

Supreme Court Blocks Enforcement of the CDC's Eviction Moratorium

August 30, 2021

On August 26, 2021, the Supreme Court [blocked enforcement](#) of the Centers for Disease Control and Prevention's (CDC's) nationwide temporary eviction moratorium issued on August 3, 2021. In [granting](#) the plaintiffs' emergency motion to vacate a lower court's ruling allowing the moratorium to remain in place pending appeal, the Court [determined](#) that the plaintiffs were "virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority." The Court did not reach a decision on the merits of the underlying case regarding whether the CDC has the legal authority to impose an eviction moratorium, as that case is on appeal before the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

The CDC originally imposed a nationwide, temporary federal moratorium on residential evictions for nonpayment of rent on [September 4, 2020](#), shortly after a narrower set of eviction protections established by the CARES Act ([§ 4024](#)) [expired](#). The original CDC order had an expiration date of [December 31, 2020](#). Prior to its expiration, Congress extended the order [through January 31, 2021](#), and the CDC administratively extended the order three times: [through March 31, June 30, and July 31, 2021](#). The third extension [stated](#) that "absent an unexpected change in the trajectory of the pandemic, CDC does not expect to extend the Order further." [Citing](#) a surge of cases spurred by the Delta variant, the CDC issued a new [order](#) on August 3, 2021 implementing another eviction moratorium [through October 3, 2021](#). The new order was only applicable in [counties with heightened rates of Coronavirus Disease 2019 \(COVID-19\) community transmission](#). The CDC orders were intended to prevent the spread of COVID-19 by preventing homelessness and overcrowded housing conditions resulting from eviction.

The CDC issued the moratoriums pursuant to [Section 361](#) of the Public Health Service Act (PHSA). Section 361, which is codified at 42 U.S.C. § 264, authorizes the CDC Director "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." Section 361 also includes a non-exhaustive list of activities that the CDC can take to exercise this authority, as well as an open-ended category of activities. These activities [include](#) "the apprehension, detention, or conditional release of individuals," as well as the "inspection, fumigation, disinfection, [and] sanitation [of] . . . sources of dangerous infection to human

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beings, and other measures, as in [its] judgment may be necessary.” The CDC’s actions, which followed an [Executive Order](#) directing it to consider such measures, are unprecedented, both in terms of the breadth of the agency’s use of [this public health authority](#) and its reach into what is [traditionally](#) state and local governance of landlord-tenant law.

As discussed in a [previous Legal Sidebar](#), numerous legal challenges to the initial moratorium were filed, resulting in conflicting court rulings by the Sixth, [Eleventh](#), and [D.C.](#) Circuit Courts of Appeals. Courts in [certain jurisdictions](#) that found the initial order unlawful were not enforcing the latest moratorium even before the Supreme Court’s August 26, 2021 order.

In the challenge addressed by the Supreme Court, the D.C. District Court held that the initial moratorium exceeded the CDC’s statutory authority, but stayed its order from taking effect pending appeal. In its order upholding the stay, the D.C. Circuit [stressed](#) that “Congress . . . 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.’” According to the D.C. Circuit, the CDC, acting through delegated authority from HHS, properly used this discretionary statutory authority by “carefully target[ing] [the moratorium] to the subset of evictions it determined to be necessary to cure the spread of the deadly and quickly spreading Covid-19 pandemic.” Consequently, the court concluded that “the CDC’s eviction moratorium falls within the plain text of 42 U.S.C. § 264(a)” and that the CDC would be likely to succeed on the merits of its case.

On June 29, 2021, the Supreme Court [denied](#) the plaintiffs’ request to lift the stay, allowing the moratorium to remain in force. Justice Kavanaugh’s concurring opinion agreed with the D.C. District Court that the CDC “exceeded its existing statutory authority by issuing a nationwide eviction moratorium” and that it would need “new legislation . . . to extend the moratorium beyond July 31.” Justice Kavanaugh however voted to deny the plaintiffs’ application to vacate the stay “because the CDC plan[ne]d to end the moratorium in only a few weeks . . . and . . . those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds.”

Following the Supreme Court’s June 2021 decision, the President [urged](#) Congress to extend the moratorium, but Congress did not pass legislation before its expiration. After the order expired, the President [asked](#) his Administration to review existing statutes to identify legal authority that would support a new eviction moratorium. On August 3, 2021, the CDC, citing changed circumstances, issued a new order pursuant to the [same statutory authority](#) cited in its previous order, PHSA [Section 361](#). The CDC stated that the new order was necessary due to the heightened transmissibility of the Delta variant that had become the dominant strain of coronavirus in the country since the Supreme Court’s June 2021 ruling, and narrowed the order’s scope to only those counties with substantial or high transmission rates of COVID-19.

After the CDC issued the new order, the plaintiffs in the D.C. District Court case applied for an emergency vacatur of the lower court’s prior decision granting a stay of the moratorium pending appeal, arguing that the new order conflicts with the Supreme Court’s ruling. The government countered that, according to D.C. Circuit precedent, plaintiffs cannot add the vote of a concurring judge to dissenters to create a majority. The government further argued that the plaintiffs had raised a number of arguments for vacating the stay in its first application to the Supreme Court, including a decrease in COVID-19 cases at the time and changed guidance from the CDC regarding social distancing and mask wearing for the fully vaccinated. The dissenting justices did not explain why they dissented and, according to the government, they might have agreed with the plaintiffs that, at that time, the CDC’s order was not “necessary” as the PHSA required. The government contended that the facts had changed since the Supreme Court’s ruling and that COVID-19 cases were again on the rise because of the Delta variant and its ability to be spread by fully vaccinated individuals.

Both the [district court](#) and the [D.C. Circuit](#) denied the plaintiffs' application to vacate the stay, but the Supreme Court granted the application on August 26, 2021, ending enforcement of the nationwide moratorium on evictions.

The Supreme Court's unsigned per curiam opinion did not resolve the merits of the case. Instead, it applied a [four-factor test](#) to determine whether a stay on the enforcement of the district court's decision that the order exceeded the CDC's statutory authority should remain in effect while the case is being appealed. The four factors, as articulated in the 2009 Supreme Court decision *Nken v. Holder*, are:

- (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.

On the first factor, the Court concluded that the plaintiffs "are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority," noting that "it is difficult to imagine [the plaintiffs] losing." The Court explained that the explicitly listed activities in [PHSA Section 361](#), including fumigation, disinfection, and extermination "of contaminated animals and articles," "directly relate to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself." The Court [viewed](#) an eviction moratorium "markedly different from" the explicitly listed activities because "eviction and the interstate spread of disease" is far less directly related to preventing the spread of disease. According to the Court, PHS Section 361 has never been used to justify an action that "has even begun to approach the size and scope of the eviction moratorium" and the statute "is a wafer-thin reed on which to rest such sweeping power." The Court also [concluded](#) that, under the other three *Nken* factors, "[t]he equities do not justify depriving the applicants of the District Court's judgment in their favor." The Court [noted](#) that the harm to landlords through financial loss and the inability to exercise "one of the most fundamental elements of property ownership—the right to exclude" from their property tenants who fail to abide by their leases—has increased over time as "many landlords have modest means" and "no guarantee of eventual recovery." The Court held that, in contrast, "the Government's interests have decreased" since the Court's June 29, 2021 decision, as the government had [additional time](#) to distribute appropriated rental assistance funds and "[Congress was on notice](#) that a further extension would almost surely require new legislation." For these reasons, the Supreme Court granted the plaintiffs' application to vacate the stay. As a result, the CDC's eviction moratorium will no longer be enforceable (absent an intervening court decision to the contrary), thus [allowing](#) states and localities to proceed with evictions subject to state and local policies.

Justices Breyer, writing in [dissent](#) for himself and Justices Sotomayor and Kagan, would have denied the application. Justice Breyer explained that the Court may only vacate a stay when the lower court "clearly and demonstrably erred in its application of [the four-factor *Nken* test]," and noted three reasons why that standard had not been met. First, citing the more narrowly targeted new CDC order, heightened concerns about the Delta variant, and split decisions by lower courts on the issue, Justice Breyer [argued](#) that "it is far from 'demonstrably' clear that the CDC lacks the power to issue its modified moratorium order." Second, Justice Breyer reasoned that "the balance of the equities strongly favors leaving the stay in place." In the dissent's view, the plaintiffs have only lost rental income, which has been mitigated by rental assistance appropriations from Congress and the CDC order's requirement that tenants pay "as close to full rent payment' as possible," whereas vacating the stay will result in "irreparable harm" through increased COVID-19 spread and resulting deaths. Finally, Justice Breyer [observed](#) that "the public interest is not favored by the spread of disease or a court's second-guessing of the CDC's judgment." The dissent [concluded](#) that, given the gravity of "the health of millions" at stake, "[the Court] should not set aside the CDC's eviction moratorium in this summary proceeding."

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