No. 21-5256

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIGER LILY, LLC, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Tennessee

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR IMMEDIATE ADMINISTRATIVE STAY

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Plaintiffs' opposition leaves no doubt as to the risk to the public health that will result in the absence of a stay, and it casts no doubt on the district court's conclusion, in denying a preliminary injunction, that plaintiffs demonstrated no remotely comparable injury requiring exercise of the court's equitable authority. Plaintiffs likewise cast no doubt on the government's showing of likelihood of success. Among other things, they fail even to acknowledge statutory provisions discussed in our motion that are incompatible with their reading, and similarly fail to acknowledge that in extending the moratorium, Congress specifically recognized that it had been issued under the authority of 42 U.S.C. § 264. We respectfully urge that a stay pending appeal is warranted.

A. As discussed in our motion (at 13), the district court in this case and every other court to consider the issue has concluded that plaintiff landlords face no irreparable injury as a result of the moratorium. The generalized assertions in plaintiffs' opposition do not call these uniform conclusions into question. Nor does plaintiffs' opposition make any reference to the $46 billion appropriated by Congress to assist landlords whose tenants' rents are in arrears.

Our motion details the injury to the public health resulting from the district court's judgment. In response, plaintiffs appear to argue that a moratorium serves little purpose in Shelby County, urging, for example, that "Shelby County is currently averaging less than 600 new cases a week, compared with San Francisco relied upon by the CDC and which is averaging more than 2,800 new cases a week." Pl. Opp. 17

(footnotes omitted). That Shelby County averages fewer new cases a week than San Francisco (or New York) has no apparent bearing on the importance of a moratorium. The critical point is that, even by plaintiffs' own account, Shelby County is experiencing several hundred new cases a week of a disease that does not respect state boundaries and that has killed more than half a million Americans.

Unsurprisingly, plaintiffs make no attempt to square their argument with this Court's ruling in *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 129 (6th Cir. 2020) (unpub.), which recognized that an immediate stay was warranted even though the plaintiffs in that case, unlike plaintiffs here, faced "the very real risk of losing their businesses." The Court's assessment of the importance of combatting the pandemic applies with full force here.

B. Plaintiffs recognize that the statute vests broad authority in the Secretary of Health and Human Services to make and enforce such regulations "as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one State or possession into any other State or possession." 42 U.S.C. § 264(a). They insist, however, that Congress limited the Secretary's authority to the specific actions detailed in the second sentence of § 264(a), which provides that the Secretary "may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of [infected or contaminated] animals or articles . . . , and other measures, as in his judgment may be necessary." Pl. Opp. 6.

Although plaintiffs assert that this sentence establishes the limits of the Secretary's authority, they fail even to acknowledge the other provisions of § 264 that preclude this conclusion. For example, as discussed in our motion, § 264(b), (c), and (d) place restrictions on the circumstances in which the agency may provide for the "apprehension, detention, examination, or conditional release of individuals." Similarly, although plaintiffs express incredulity at the notion that Congress would believe that the temporary moratorium has a sufficient nexus to the statute, they make no attempt to reconcile their view with the 2021 Appropriations Act, which explicitly extended the CDC Order issued "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, tit. V, § 502, 134 Stat. 1182, 2078-2079 (2020).

Plaintiffs' argument reduces to a parade of horribles that bear no resemblance to the provision that they challenge. They suggest that recognizing the validity of the moratorium "would mean that Congress intended to empower the CDC to unilaterally violate the most basic of liberties." Pl. Opp. 7. Plaintiffs presumably do not include a delay in evictions in this category. (Nor do they suggest that this temporary measure is as intrusive as other measures specifically authorized by § 264, such as the "apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage," 42 U.S.C. § 264(d).) Similarly, although plaintiffs declare that "Congress unambiguously chose *not* to delegate" the "authority to interfere with state property rights," Pl. Opp. 6, that

authority is included even in the list of powers that plaintiffs mistakenly believe to be exclusive. *See* 42 U.S.C. § 264(a) (authorizing "destruction of animals or articles"); *see also Independent Turtle Farmers of La., Inc. v. United States*, 703 F. Supp. 2d 604, 620 (W.D. La. 2010) (upholding ban on sale of baby turtles, including healthy turtles).

Plaintiffs also fail to acknowledge the limited nature of the intrusion on their own property interests. The moratorium does not excuse tenants' obligations to pay rent or to comply with other obligations of their lease. Nor does it preclude a landlord from initiating a state court eviction proceeding as long as the actual eviction does not occur while the Order remains in effect. And, as noted, Congress has appropriated $46 billion in emergency rental assistance designed to assist landlords whose tenants have rent in arrears.

Finally, plaintiffs' contentions that the CDC Order is impermissibly vague or arbitrary and capricious are wholly without basis. States, like the CDC, have recognized the impact of evictions in enacting moratoria, as did Congress in extending the moratorium. And the CDC Order speaks for itself.

CONCLUSION

The Court should stay the district court's judgment pending appeal and issue an immediate administrative stay to preserve the status quo.

Respectfully submitted,

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MARCH 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because the reply contains 993 words. The reply complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it has been prepared using Microsoft Word 2016 in proportionally spaced 14-point Garamond typeface.

/s/ Brian J. Springer
BRIAN J. SPRINGER

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2021, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Brian J. Springer
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