

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

294 M.D. 2021

JACOB DOYLE CORMAN, III, et al., Petitioners,

v.

**ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF
HEALTH, Respondent.**

*PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENT'S
APPLICATION FOR SUMMARY RELIEF*

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**BRIEF IN OPPOSITION TO RESPONDENT’S APPLICATION
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The matter before this Court involves an Executive Agency, the Department of Health, and its attempt to grant itself unlimited power in the absence of express authority from the Legislative Branch.

The U.S. Supreme Court has recently confronted a similar situation involving government overreach in the form of an Executive Agency seeking to grant itself unfettered power in the absence of express authority from the Legislative Branch.

In the recent case of *Ala. Assoc. of Realtors v. Dep’t of Health and Hum. Servs.*, -- S.Ct. -- , 2021 WL 3783142 (2021), the United States Supreme Court struck down the Center for Disease Control’s (“CDC”)

nationwide eviction moratorium. The *Ala. Assoc. of Realtors* case is eerily similar to the case presently before this court. And the stakes are equally important in Pennsylvania.

In *Ala. Assoc. of Realtors*, the Court clearly stated that the Center for Disease Control's ("CDC") interpretation of 42 U.S.C. § 264(a) would grant the CDC, "a breathtaking amount of authority," and subsequently held that the CDC did not have the authority to issue its moratorium on evictions. *Id.* at p.3. In March of 2020, Congress passed the CARES Act to address the unprecedented burdens created by the COVID-19 Pandemic. As part of the CARES Act was a limited eviction moratorium with a defined duration and expiration date. *Id.* at p.1. Upon the statutory expiration date of the eviction moratorium, the CDC unilaterally extended the moratorium on multiple occasions without any statutory authorization by Congress.

The CDC justified its unauthorized extensions pursuant to 42 U.S.C. § 264(a). Section 264(a) is notably similar to the purported authority claimed by Respondent in her August 31, 2021, Order states in relevant part as follows.

"The Surgeon General, with the approval of the [Secretary of Health and Human Services], *is authorized 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. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.”

42 U.S.C. § 264(a) (emphasis added); see also 42 C.F.R. § 70.2 (2020) (delegating this authority to the Center for Disease Control).

The *Alabama Association of Realtors* sued to enjoin the enforcement of the CDC’s moratorium, arguing that the CDC lacked the authority to promulgate the moratorium. *Ala. Assoc. of Realtors*, 2021 WL 3783142 at p. 2. The United States District Court for the District of Columbia ruled in favor of the plaintiffs, holding that the CDC lacked the authority to issue the moratorium; however, pending appeal, the court stayed its order. The agency argued that section 264(a), “[gave] the CDC broad authority to take whatever measures it deems necessary to control the spread of COVID-19, including issuing the moratorium.”

In granting the Association of Realtors’ vacatur the lower court’s stay, the Supreme Court stated in relevant part as follows:

“And careful review of that record makes clear that the applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority. It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened. Instead, the CDC has imposed

a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts.” *Ala. Assoc. of Realtors at pp. 1-2.*

The Supreme Court went on to analyze the authority relied upon by the CDC, specifically, section 361(a) of the Public Health Services Act which provides in relevant part as follows:

“The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized 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. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.” *Ala. Assoc. of Realtors at p. 2, 42 C.F.R. §70.2 (2020).*

With respect to section 361(a), the Supreme Court stated “Regulations under this authority have generally been limited to quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease.” *Ala. Assoc. of Realtors at pp. 2-3, see, e.g., 40 Fed. Reg. 22543 (1975)* (banning small turtles known to be carriers of salmonella).

With respect to CDC’s interpretation of section 361(a), the Court concluded in relevant part as follows:

“The Government contends that the first sentence of § 361(a) gives the CDC broad authority to take whatever measures it deems necessary to control the spread of COVID–19, including issuing the moratorium. But the second sentence informs the grant of authority by illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles. ... Reading both sentences together, rather than the first in isolation, it is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium. Even if the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’” *Ala. Assoc. of Realtors at p. 4; citing Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)).

The Supreme Court stated as follows:

“Indeed, the Government's read of § 361(a) would give the CDC **a breathtaking amount of authority**. *It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit in § 361(a) beyond the requirement that the CDC deem a measure ‘necessary.’* 42 U.S.C. § 264(a); 42 C.F.R. § 70.2. Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work? This claim of expansive authority under § 361(a) is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium. ... Section 361(a) is a wafer-thin reed on which to rest such sweeping power.” *Ala. Assoc. of Realtors at pp. 4-5*.

The Court went on to articulate the principle that

“It is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.” (emphasis added) *Ala. Assoc. of Realtors* at p. 5. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585–586, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (concluding that even the Government's belief that its action “was necessary to avert a national catastrophe” could not overcome a lack of congressional authorization).

Indeed, this Court can, and must, follow the Supreme Court’s analysis. Respondent’s interpretation of 35 P.S. § 532(a); 28 Pa. Code § 27.60; 35 P.S. § 521.5; and 71 P.S. 1403(a) is limitless. It places no restrictions on the Department’s power and authority outside of the requirement that the Department deem such measures, “appropriate.” (*Compare to Ala. Assoc. of Realtors v. Dep’t of Health and Hum. Servs.*, -- S.Ct. --, 2021 WL 3783142 at 3* (2021) (Stating: “It is hard to see what measures this interpretation would place outside the CDC’s reach, and the Government has identified no limit in § 361(a) [42 U.S.C. § 264(a)] beyond the requirement that the CDC deem a measure ‘necessary.’))

The lessons learned in *Ala Assoc. of Realtors* should, we suggest, be applied to the case at bar.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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