

## The CDC's Eviction Moratorium Challenged Again, But Is It Different This Time?

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As I explained in greater detail here, on May 5, 2021, the United States District Court for the District of Columbia determined in *Alabama Association of Realtors, et al. v. United States Department of Health and Human Services* that the Centers for Disease Control and Prevention (CDC) did not have the authority to issue an eviction moratorium. The District Court stayed its order to allow the moratorium to remain in place while the parties appealed the District Court's decision. The appeal based on the merits of the District Court's order is currently pending.

The Plaintiffs, consisting of a group of various parties seeking to strike down the moratorium, previously filed an application to the United States Court of Appeals for the District of Columbia Circuit, seeking to vacate the stay and strike down the moratorium while the appeals case on the merits was being argued. "Vacating the stay" means that the Court of Appeals would remove the stay that the District Court placed on its own order. This would strike down the eviction moratorium. On June 2, 2021, the Court of Appeals rejected Plaintiffs' application, and the next day, the Plaintiffs applied to the United States Supreme Court to vacate the stay. On June 29, 2021, the Supreme Court denied the application in a 5-4 vote. Justice Brett Kavanaugh, concurring in the decision refusing to vacate the stay, expressed doubts of the legality of the moratorium, but upheld the stay due to the fact that the moratorium was then set to expire on July 31, 2021.

While the previous eviction moratorium did expire on July 31, a new, purportedly narrower, moratorium was issued on August 3, 2021. With the new moratorium, Plaintiffs again applied to vacate the stay on the District Court's order, which the District Court again denied on August 13, 2021. The Plaintiffs applied to the Court of Appeals to vacate the stay. Last Friday, August 20, 2021, the United States Court of Appeals for the District of Columbia Circuit again denied the application. This time, Plaintiffs immediately applied to the Supreme Court to vacate the stay, submitting its application to the Chief Justice on August 20, 2021. That same day, the Chief Justice required the government to respond to Plaintiffs' application by noon today (August 23, 2021).

While the new eviction moratorium was issued on August 3, 2021 purports to be narrower than the previous one, it does little to remedy the legal problems with the previous moratoriums (as I discussed here). Thus, the legal arguments in the Plaintiffs' application are not significantly different. What is new, however, is that the Plaintiffs have cited statements from President Biden which, Plaintiffs argue, suggest that the new moratorium is simply pretext for trying to buy the Biden administration time to distribute relief funds. Thus, Plaintiffs argue, the moratorium is political "gamesmanship." Plaintiffs specifically cite President Biden's statements that the "bulk of constitutional scholarship" indicates that extending the moratorium would not likely "pass constitutional muster," but that the time of litigation would buy the government time to distribute the funds.[1]

Nevertheless, it remains to be seen whether such statements will be meaningfully reviewed by the Court. In *Trump v. Hawaii*, decided in 2018, the Supreme Court determined that President Trump's Presidential Proclamation 9645, establishing a travel ban into the United States from certain countries, did not violate the Immigration and Naturalization Act nor the Establishment Clause of the First Amendment. In that case, the Trump administration tweaked its executive orders to ensure its constitutionality. The version before the Supreme Court in *Trump v. Hawaii* passed constitutional muster. In dissent, Justice Sonia Sotomayor, argued that the Court ought to consider certain Tweets and statements made by President Trump during the tweaking and during the 2016 campaign to find the President's motivations for the

order.[2] These motivations, she argued, did not pass constitutional muster.[3] The majority, however, did not review these statements.

It remains to be seen whether the Court's liberals and conservatives will "trade places" on the issue of considering such statements. For the time being, it will be interesting to see whether the Supreme Court decides to consider Plaintiffs' accusation that the eviction moratorium is political "gamesmanship" and especially interesting, however, to see how the government responds to this position. We will provide additional analysis once the government's brief is filed.

For more information on the Eviction Moratorium and other COVID-19 business solution topics, contact Aaron Walayat at [awalayat@tuckerlaw.com](mailto:awalayat@tuckerlaw.com). You can also access Tucker Arensberg's recent articles regarding pandemic business solutions at <https://www.tuckerlaw.com/category/covid-19-answers-to-business-challenges>

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[1] Emergency Application to Vacate the Stay Pending Appeal Issued by the United States District Court for the District of Columbia and for Immediate Administrative Vacatur at pg. 2.

[2] *Trump v. Hawaii*, 585 U.S. \_\_\_, 138 S.Ct. 2392, 2437-2438 (2018) (Sotomayor, J. dissenting).

[3] *Id.* at 2438.