

No. 20-14210

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**RICHARD LEE BROWN, et al.**

**Plaintiffs-Appellants,**

**v.**

**ALEX AZAR, Secretary of Health and Human Services, et al.,**

**Defendants-Appellees.**

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**DEFENDANTS-APPELLEES' OPPOSITION TO MOTION  
FOR INJUNCTION PENDING APPEAL**

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**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, 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.

Azar, Alex

Benfer, Emily A.

Bliss, Charles Richardson

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

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Children's Healthwatch

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National Hispanic Medical Association

National Housing Law Project

National Medical Association

New Civil Liberties Alliance

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The George Consortium

U.S. Centers for Disease Control and Prevention

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**TABLE OF CONTENTS**

	<u>Page</u>
INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
ARGUMENT .....	3
A.    Plaintiffs Are Unlikely to Succeed on the Merits.....	4
B.    The Balance of Equities and Public Interest Also Preclude an Injunction.....	9
CONCLUSION .....	13
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

**TABLE OF CITATIONS**

<b>Cases:</b>	<b><u>Page(s)</u></b>
<i>American Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.,</i> 557 F.3d 1177 (11th Cir. 2009).....	4, 9
<i>Brooklyn Heights Ass’n v. National Park Serv.,</i> 777 F. Supp. 2d 424 (E.D.N.Y. 2011).....	11
<i>Carpenter Tech. Corp. v. City of Bridgeport,</i> 180 F.3d 93 (2d Cir. 1999) .....	11
<i>FERC v. Electric Power Supply Ass’n,</i> 136 S. Ct. 760 (2016).....	8
<i>Independent Turtle Farmers of La., Inc. v. United States,</i> 703 F. Supp. 2d 604 (W.D. La. 2010).....	6
<i>League of Indep. Fitness Facilities &amp; Trainers, Inc. v. Whitmer,</i> 814 F. App’x 125 (6th Cir. 2020) (unpub.).....	12
<i>Marshall v. United States,</i> 414 U.S. 417 (1974).....	9
<i>Northeastern Fla. Chapter of the Ass’n of Gen. Contractors of Am. v. City of Jacksonville,</i> 896 F.2d 1283 (11th Cir. 1990).....	10
<i>Sebelius v. Cloer,</i> 569 U.S. 369 (2013).....	6

*South Bay United Pentecostal Church v. Newsom,*

140 S. Ct. 1613 (2020).....9

*Swain v. Junior,*

961 F.3d 1276 (11th Cir. 2020).....11

*Touchston v. McDermott,*

234 F.3d 1130 (11th Cir. 2000) (en banc).....4

*United States v. Alabama,*

443 F. App’x 411 (11th Cir. 2011) (unpub.)..... 4, 9

*United States v. Askins & Miller Orthopaedics, P.A.,*

924 F.3d 1348 (11th Cir. 2019)..... 10, 11

*Watson v. Perdue,*

410 F. Supp. 3d 122 (D.D.C. 2019).....11

**Statutes:**

20 U.S.C. § 3508(b) .....4

42 U.S.C. § 264(a) ..... 4, 5

42 U.S.C. § 264(b).....6

42 U.S.C. § 264(c) .....6

42 U.S.C. § 264(d).....6

**Regulations:**

42 C.F.R. § 70.2..... 5, 6

**Other Authorities:**

CDC, *HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of*

*COVID-19: Frequently Asked Questions*,

<https://go.usa.gov/x7dhh> (last visited Nov. 23, 2020)..... 2, 10

Eviction Lab, *COVID-19 Housing Policy Scorecard*,

<https://evictionlab.org/covid-policy-scorecard> (last visited Nov. 23, 2020) .....8

Reorganization Plan No. 3 of 1966, 31 Fed. Reg. 8855 (June 25, 1966),

*reprinted in* 80 Stat. 1610 (1966) .....4

Temporary Halt in Residential Evictions to Prevent the Further Spread of

COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).....*passim*

## INTRODUCTION AND SUMMARY OF ARGUMENT

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). 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, which increase the spread of COVID-19. *Id.* at 55,294-96.

The Centers for Disease Control and Prevention (CDC), a division of the Department of Health and Human Services (HHS), issued the temporary eviction moratorium on September 4, 2020. 85 Fed. Reg. at 55,292. While the Order remains in effect—until December 31, 2020, unless extended or terminated—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 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 contractual terms. 85 Fed. Reg. at 55,294. Landlords may continue to impose fees, interest, or other penalties. *Id.* Landlords also 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 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 place. *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 (Frequently Asked Questions)*, <https://go.usa.gov/x7dhh> (last visited Nov. 23, 2020) (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”).

Plaintiffs are individual landlords and a trade association for rental housing managers who wish to evict tenants for the nonpayment of rent immediately, before the temporary moratorium expires. As relevant here, they allege that the Order exceeds the CDC's statutory and regulatory authority and that it is arbitrary and capricious. The district court denied plaintiffs' motion for a preliminary injunction, and plaintiffs now seek an injunction pending appeal.

Plaintiffs' motion should be denied. 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 outweighed by the public's interest in controlling the spread of COVID-19.

### **ARGUMENT**

Plaintiffs ask this Court to enter an injunction pending appeal that would allow them to evict tenants immediately, before the CDC's temporary eviction moratorium expires. *See* Mot. 8 (stating that "[t]his appeal is a time-sensitive matter because, unless extended, the CDC's Order expires on December 31, 2020"). The motion should be denied. To obtain the "extraordinary remedy" of an injunction pending appeal, plaintiffs must show (1) "a substantial likelihood that they will prevail on the merits of the appeal"; (2) "a substantial risk of irreparable injury . . . unless the injunction is granted"; (3) "no substantial harm to other interested persons"; and

(4) “no harm to the public interest.” *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000) (en banc). As with a preliminary injunction, “[f]ailure to show any of the four factors is fatal.” *United States v. Alabama*, 443 F. App’x 411, 419 (11th Cir. 2011) (unpub.) (quoting *American Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009)). The district court correctly concluded that plaintiffs failed to establish any of these four factors.

**A. Plaintiffs Are Unlikely to Succeed on the Merits.**

Plaintiffs contend that the temporary eviction moratorium exceeds the CDC’s statutory and regulatory power and is arbitrary and capricious. The district court correctly concluded that plaintiffs are not substantially likely to succeed on the merits of either claim.<sup>1</sup>

1. The temporary eviction moratorium falls well within the agency’s statutory and regulatory authority. Congress authorized the Secretary of HHS 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).<sup>2</sup> That language, by its terms,

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<sup>1</sup> In district court, plaintiffs also alleged that the temporary eviction moratorium denies them access to the courts, but plaintiffs have abandoned that claim in their motion for an injunction pending appeal. Thus, that claim is not addressed here.

<sup>2</sup> 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 HHS. *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).

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.” Mot., Attach. D at 19.

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 she “deems reasonably necessary.”

The district court correctly rejected plaintiffs’ contention that the broad grant of authority in the first sentence of § 264(a) is implicitly narrowed by that provision’s second sentence, which indicates that 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) address 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.” Mot., Attach. D at 21; *see also Independent Turtle Farmers of La., Inc. v. United States*, 703 F. Supp. 2d 604, 619-20 (W.D. La. 2010) (holding that the second sentence of § 264(a) is illustrative, not exhaustive).

Plaintiffs’ invocation of various canons of statutory interpretation (Mot. 10-12) cannot override the statutory text. The Supreme Court has 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); *see also* Mot., Attach. D at 25-26. And here, the plain text of § 264 forecloses plaintiffs’ attempts to interpret the broad grant of authority narrowly.

2. Plaintiffs’ alternative contention that the CDC Order is arbitrary and capricious is equally baseless. As the district court explained, substantial evidence supports the agency’s judgments that the Order is “reasonably necessary” to prevent the spread of COVID-19 and that state measures are “insufficient” to do so.

42 C.F.R. § 70.2.

As the district court described, “the Order explains, in detail, why a temporary eviction moratorium is reasonably necessary.” Mot., Attach. D at 32. The Order explains that the impact of COVID-19 has been severe, leading to a global pandemic and resulting 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 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. Similarly, multiple big cities have reported outbreaks of COVID-19 in homeless shelters. *Id.* at 55,295. And shelters may be unable to practice safe social distancing or provide necessary disinfectants, particularly as more individuals seek shelter in the upcoming winter months. *Id.* The CDC therefore fully justified the Order—which applies 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 demonstrates that state and local measures were inadequate to prevent the spread of disease. The Order explains 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 Nov. 23, 2020)). The CDC 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. *Id.* 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.

Plaintiffs’ disagreement with the CDC’s findings, and their assertion that other remedial options exist, *see* Mot. 12-13, 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.” Mot., Attach. D 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 v. United States*, 414 U.S. 417, 427 (1974)).

Because plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claims, their request for an injunction pending appeal must fail. “Failure to show any of the four factors is fatal, and the most common failure is not showing a substantial likelihood of success on the merits.” *Alabama*, 443 F. App’x at 419 (quoting *American Civil Liberties Union of Fla., Inc.*, 557 F.3d at 1198).

**B. The Balance of Equities and Public Interest Also Preclude an Injunction.**

Plaintiffs’ motion also fails on independent grounds. As the district court explained, plaintiffs’ asserted harm is far outweighed by the harm that an injunction pending appeal would pose for third parties and the public interest.

1. As the district court explained, any impact of the CDC Order on plaintiffs is not irreparable. Although the 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 contractual terms. 85 Fed. Reg. at 55,294. Landlords may continue to impose fees, interest, or other penalties and may evict tenants on other, separate bases including engagement in criminal activity, property damage, and other lease violations. *Id.* And even if a tenant qualifies as a covered person, the 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 place. *See id.* at 55,293 (defining “evict” as “to remove or cause the removal of”); *see also Frequently Asked Questions, supra* p. 2, at 1 (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”).

As the district court noted, plaintiffs identified two tenants who could be evicted for nonpayment of rent. *See* Mot., Attach. D at 10-11. Plaintiffs assert that they are harmed by the tenants’ failure to pay rent and other fees, but that is the sort of calculable economic damage that can be remediated by a money judgment. *See id.* at 58-59; *see also Northeastern Fla. Chapter of the Ass’n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Moreover, plaintiffs failed to substantiate their assertion that they will be unable to collect these debts in the future. *See* Mot., Attach. D at 55-56 (noting the dearth of evidence regarding plaintiffs’ collection efforts or the tenants’ current and future abilities to pay). Thus, the district court correctly concluded that the record in this case bears no resemblance to the showing made in *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348,

1360 (11th Cir. 2019), where this Court found irreparable harm because the record amply showed continued evasion of tax obligations and unlikelihood of recoupment.

Unable to show that their asserted economic injuries are non-compensable, plaintiffs retreat to the contention that any interference with access to their property, no matter how slight, automatically qualifies as irreparable harm. Mot. 20-21.

However, plaintiffs rely on cases involving 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. Perdue*, 410 F. Supp. 3d 122, 131 (D.D.C. 2019) (loss of family farm); *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 all a far cry from the temporary eviction moratorium at issue here.

2. In any event, 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. Mot., Attach. D at 65. 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). As the district court explained, COVID-19 is "an easily transmissible, potentially serious and sometimes fatal disease" which, at the time of the district court's order, had already infected over seven million and claimed the lives of over 200,000 persons within the United States. Mot., Attach. D at 64. Moreover, 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.” *Id.* (citing 85 Fed. Reg. at 55,294). The district court therefore joined numerous “federal courts across the country [that] have routinely concluded that undoing orders 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.” *Id.* at 62 (citing cases).

The district court thus acted well within its discretion in concluding that the balance of the equities and public interest preclude the injunction that plaintiffs seek. Plaintiffs make no serious attempt to argue otherwise. Their motion simply ignores the public interest in controlling the spread of COVID-19, *see* Mot. 21-22, which courts have found to overcome harms far more substantial than those asserted here. *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.”).

## CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for an injunction pending appeal.

Respectfully submitted,

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November 2020

### **CERTIFICATE OF COMPLIANCE**

This opposition complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 3,056 words. This opposition 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*  
\_\_\_\_\_  
Brian J. Springer

### **CERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2020, I electronically filed the foregoing opposition 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.

*s/ Brian J. Springer*  
\_\_\_\_\_  
Brian J. Springer