

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALABAMA ASSOCIATION OF
REALTORS, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

No. 20-cv-3377 (DLF)

MEMORANDUM OPINION

As part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020), Congress enacted a 120-day eviction moratorium that applied to rental properties receiving federal assistance, *id.* § 4024(b). After that moratorium expired, the U.S. Department of Health and Human Services (HHS), through the Centers for Disease Control and Prevention (CDC), issued an order implementing a broader eviction moratorium that applied to all rental properties nationwide, 85 Fed. Reg. 55,292 (Sept. 4, 2020), which prompted this suit. Since then, Congress has granted a 30-day extension of the CDC Order, and the CDC has extended the order twice itself. The current order is set to expire on June 30, 2021.

In this action, the plaintiffs raise a number of statutory and constitutional challenges to the CDC Order. Before the Court is the plaintiffs' Motion for Expedited Summary Judgment, Dkt. 6, as well as the Department's Motion for Summary Judgment, Dkt. 26, and Partial Motion to Dismiss, Dkt. 32. For the reasons that follow, the Court will grant the plaintiffs' motion and deny the Department's motions.

I. BACKGROUND

On March 13, 2020, then-President Trump declared COVID-19 a national emergency. *See generally* Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020). Two weeks later, he signed the CARES Act into law. *See* Pub. L. No. 116-136, 134 Stat. 281 (2020). The CARES Act included a 120-day eviction moratorium with respect to rental properties that participated in federal assistance programs or were subject to federally-backed loans. *See id.* § 4024. In addition, some—but not all—states adopted their own temporary eviction moratoria. Administrative Record (“AR”) at 966–72, 986–1024, Dkt. 40. The CARES Act’s federal eviction moratorium expired in July 2020.

On August 8, 2020, then-President Trump issued an executive order directing the Secretary of HHS (“the Secretary”) and the Director of the CDC to “consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession.” Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, Executive Order 13,945, 85 Fed. Reg. 49,935, 49,936 (Aug. 8, 2020).

Weeks later, on September 4, 2020, the CDC issued the “Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19” (“CDC Order”), pursuant to § 361 of the Public Health Service Act, 42 U.S.C. § 264(a), and 42 C.F.R. § 70.2. 85 Fed. Reg. 55,292 (Sept. 4, 2020). In this order, the CDC determined that a temporary halt on residential evictions was “a reasonably necessary measure . . . to prevent the further spread of COVID-19.” 85 Fed. Reg. at 55,296. As the CDC explained, the eviction moratorium facilitates self-isolation for individuals

infected with COVID-19 or who are at a higher-risk of severe illness from COVID-19 given their underlying medical conditions. *Id.* at 55,294. It also enhances state and local officials' ability to implement stay-at-home orders and other social distancing measures, reduces the need for congregate housing, and helps prevent homelessness. *Id.* at 55,294.

The CDC Order declared that “a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action shall not evict any covered person.” *Id.* at 55,296. To qualify for protection under the moratorium, a tenant must submit a declaration to their landlord affirming that they: (1) have “used best efforts to obtain all available government assistance for rent or housing”; (2) expect to earn less than \$99,000 in annual income in 2020, were not required to report any income in 2019 to the Internal Revenue Service, or received a stimulus check under the CARES Act; (3) are “unable to pay the full rent or make a full housing payment 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) are “using best efforts to make timely partial payments”; (5) would likely become homeless or be forced to move into a shared residence if evicted; (6) understand that rent obligations still apply; and (7) understand that the moratorium is scheduled to end on December 31, 2020. *Id.* at 55,297.

Unlike the CARES Act's moratorium, which only applied to certain federally backed rental properties, the CDC Order applied to all residential properties nationwide. *Id.* at 55,293. In addition, the CDC Order includes criminal penalties. Individuals who violate its provisions are subject to a fine of up to \$250,000, one year in jail, or both, and organizations are subject to a fine of up to \$500,000. *Id.* at 55,296.

The CDC Order was originally slated to expire on December 31, 2020. *Id.* at 55,297. As part of the Consolidated Appropriations Act, however, Congress extended the CDC Order to

apply through January 31, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020). On January 29, 2021, the CDC extended the order through March 31, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021). In this extension, the CDC updated its findings to account for new evidence of how conditions had worsened since the original order was issued, as well as “[p]reliminary modeling projections and observational data” from states that lifted eviction moratoria “indicat[ing] that evictions substantially contribute to COVID-19 transmission.” *Id.* at 8022. The CDC later extended the order through June 30, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021).

A. Procedural History

The plaintiffs—Danny Fordham, Robert Gilstrap, the corporate entities they use to manage rental properties (Fordham & Associates, LLC, H.E. Cauthen Land and Development, LLC, and Title One Management, LLC), and two trade associations (the Alabama and Georgia Associations of Realtors)—filed this action on November 20, 2020. Compl., Dkt. 1. They challenge the lawfulness of the eviction moratorium on a number of statutory and constitutional grounds. The plaintiffs allege that the eviction moratorium exceeds the CDC’s statutory authority, *id.* ¶¶ 81–84 (Count III), violates the notice-and-comment requirement, *id.* ¶¶ 63–70 (Count I), and is arbitrary and capricious, *id.* ¶¶ 85–91 (Count IV), all in violation of the Administrative Procedure Act (APA). The plaintiffs further allege that the eviction moratorium fails to comply with the Regulatory Flexibility Act. *Id.* ¶¶ 71–78 (Count II). To the extent that the Public Health Service Act authorizes the eviction moratorium, the plaintiffs allege that the Act is an unconstitutional delegation of legislative power under Article I. *Id.* ¶¶ 92–95 (Count V). Finally, the plaintiffs allege that the eviction moratorium constitutes an unlawful taking of

property in violation of the Takings Clause, *id.* ¶¶ 96–103 (Count VI), violates the Due Process Clause, *id.* ¶¶ 96–110 (Count VII), and deprives the plaintiffs of their right of access to courts, *id.* ¶¶ 111–15 (Count VIII). The plaintiffs seek declaratory and injunctive relief, attorneys’ fees and costs, and any other relief the Court deems just and proper. *Id.* ¶¶ 116–20.

Before the Court is the plaintiffs’ expedited motion for summary judgment, Dkt. 6, and the Department’s cross-motion for summary judgment. Also before the Court is the Department’s partial motion to dismiss, Dkt. 32, in which the Department argues that Congress ratified the CDC Order when it extended the eviction moratorium in the Consolidated Appropriations Act of 2021. All three motions are now ripe for review.

B. Relevant Decisions

This Court is not the first to address a challenge to the national eviction moratorium set forth in the CDC Order. In the last several months, at least six courts have considered various statutory and constitutional challenges to the CDC Order. Most recently, the Sixth Circuit denied a motion to stay a district court decision that held that the order exceeded the CDC’s authority under 42 U.S.C. § 264(a), *see Tiger Lily, LLC v. United States Dep’t of Hous. & Urb. Dev.*, No. 2:20-cv-2692, 2021 WL 1171887, at *4 (W.D. Tenn. Mar. 15, 2021) (concluding that the CDC Order exceeded the statutory authority of the Public Health Service Act), *appeal filed* No. 21-5256 (6th Cir. 2021); *Tiger Lily, LLC v. United States Dep’t of Hous. & Urb. Dev.*, 992 F.3d 518, 520 (6th Cir. 2021) (denying emergency motion for stay pending appeal); *see also Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, No. 5:20-cv-2407, 2021 WL 911720, at *12 (N.D. Ohio Mar. 10, 2021) (holding that the CDC exceeded its authority under 42 U.S.C. § 264(a)). Two other district courts, however, declined to enjoin the CDC Order at the preliminary injunction stage, *see Brown v. Azar*, No. 1:20-cv-03702, 2020 WL 6364310, at *9–

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