United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5093 **September Term, 2020**

1:20-cv-03377-DLF

Filed On: June 2, 2021

Alabama Association of Realtors, et al.,

Appellees

v.

United States Department of Health and Human Services, et al.,

Appellants

BEFORE: Millett, Pillard, and Wilkins, Circuit Judges

O R D E R

The United States Department of Health and Human Services, the Centers for Disease Control and Prevention ("CDC"), and other federal agencies and officials (collectively, "HHS") appeal the district court's order entering summary judgment in favor of Appellees and vacating the nationwide temporary eviction moratorium instituted by the CDC in light of the COVID-19 pandemic. Shortly after HHS noticed the appeal, the district court entered an administrative stay of its order, and HHS filed in this court a contingent emergency motion for a stay pending appeal in the event the district court did not grant the stay motion HHS filed in that court. The district court subsequently stayed its own summary judgment order pending appeal. Appellees have filed in this court an emergency motion to vacate that stay pending appeal. Upon consideration of Appellees' emergency motion to vacate the stay pending appeal, the opposition thereto, and the reply, HHS's contingent emergency motion for a stay, and the motion for leave to participate as amicus and the lodged amicus brief, it is

ORDERED that the motion to vacate the stay pending appeal be denied. In evaluating a motion to vacate a stay entered by the district court, this court reviews the district court's decision under the deferential abuse-of-discretion standard of review. See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843–44 (D.C. Cir. 1977); see also Sherley v. Sebelius, 644 F.3d 388, 393 (D.C. Cir. 2011).

The district court did not abuse its discretion in granting a stay in this case. Under this court's traditional four-factor test for a stay, we ask whether (1) the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) the

applicant will be irreparably injured absent a stay; (3) issuance of a stay would substantially injure other interested parties; and (4) the public interest favors or disfavors a stay. See Nken v. Holder, 556 U.S. 418, 434 (2009); see also Alabama Ass'n of Realtors v. HHS, No. 20-cv-3377 (DLF), 2021 WL 1946376, at *1 (D.D.C. May 14, 2021). While Appellees object to the district court's use of a sliding-scale analysis, we need not and do not address the propriety of that approach because Appellees have not shown that vacatur is warranted under the likelihood-of-success standard that they would apply.

As to the first factor, while of course not resolving the ultimate merits of the legal question, we conclude that HHS has made a strong showing that it is likely to succeed on the merits. See Nken, 556 U.S. at 434. We do so for the following four reasons.

First, the CDC's eviction moratorium falls within the plain text of 42 U.S.C. § 264(a). Congress expressly determined that responding to events that by their very nature are unpredictable, exigent, and pose grave danger to human life and health requires prompt and calibrated actions grounded in expert public-health judgments. Section 264(a) authorizes 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 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).[1] Congress thereby designated the HHS Secretary the expert best positioned to determine the need for such preventative measures, twice stating that it authorizes such measures as the Secretary determines "in his judgment [are] necessary." 42 U.S.C. § 264(a). That text also makes a determination of necessity a prerequisite to any exercise of Section 264 authority, and that necessity standard constrains the granted authority in a material and substantial way.

Here, to ensure that the moratorium was tailored to the necessity that prompted it, HHS carefully targeted it to the subset of evictions it determined to be necessary to curb the spread of the deadly and quickly spreading Covid-19 pandemic. Notably, Appellees do not dispute HHS's determination that the moratorium would "prevent the [interstate] introduction, transmission, or spread" of COVID. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,295 (Sept. 4, 2020) ("The statistics on interstate moves show that mass evictions would likely increase the interstate spread of COVID-19."). The agency reasonably

[1] The Surgeon General's and the Secretary's authority under this provision has been delegated to the Director of the CDC. See Reorganization Plan No. 3 of 1966, 31 Fed. Reg. 8855 (June 25, 1966); 42 C.F.R. § 70.2.

recognized that evicted people must move, and that a time-limited eviction moratorium would directly promote the self-isolation needed to help control the pandemic. Id. at 55,294–55,295; Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731, 16,733 (Mar. 31, 2021). The moratorium also applies only to those renters that the agency determined otherwise would likely need to move to congregate settings where COVID spreads quickly and easily, or would be rendered homeless and forced into shelters or other settings that would increase their susceptibility to COVID, the uncontained spread of the disease, and the adverse health consequences of its contraction. 86 Fed. Reg. at 16,735. In those ways, the moratorium fits within the textual authority conferred by Section 264(a) to adopt measures necessary to prevent the spread of a pandemic.

Second, Congress has expressly recognized that the agency had the authority to issue its narrowly crafted moratorium under Section 264. Last December, rather than enact its own moratorium, Congress deliberately chose legislatively to extend the HHS moratorium and, in doing so, specifically to embrace HHS's action "under section 361 of the Public Health Service Act (42 U.S.C. 264)[.]" Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, title V, § 502, 134 Stat. 1182, 2078–79 (Dec. 27, 2020).

Third, the text and structure of Section 264's additional provisions—beyond the core statutory authority to take action "necessary" to "prevent the introduction, transmission, or spread of communicable diseases" interstate and internationally—reinforce HHS's authority to temporarily suspend evictions. The second sentence of Section 264(a) provides that, "[f]or purposes of carrying out and enforcing such regulations" as are authorized by the provision's first sentence, "the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a). That language makes clear that HHS has even the exceptional authority to take measures carrying out its regulations that Congress in 1944 had reason to believe required express congressional authorization under the Fourth Amendment. See Oklahoma Press Publ'g Co. v. Walling Wage & Hour Adm'r, 327 U.S. 186, 201 & nn.26, 27 (1946) (citing FTC v. American Tobacco Co., 364 U.S. 298, 305–06 (1924)).

Appellees argue that the balance of Section 264(a) constricts the scope of the regulatory authority the statute confers, and that the moratorium exceeds that authority. They argue, in particular, that the regulatory power under the first sentence of Section 264(a) is limited to measures closely akin to those the second sentence enumerates. That is incorrect. By its plain wording, the second sentence applies not to the

substantive scope of the regulatory authority conferred, but to the measures that HHS can deploy to "carry[] out and enforc[e] such regulations[.]" 42 U.S.C. § 264(a). That is language of expansion, not contraction, designed to strengthen HHS's ability to take the measures determined to be necessary to protect the public health from the dangers posed by contagious diseases that respect no boundaries. The ensuing subsections (b), (c), and (d) of Section 264 reinforce that point by their explicit reference to HHS's regulatory power over the movement of persons to prevent the spread of communicable disease. Indeed, contrary to their cramped reading of Section 264(a), appellees acknowledge in their reply brief (at page 5) that Section 264's regulatory power includes the power to prevent the interstate movement "of contagious persons[.]" That is the objective of the eviction moratorium.

Fourth, HHS is likely to succeed notwithstanding the Appellees' other statutory-construction arguments. Appellees suggest that a moratorium reaching rental property should be narrowly construed to avoid intrusion on "an area traditionally left to the States." Appellant Br. 13. But Congress has well-established authority to regulate rental housing transactions because they "substantially affect[]" interstate commerce. Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1066, 1068–70 (D.C. Cir. 2003) (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995)); see Russell v. United States, 471 U.S. 858, 862 (1985). Tellingly, under appellees' Commerce Clause theory, even Congress's extension of the moratorium was unconstitutional—a point that Appellees do not even acknowledge, let alone answer.

HHS is also likely to succeed despite Appellants' federalism objection because Congress expressly empowered HHS to act in areas of traditional state authority when necessary to prevent interstate transmission of disease. See Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). Appellees' major-questions objection does not change the calculus, given the statute's plain text and Congress's explicit embrace in the Consolidated Appropriations Act of action it referenced HHS having taken under 42 U.S.C. § 264. Cf. Utility Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014). As for Appellees' non-delegation argument, Section 264's requirement that the regulatory measures adopted be "necessary to prevent the introduction, transmission, or spread of communicable diseases," 42 U.S.C. § 264(a), provides an intelligible principle that guides the agency's authority. See Gundy v. United States, 139 S. Ct. 2116, 2129 (2019); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472 (2001); Mistretta v. United States, 488 U.S. 361, 372–73 (1989).

To be sure, HHS has not previously imposed a rental-eviction moratorium under Section 264. But no public health crisis even approaching the scale and gravity of this one has occurred since the Public Health Service Act was passed in 1944. Appellees point to the lack of other eviction moratoria as a reason to question the Secretary's

power here, but the paucity of examples more likely underscores that the statutory constraints on HHS's regulatory authority work. Cf. Appellees' Br. In Supp. of Emergency Mot. to Vacate Stay 11-12; (quoting Utility Air Regulatory Grp., 573 U.S. at 324); Reply Br. 5.

The district court acted within its discretion in concluding that the remaining factors supported its stay of its own order. HHS has demonstrated "that lifting the national moratorium will 'exacerbate the significant public health risks identified by [the] CDC'" because, even with increased vaccinations, COVID-19 continues to spread and infect persons, and new variants are emerging. See Alabama Ass'n of Realtors, 2021 WL 1946376, at *4 (citation omitted). The government's interest in avoiding this harm merges with the public interest factor. See Pursuing America's Greatness v. FEC, 831 F.3d 500, 511 (D.C. Cir. 2016) ("[I]n this case, the FEC's harm and the public interest are one and the same, because the government's interest *is* the public interest." (emphasis in original)).

As for harms to other parties, including Appellees, the record does not show any likelihood of irreparable injury. Appellees' briefs make conclusory reference to general financial harms their declarant suggested could befall landlords nationwide. But the record is devoid of the requisite evidence of irreparable injury likely to befall the landlord parties to this case. In particular, the record does not demonstrate any likelihood that Appellees' themselves will lose their businesses, that an appreciable percentage of their own tenants who would otherwise pay in full will be unable to repay back rent, or that financial shortfalls are unlikely ultimately to be mitigated.

To the contrary, the calibrated design of the moratorium evidences and embodies Section 264's limitations on HHS's authority, ensuring that the steps taken are all "necessary." 42 U.S.C. § 264(a). More specifically, the moratorium imposes several exacting conditions that circumscribe the reach and degree of relief the order provides, and narrowly tailors the imposition on landlords.

For starters, not all tenants qualify for relief. The moratorium applies only to renters (not mortgage holders or hotel guests) (i) who cannot find other non-shared, non-congregate housing, and (ii) whose economic need meets a stated level, arises from specified circumstances, and could not otherwise be abated. See 86 Fed. Reg. at 16,731–16,732 (definition of "Covered person" paragraphs (1)–(3), (5); and definition of "Residential property"). And the order allows landlords to initiate eviction proceedings and even to obtain removal orders—it is only the enforcement of such orders that has been temporarily halted. See 85 Fed. Reg. at 55,293 (defining "[e]vict" in part as "to remove or cause the removal of" a covered person from a residential property); CDC, *HHS/CDC* Temporary Halt in Residential Evictions to Prevent the Further Spread of

COVID-19: Frequently Asked Questions 1, https://go.usa.gov/xHvzV (last visited June 1, 2021) (The moratorium is not "intended to prevent landlords from starting eviction proceedings, provided that the actual physical removal of a covered person for non-payment of rent does NOT take place during the period of the Order.") (emphasis in original).

On top of that, the obligation to pay all rent due remains, and provision has been made to address the interim shortfalls. Even those tenants who do qualify for protection remain obligated to pay their rent, and to make best efforts to promptly pay in part or full. 86 Fed. Reg. at 16,732 (definition of "Covered person" paragraph (4)); id. at 16,738. The order specifically preserves the landlords' legal right to recover all rent owed with interest and penalties. See 85 Fed. Reg. at 55,294–97. In the meantime, Congress has allocated substantial sums of money for rental assistance that is intended and designed to run to landlords like Appellees. See, e.g., Consolidated Appropriations Act, 2021, div. N, title V, § 501, 134 Stat. at 2070-78.

The fact that Appellees waited eleven weeks before bringing their challenge to the moratorium and have not asked this court for an expedited resolution of the merits of the appeal further suggests that the current moratorium extension—from March 31 through June 30, 2021—does not impose irreparable harm supporting vacatur of the stay. Cf. Fund for Animals v. Frizzell, 530 F.2d 982, 987 (D.C. Cir. 1975).

Given all of that, the district court properly concluded that Appellees' financial losses are at least partially recoverable, at least partially mitigated through relief from Congress, and "the magnitude" of any "additional financial losses [incurred during appeal] is outweighed by HHS's weighty interest in protecting the public" health, Alabama Ass'n of Realtors, 2021 WL 1946376, at *5—an interest that also satisfies the fourth stay factor, id.

For the foregoing reasons, the district court did not abuse its discretion in staying its order pending appeal. It is

FURTHER ORDERED that the government's emergency motion for a stay be dismissed as moot. It is

FURTHER ORDERED that the motion for leave to participate as amicus be

denied without prejudice. The court will entertain motions to participate as amicus that are accompanied by merits briefs.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Tatiana Magruder
Deputy Clerk