

## CDC Eviction Halt Order 2.0: Advocates' Primer

On August 3, 2021, President Biden announced that the CDC would impose a new “more targeted eviction moratorium” to protect tenants from eviction in areas experiencing high rates of Covid-19 transmission. The order,<sup>1</sup> released later that day, was much the same as the previous CDC eviction restrictions had been—except with a distinct geographical limitation based on Covid rates: “This Order applies in U.S. counties experiencing substantial and high levels of community transmission levels of SARS-CoV-2 as defined by CDC, as of August 3, 2021.” Order at 12.

Hence, as before, the new CDC eviction halt enables tenants who meet certain criteria to invoke protection against eviction by providing a signed declaration to their landlords. To sign the declaration, a tenant needs to meet the same five essential criteria as before:

- Has used best efforts to obtain all available governmental assistance for rent;
- Income no greater than \$99,000 in 2020, or expects to receive no more than \$99,000 in 2021 (\$198,000 if filing jointly), or was not required to report income to the IRS in 2020, or received a stimulus check;<sup>2</sup>
- Unable to pay full rent due to an income loss or “extraordinary” medical bills;
- Likely to become homeless or forced to live in “close quarters” in shared housing if evicted, and
- Using best efforts to “make timely partial payments that are as close to the full payment as the individual’s circumstances may permit.”

Order at 2-3. However, there is now an additional sixth requirement: that “the individual resides in a U.S. county experiencing substantial or high rates of community transmission levels of SARS-CoV-2 as defined by CDC.” Order at 3. CDC has issued a new declaration form, which frustratingly requires tenants to check a box declaring that they “live in a U.S. county experiencing substantial or high rates of community transmission levels of SARS-CoV-2.” Because every low-income tenant is an expert in determining the Covid-19 community transmission rates for their counties of residence. At any rate, the form is available, in English and Spanish, at: <https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html>

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<sup>1</sup> Posted on-line at: <https://www.cdc.gov/coronavirus/2019-ncov/communication/Signed-CDC-Eviction-Order.pdf>

<sup>2</sup> The order defines “stimulus check” to include “payments made pursuant to Section 2201 of the CARES Act, to Section 9601 of the American Rescue Plan Act of 2021, or to any similar federally authorized payments made to authorized persons in 2020 and 2021.”

**How do I find out whether a county has a substantial or high rates of community transmission levels of SARS-CoV-2 (as defined by CDC)?**

The Order directs readers to a specific CDC tool to find out whether a particular county has a substantial or high rate of Covid transmission at this URL: <https://covid.cdc.gov/covid-data-tracker/#county-view>. See Order at 18.

Some advocates have reported that the CDC dataset is incomplete and there are some areas that show up as grey "no data" zones on the map. The order does not make clear how such zones should be handled. However, CDC indicates a county has a "substantial" transmission level if either (i) the county has 50+ new cases per 100,000 persons within the past 7 days, or (ii) 8% or more of the county's Nucleic Acid Amplification Tests (NAATs) within the previous 7 days were positive. Advocates able to obtain this data from other sources may be able to establish that a county is covered by the CDC order even if the official CDC site does not have data. In a truly extreme case, expert evidence might even be appropriate on the question.

If tenants or courts are unable to locate data from which to ascertain the community Covid transmission rates, advocates should take the position that no tenant should be evicted for the lack of such data. A county's transmission rate is an empirical fact that should presumably be ascertainable through discovery. Courts can continue cases to enable the parties to assemble the necessary evidence.

**What happens if a county has a substantial or high rate of Covid transmission, but then the rate declines (below the "substantial" level)?**

Per the order, "If a county that is covered by this Order no longer experiences substantial or high levels of community transmission for 14 consecutive days, then this Order will no longer apply in that county, unless and until the county again experiences substantial or high levels of community transmission while this Order is in effect." Order at 12-13. Advocates may want to consider logging the community transmission rates of the counties in which they provide services, as it is not clear the extent to which historical data will be readily available on daily transmission rates through the CDC site.

**What happens if a county does not have a substantial or high rate of Covid transmission, but then the rate increases and becomes substantial or high?**

As you could probably guess, "[i]f a U.S. county that is not covered by this Order as of August 3, 2021 later experiences substantial or high levels of community transmission while this Order is in effect, then that county will become subject to the Order as of the date the county begins experiencing substantial or high levels of community transmission." Order at 13. Importantly, a county does not need to remain above the "substantial" threshold for 14 days to become covered, only to lose coverage.

**If a tenant already signed and provided a declaration to a landlord invoking protection under one of the prior CDC eviction halt orders, does the tenant need to provide another declaration now?**

No. The new order clearly states that "[a]ny tenant, lessee, or resident of a residential property who previously submitted a Declaration, still qualifies as a 'Covered Person,' and is still present in a rental unit is entitled to protections under this Order." Order at 13.

**Even though the old declaration didn't say anything about the tenant's county having a substantial or high rate of Covid transmission?**

That's right. Because this wouldn't really be a fact within the tenant's personal knowledge anyway, so it makes sense not to require it as part of the declaration. *But see, cf.*, CDC form declaration.

**My client was physically evicted on August 3 in the morning, about five hours before the new halt order was announced. Can I use the CDC order to get that person back in?**

Not likely. The new CDC order states: "Any eviction that was complete before issuance of this Order including from August 1 through August 3, 2021, is not subject to this Order, as it does not operate retroactively." Order at 13. But note that any tenant "still present in a rental unit is still entitled to protections under th[e] Order." Order at 13.

**What about all these judicial challenges to the CDC's authority (to impose the halt order)? What should I say if my local judge questions whether the CDC order should be followed?**

Unfortunately, state courts all around the U.S. questioned and sometimes balked at honoring even the previous CDC eviction halt orders, and tenants and advocates should expect that to continue with respect to the new halt order. Undoubtedly the uncertain legal status of the CDC halt order will remain the most significant challenge for tenants and advocates, whether in advising tenants about their legal positions and available options, making good housing related decisions, negotiating with landlords, or defending cases in court.

In coping with this challenge, advocates should be prepared to articulate three key points of law:

- The present CDC order is in effect and has not been enjoined by any court;
- The U.S. Supreme Court ruling on the motion to lift the stay-pending-appeal in *Alabama Realtors* does not obligate a lower court judge to find the CDC order unlawful;
- If the court wishes to consider the legality of the CDC order, then the federal government is a necessary party that should be joined; and
- A full legal analysis shows the CDC had authority to issue the eviction halt order.

As to the first point, at the time of this writing there is a motion pending before Judge Dabney Friedrich in the District of D.C. that essentially seeks to enjoin the CDC order. However, unless and until either that motion is granted (either by Judge Friedrich or some appellate court) or until some other court enters an order enjoining the *current* CDC eviction halt, the protection remains in effect.

Some judges may say they agree with the legal reasoning that various federal courts that have declared the previous CDC orders to have been outside the agency's authority, and therefore intend not to honor the CDC order based on their own analysis. As a threshold matter, advocates should ensure that such judges understand the purpose of the CDC order is to protect the public against the spread of Covid-19 and thus refusing to honor the CDC order not only harms the specific tenant facing eviction but also impairs the public health interest the CDC was seeking to protect. Hence, any court undertaking its own

analysis as to the legality of the CDC order should consider the CDC a necessary party and order that the agency be joined. *See, e.g.,* Fed.R.Civ.P. 19(a). Advocates should consider appealing judgments entered in disregard of the CDC order where the Court made no attempt to secure participation of the CDC.

Other judges may suggest (whether or not they personally agree with the federal court decisions finding against the CDC's authority) that they are required to follow the *Alabama Realtors* ruling in the SCOTUS on the appellate stay—and that *Alabama Realtors* compels a conclusion that the CDC order is without authorization. *See Alabama Realtors v. DHHS*, \_\_\_ U.S. \_\_; 141 S.Ct. 2320 (2021). Yet on the first point, it is important to note that the *Alabama Realtors* decision contains only the unexplained, 4-4 votes of eight justices and a “conurrence” from Justice Kavanaugh in which he remarks on how he might have voted differently had the motion come to him under a different set of circumstances:

JUSTICE KAVANAUGH, concurring.

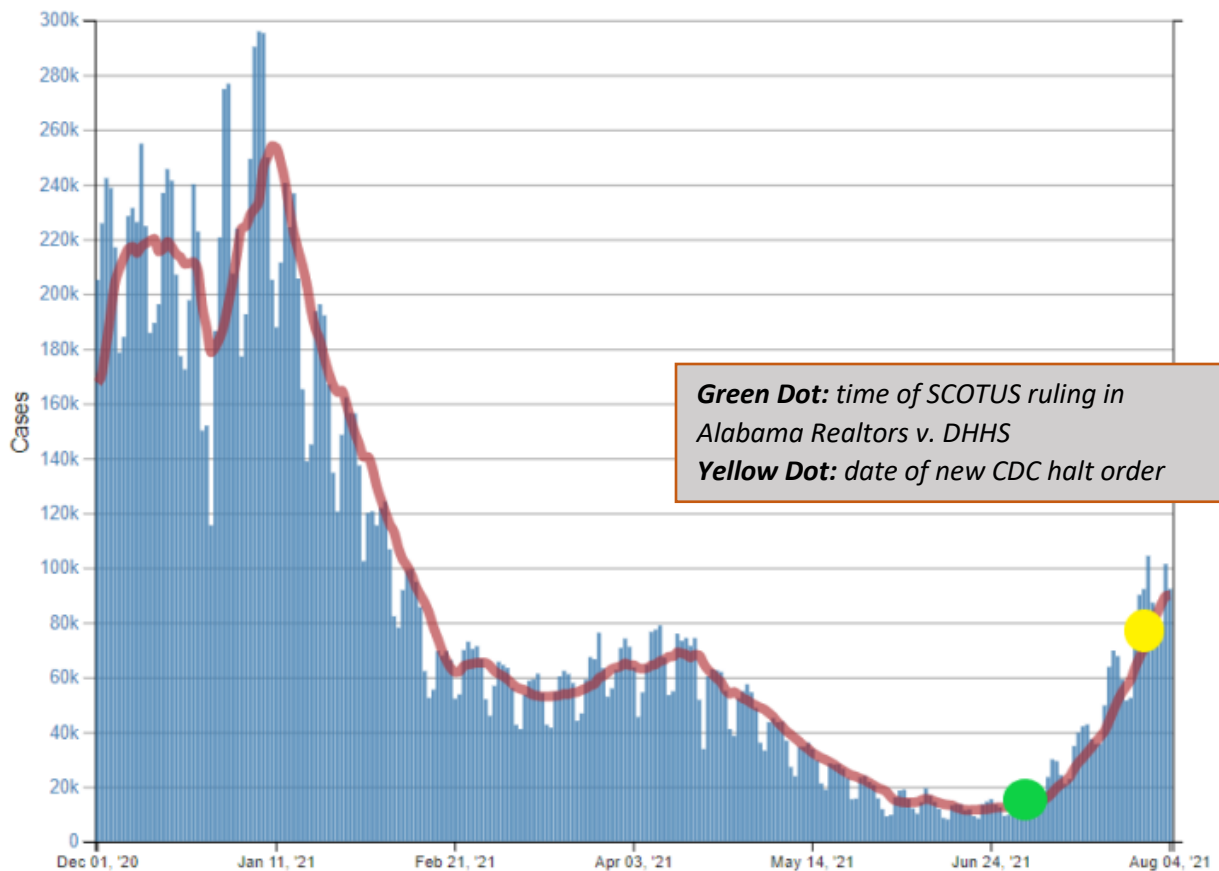
I agree with the District Court and the applicants that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium. *See Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014). Because the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds, I vote at this time to deny the application to vacate the District Court's stay of its order. *See Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U. S. 1301, 1305 (1991) (Scalia, J., in chambers) (stay depends in part on balance of equities); *Coleman v. Paccar Inc.*, 424 U. S. 1301, 1304 (1976) (Rehnquist, J., in chambers). In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.

In other words, the Kavanaugh concurrence is dicta and not binding on any judge. The binding portion of a Supreme Court opinion includes the result and “those portions of the opinion necessary to that result[.]” *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996); *see also Jama v. ICE*, 543 U.S. 335, 352 (2005) (“Dictum settles nothing, even in the court that utters it.”).

Accordingly, it is only the result of the *Alabama Realtors* ruling, and not the dicta, that lower courts must follow. The result was that five justices affirmed a ruling, by the D.C. Circuit Court of Appeals, that Judge Friedrich was within her discretion to stay (pending appellate review) an order declaring the eviction halt to have been outside CDC's authority.

Advocates should also point out that factual differences exist between the circumstances at the time of Kavanaugh's concurrence and the time of the new CDC order. When Kavanaugh wrote his concurrence, daily new Covid cases were low and plummeting. But now the delta variant has arrived in the U.S., and daily case numbers have risen dramatically and continue to climb. *See Order at 5-6 and chart below:*

**Daily Trends in Number of COVID-19 Cases in the United States Reported to CDC**



Prepared using [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendscases](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases)

To the extent Kavanaugh’s view (that any extension beyond July 31 would not be warranted by public interest considerations) was predicated on the domestic Covid-19 situation at the time of writing, that may have changed. Or any of the other four justices who voted to lift the stay might similarly revise their position in light of these new facts.

Last, to the extent advocates find themselves arguing the merits of CDC’s authority to impose eviction halt orders, the D.C. Circuit Court of Appeals’ opinion affirming the stay of Judge Friedrich’s opinion hits the highlight of each substantial contention:

- “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;”
- “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;”
- “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;” and

- Congress has expressly recognized that the agency had the authority to issue its narrowly crafted moratorium under Section 264 [in the] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, title V, § 502, 134 Stat. 1182, 2078–79 (Dec. 27, 2020).”

*Alabama Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 WL 2221646, at \*1 (D.C. Cir. June 2, 2021); *but see, c.f., Tiger Lily, LLC v. HUD.*, No. 21-5256, 2021 WL 3121373, at \*6 (6th Cir. July 23, 2021) (finding CDC did not have authority to issue eviction halt order and interpreting Congressional ratification as only applying to period of extension to Jan. 31, 2021).

Advocates can find numerous examples of legal briefs written on behalf of tenants arguing these various issues on NHLP’s Covid-19 page at: <https://www.nhlp.org/covid19/>

**Our local court has already stated publicly that it’s not going to follow the new CDC order and so far they haven’t been. Is there anything we can do besides appeal individual cases?**

Many state court systems provide for writs of prohibition, mandamus, or superintending control, which may be used essentially to enjoin such illegal practice of lower tribunals—such as following a policy of adjudicating cases without regard to a governing law. *See, e.g., C.J.S. Prohibition, § 14* (writ of prohibition not a remedy for simple abuse of discretion by a trial court but appropriate where a lower court is about to exercise judicial power in a way that is not authorized by law and that “exercise of power would result in injury for which there is no other adequate remedy.”).

For examples of pleadings seeking this form of relief, see:

- Missouri:
  - Petition: <https://www.nhlp.org/wp-content/uploads/MO-Petition.pdf>
  - Brief: <https://www.nhlp.org/wp-content/uploads/MO-Supporting-Brief.pdf>
- Virginia
  - Petition: <https://www.nhlp.org/wp-content/uploads/Martin-et-al-Petition-for-Writ-of-Prohibition.pdf>,
  - Brief: <https://www.nhlp.org/wp-content/uploads/Martin-Memo-of-Law-in-Support-of-Petition.pdf>

Alternatively, a due process action in U.S. District Court might be possible on behalf of a tenant who anticipates being evicted or possibly (arguing that the local court's policy of refusing to honor the CDC order will result in the plaintiff being evicted without due process of law) or possibly an organizational plaintiff. For more information on how to bring actions of this nature, see: <https://www.nhlp.org/wp-content/uploads/Federal-court-challenges-to-Covid-evictions.pdf>