

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

LAUREN TERKEL; PINEYWOODS §  
ARCADIA HOME TEAM, LTD; LUFKIN §  
CREEKSIDE APARTMENTS, LTD; LUFKIN §  
CREEKSIDE APARTMENTS II, LTD; and §  
LAKERIDGE APARTMENTS, LTD; §  
WEATHERFORD MEADOW VISTA §  
APARTMENTS, LP; and MACDONALD §  
PROPERTY MANAGEMENT, LLC; §  
*Plaintiffs,* §

v. §

CENTERS FOR DISEASE CONTROL AND §  
PREVENTION; ROBERT R. REDFIELD, in §  
his official capacity as Director of the Centers §  
for Disease Control and Prevention; NINA §  
WITKOFKY, in her official capacity as §  
Acting Chief of Staff for the Centers for Disease §  
Control and Prevention; UNITED STATES §  
DEPARTMENT OF HEALTH AND HUMAN §  
SERVICES; and ALEX AZAR, in his official §  
capacity as Secretary of the Department of §  
Health and Human Services; §  
*Defendants.* §

CIVIL ACTION NO. 6:20-cv-564-JCB

JUDGE BARKER

**PLAINTIFFS' STATEMENT IN SUPPORT OF CONSIDERING AND GRANTING  
DECLARATORY RELIEF ON SUMMARY JUDGMENT**

On November 20, 2020, this Court ordered the parties “to provide any information that would counsel against considering or granting summary judgment.” Doc. 18. Plaintiffs are in full agreement that summary judgment on the merits of their constitutional claims can and should be granted. The facts here are undisputed and the sole issue presented is a legal question of constitutional interpretation. The Court should therefore convert Plaintiffs’ preliminary injunction motion to a summary judgment and enter a final judgment resolving the entirety of this case at the trial court level. Given Plaintiffs’ agreement that the motion should be converted, Plaintiffs are uncertain that any further response is required. However, insofar as any response from Plaintiffs

is required, Plaintiffs hereby file the following brief statement in support of considering and granting their request for declaratory relief on a summary judgment basis.

Under Federal Rule of Civil Procedure 56(f), a court may, by its own motion, consider summary judgment when: (1) it has provided notice to the parties; (2) it has given parties a reasonable time to respond; and (3) material facts are not genuinely in dispute. The Court here has provided sufficient notice to the parties and has given them a reasonable time (two weeks) to respond. *See, e.g., Wolcott v. Sebelius*, 497 Fed. Appx. 400, 405 (5th Cir. 2012) (finding that giving just a few hours' notice before entering a *sua sponte* motion for summary judgment was insufficient, whereas "explicitly order[ing] the parties" to file motions by a certain date was reasonable under Rule 56(f)) (citing *Powell v. United States*, 849 F.2d 1576, 1579 (5th Cir. 1988); *New York Life Ins. Co. v. Brown*, 84 F.3d 137 (5th Cir. 1996)).

Moreover, there are no material facts in dispute. Defendants did not dispute the facts alleged in Plaintiffs' declarations either in their Response or during the hearing on Plaintiffs' Motion for Preliminary Injunction. More importantly, Plaintiffs' brought a purely legal challenge to the constitutionality of the CDC Order. To the extent that the Administrative Procedure Act (APA) applies beyond the procedural means for Plaintiffs to raise their constitutional challenge, any record the government might submit is irrelevant to the sole constitutional legal claim at issue. When it comes to constitutional claims under the APA, "[t]he Court need not consider the record on the APA claim because it requires a purely legal statutory-interpretation analysis." *Franciscan All. Inc. v. Azar*, 414 F. Supp. 3d 928, 942 n.6 (N.D. Tex. 2019).

Any arguments by Defendants to the contrary can be viewed as nothing more than a delay tactic to drag litigation into the new year. But as this Court points out, "neither factual development in this court nor filing of the administrative record appears necessary to put the court in a position

to adjudicate the merits of plaintiffs' claims." Doc. 18. Thus, Plaintiffs respectfully request that this Court consider their claim for declaratory relief on summary judgment, grant summary judgment in Plaintiffs' favor, and enter a final judgment in this case providing prompt relief to Plaintiffs who continue to suffer daily compounding injuries.

DATED: December 4, 2020

Respectfully submitted,

/s/Robert Henneke

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**CERTIFICATE OF SERVICE**

I certify that the foregoing document was electronically filed on December 4, 2020 with the clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/Robert Henneke  
ROBERT HENNEKE