

reason

Justice Kavanaugh Grants Holdover Tenants A One-Month Reprieve From The Law

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June 29, 2021

Earlier today, I observed that Chief Justice Roberts and Justice Kavanaugh were the only members to be in the majority of three cases. The streak continues. This evening, the Supreme Court refused to put the eviction moratorium on hold. The vote was 5-4. Really it was 2+3-4. The Chief and Justice Kavanaugh joined the Kagan-3. Justices Thomas, Alito, Gorsuch, and Barrett would have granted the application.

Justice Kavanaugh wrote a one paragraph concurrence. He found that the CDC is acting without statutory authority. But, because the CDC moratorium will wind down "in a few weeks, on July 31," he would not intervene now. Here is the paragraph, in its entirety:

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.

This may be the most Kavanaugh concurrence I have ever read. First, he feels the need to explain himself in any case that could reach a conservative result. On the one hand, he is solid on admin law. (Thanks Don McGahn!) On the other hand, he declines to take actions that could put those principles into effect. I am tired of these apologetic soliloquies.

Second, his rationale for moderation doesn't hold up. The application was filed on June 3. The response was due on June 10. The application has been pending for 19 days. It did not take 19 days to write a one-paragraph concurrence. No one wrote a dissent in response. The Court was

no doubt hoping Biden would decline to extend the moratorium so the case would go away. But the administration did extend it. And with 31 days remaining on the order, Justice Kavanaugh now says there are only a "few weeks" left. (I think in common usage, a "few weeks" has to be less than a month.) Therefore, he will decline to grant relief. If the Court moved with alacrity, the rule of law would have already been restored. This case reminds me of Danville Christian Academy. The Court sat on the application, and then dismissed it because the academic year was almost over.

Third, Justice Kavanaugh issued a clear ultimatum to the Biden Administration: if you extend the moratorium one more time, I'll flip my vote. Congressional authorization is not needed now. But come August 1, I'll boof up your executive action. In effect, Justice Kavanaugh is telling Biden to go to Congress, or throw 6 million people on the street. Just like he lectured the Governor of Mississippi to grant clemency to Brett Jones. It is none of the Court's business what the other branches do. Justice Kavanaugh's warning is reminiscent of Justice O'Connor's 25-year clock in *Grutter*. The Constitution does not take a sabbatical during a pandemic, Justice Gorsuch reminds us.

Disclosure: I recently filed an amicus brief in the 5th Circuit eviction moratorium case on behalf of the Cato Institute.

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