* at 1286.[6]

B. The Balance Of Equities And Public Interest Also Preclude A Preliminary Injunction

The district court correctly concluded that plaintiffs' asserted harm "pales in comparison to the significant loss of lives that . . . could occur" if the temporary eviction moratorium were enjoined. Dkt. No. 48, at 65. Thus, the balance of equities and public interest precluded a preliminary injunction. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (considering the balance of equities and public interest together "when the Government is the opposing party").

This Court has recognized that "it doubtlessly advances the public interest to stem the spread of COVID-19." *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020). No one disputes that COVID-19 is "easily transmissible, potentially serious and

[6] Plaintiffs are also mistaken in equating their statutory claim with a constitutional claim. *See* Br. 50-51. The Supreme Court has rejected the proposition that an act "in excess of . . . statutory authority is *ipso facto* in violation of the Constitution." *Dalton v. Specter*, 511 U.S. 462, 472 (1994).

sometimes fatal." Dkt. No. 48, at 64. At the time of the district court's order, the disease had already infected over seven million and claimed the lives of over 200,000 persons within the United States. *Id.* And the situation worsened in the months leading up to the January extension: the agency's recent order indicates that, as of January 21, 2021, the total number of reported cases exceeded 24 million and the number of deaths exceeded 400,000. *See* 86 Fed. Reg. at 8021. December 2020 and January 2021 were the worst months to date, with "the number of deaths per day from COVID-19 consistently exceed[ing] any other cause."[7] *Id.* And "new variants of [the virus] have emerged globally, some of which have been associated with increased transmissibility." *Id.*

The CDC identified "evidence of an anticipated surge in infections [if] displaced tenants [are] forced into crowded living quarters or homeless shelters, where compliance with public health guidelines, including social distancing and self-quarantining, is impossible." Dkt. No. 48, at 64 (citing 85 Fed. Reg. at 55,294); *see also* 86 Fed. Reg. at 8022 (citing newly available scientific evidence that evictions exacerbate the spread of COVID-19). The district court therefore joined numerous "federal courts across the country [that] have routinely concluded that undoing orders

[7] Although the rate of new infections has slowed in recent weeks, the 7-day moving average of new cases on February 17, 2021 was still nearly double the 7-day moving average on September 4, 2020, the day the Order originally went into effect. *See* CDC, *COVID Data Tracker*, https://go.usa.gov/xsTnD (last visited Feb. 19, 2021). In addition, new evidence demonstrates that more COVID-19 infections and deaths would have occurred but for eviction moratoria. *See* 86 Fed. Reg. at 8022.

deemed necessary by public health officials and experts to contain a contagious and fast-spreading disease would result in comparatively more severe injury to the community." Dkt. No. 48, at 62 (citing cases). Indeed, other courts have recognized that the interest in protecting public health amidst the COVID-19 pandemic overcomes even serious harms. *See, e.g.*, *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 129 (6th Cir. 2020) (unpub.) ("Though Plaintiffs bear the very real risk of losing their businesses, the Governor's interest in combatting COVID-19 is at least equally significant.").

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In short, the district court acted well within its discretion in denying plaintiffs' motion for a preliminary injunction, and its order should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7,314 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brian J. Springer
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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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