No. 21-A___

In The
Supreme Court of the United States

PANTELIS CHRYSAFIS, BETTY S. COHEN, BRANDIE LACASSE, MUDAN SHI, FENG ZHOU, AND RENT STABILIZATION ASSOCIATION OF NYC, INC.,

Applicants,

v.

LAWRENCE K. MARKS, IN HIS OFFICIAL CAPACITY AS CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF NEW YORK STATE,

Respondent.

To the Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court and Circuit Justice for the Second Circuit

Emergency Application for Writ of Injunction

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QUESTIONS PRESENTED

In early May 2021, New York State, purporting to address the COVID-19 pandemic, extended a sweeping eviction moratorium that blocks property owners from pursuing residential eviction proceedings—even those initiated pre-COVID—against any tenants who unilaterally claim they are experiencing "financial hardship" due to COVID-19. As a result, for more than sixteen months and counting, the courthouse door has been barred to New York's landlords, denying them any meaningful opportunity to be heard. This eviction moratorium law also compels owners to convey the government's message, against the owners' wishes and interests, by forcing them to supply a government-drafted notice and declaration form instructing tenants on how to forestall eviction and evade paying rent, as well as a government-curated list of legal service providers who are available to assist tenants in doing so. At the same time, New York has now lifted virtually all of its other COVID restrictions, with Governor Cuomo last month declaring the State's "disaster emergency" over because of "New York's dramatic progress against COVID-19."

Nevertheless, following an evidentiary hearing converted into a trial on the merits, the district court denied emergency relief and entered a final judgment dismissing this challenge. It did so even though the court found as a matter of fact that the small property owners suing here have "satisfactorily demonstrated a risk of irreparable harm," from both the ongoing deprivation of their constitutional rights and their particularized "showing" of crippling "hardship[s]" resulting from the eviction moratorium's interference with their property interests. Ex. D at 2, 6, 11-12.

The United States Court of Appeals for the Second Circuit declined to issue an emergency injunction pending the resolution of Applicants' expedited appeal.

The questions presented on this writ of injunction application are:

1. Whether New York's eviction moratorium law, which continues to block property owners from pursuing eviction proceedings or otherwise challenging their tenants' bald claims of COVID-19 "hardship," and compels them to serve as the government's mouthpieces in transmitting government-drafted messages, declaration forms, and lists of recommended legal service providers to their tenants, deprives these property owners of their due process rights and violates their First Amendment rights against compelled speech.

2. Whether the courts below erred in concluding that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), requires the application of deferential, rational basis review in evaluating constitutional challenges to government action taken in response to a public health emergency, particularly where, as here, New York has declared its "state of emergency" to be over.

PARTIES AND RULE 29.6 STATEMENT

Applicants are PANTELIS CHRYSAFIS, BETTY S. COHEN, BRANDIE LACASSE, MUDAN SHI, FENG ZHOU, and RENT STABILIZATION ASSOCIATION OF NYC, INC. Applicants were the Plaintiffs in the United States District Court for the Eastern District of New York and are the Appellants in the United States Court of Appeals for the Second Circuit. Applicant RENT STABILIZATION ASSOCIATION OF NYC, INC. is a non-profit membership organization with no parent corporation, and there is no publicly held corporation owning 10% of more of its stock.

Respondent is LAWRENCE K. MARKS, in his official capacity as Chief Administrative Judge of the Courts of New York State. Respondent was a Defendant in the United States District Court for the Eastern District of New York and is the Appellee in the United States Court of Appeals for the Second Circuit.

The other Defendants in the United States District Court for the Eastern District of New York were ADRIAN H. ANDERSON, in his official capacity as Sheriff of Dutchess County, New York, JAMES DZURENDA, in his official capacity as Sheriff of Nassau County, New York, JOSEPH FUCITO, in his official capacity as Sheriff of New York City, New York, MARGARET GARNETT, in her official capacity as Commissioner of the New York City Department of Investigation, and CAROLINE TANG-ALEJANDRO, in her official capacity as Director, Bureau of Marshals, New York City Department of Investigation. The claims against these additional Defendants were dismissed for failure to state a claim against them, and Applicants have not appealed from that dismissal.[1]

DECISIONS BELOW

The decisions in this case in the lower courts are styled *Chrysafis v. Marks*. The order of the United States Court of Appeals for the Second Circuit, dated July 26, 2021, denying Applicants' motion for an injunction pending appeal is attached hereto as Exhibit A. The text order of the United States District Court for the Eastern

[1] The caption of the Second Circuit's July 26 order in this case erroneously identifies these other Defendants as "Defendants-Appellees" in the court of appeals. Ex. A. That order also erroneously identifies certain non-parties who appeared as *amici* in the district court as "Plaintiffs." *Ibid.* Those errant party designations are the result of a docketing error that Applicants have brought to the attention of the court of appeals. *See* Ct. App. Dkt. No. 22.

District of New York, dated June 15, 2021, denying Applicants' motion for an injunction pending appeal is attached hereto as Exhibit B. The final judgment entered by the Clerk of the United States District Court for the Eastern District of New York, dated June 14, 2021, is attached hereto as Exhibit C (the "Final Judgment"). The order of the United States District Court for the Eastern District of New York, dated June 11, 2021, denying Applicants' motion for a preliminary injunction and directing entry of a final judgment on the merits in favor of Respondent is attached hereto as Exhibit D (the "District Court Order") and is also available at 2021 WL 2405802. The District Court Order has been designated for publication in the Federal Supplement, but a reporter citation is not yet available. The District Court Order and Final Judgment are on appeal in the circuit court. The transcript of the district court's evidentiary hearing on Applicants' motion for a preliminary injunction, which was converted into a trial on the merits, is attached hereto as Exhibit E. The docket number in the United States District Court for the Eastern District of New York is 21-cv-2516, and the docket number in the United States Court of Appeals for the Second Circuit is 21-1493.

JURISDICTION

Applicants have a pending appeal in the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1291. This Court has jurisdiction, pursuant to 28 U.S.C. § 1651.

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**TO THE HONORABLE SONIA SOTOMAYOR,
ASSOCIATE JUSTICE OF THE SUPREME COURT AND
CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:**

Pursuant to Rules 20, 22, and 23 of the Rules of this Court, and 28 U.S.C. § 1651, Applicants Pantelis Chrysafis, Betty S. Cohen, Brandie LaCasse, Mudan Shi, Feng Zhou, and Rent Stabilization Association of NYC, Inc. ("Applicants") respectfully request issuance of an injunction barring enforcement of Part A of New York State's COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 pending appeal.[2] CEEFPA allows any tenant in New York State (the "State") to block eviction proceedings simply by submitting an unsworn "hardship declaration" that the landlord cannot contest. This law runs roughshod over property owners' constitutional rights to procedural due process and free speech, and it should be immediately enjoined—especially since Governor Cuomo has lifted virtually all other pandemic-related restrictions and formally declared an end to the State's COVID-19 "state of emergency."

As the district court found following an evidentiary hearing, the small property owner landlords who are the Applicants here have been devastated by New York's ongoing eviction moratorium and are themselves facing "significant hardship as a result." Dist. Ct. Order at 6. Indeed, a number of them are desperate to move into their properties, and at least one is now effectively homeless as a result of this continuing eviction moratorium. They require immediate relief to end CEEFPA's ongoing violations of their due process and free speech rights, so that they can reclaim

[2] The challenged eviction moratorium law (Part A of CEEFPA, as extended on May 4, 2021) is referred to throughout as "CEEFPA."

their private properties that are currently occupied by non-paying and holdover tenants—including some who stopped paying rent well before the COVID-19 pandemic or are causing damage to the property.

As this Court reaffirmed just last month, "the protection of private property is indispensable to the promotion of individual freedom," as "property must be secured, or liberty cannot exist." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (citation and alteration omitted). Yet under CEEFPA, property owners are deprived of their real property interests without *any* process in place to guard against erroneous deprivations, in clear contravention of their due process rights. Instead, once a tenant fills out and submits an unsworn "hardship declaration"—that is, once the tenant checks a box stating that he or she is suffering from "financial hardship" due to COVID-19—no new eviction proceedings can be commenced, and any eviction proceedings are automatically "stayed," until at least August 31, 2021. The State extended the eviction moratorium in early May 2021—after the pandemic was already waning in the State—and may do so again. Moreover, a tenant's unilateral assertion of "hardship" need not be substantiated, the basis for the asserted hardship need not be specified, and owners are not provided with *any* opportunity to challenge or rebut their tenants' hardship claims until CEEFPA expires. "[F]airness can rarely be obtained" through this sort of "secret, one-sided determination of facts decisive of rights." *Connecticut v. Doehr*, 501 U.S. 1, 14 (1991) (citation omitted). Indeed, even after CEEFPA expires, the unsworn hardship declaration creates a "rebuttable presumption" of hardship in any eviction proceeding based on a tenant's failure to

pay rent during the pandemic—again, despite the fact that the tenant need not provide supporting evidence or even specify the purported basis for the hardship claim that the owner must somehow rebut.

Even as the district court here denied these Applicants' request for injunctive relief, it acknowledged that this case "might appear to raise due process concerns" under *Mathews v. Eldridge*, 424 U.S. 319 (1976). Dist. Ct. Order at 13. But the court held, wrongly, that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and other substantive due process cases prevented it from "second-guess[ing]" the New York Legislature's decision to extend CEEFPA through at least August 31, 2021. Dist. Ct. Order at 18-19. Although Applicants promptly filed an emergency motion for an injunction pending appeal in the Second Circuit, that court waited more than five weeks before denying the motion for an unspecified "fail[ure] to meet the requisite standard," Ex. A, thereby allowing the district court's error to stand and prolonging the irreparable harm that Applicants are being forced to endure.

In the months since this Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), there has been widespread confusion among lower courts across the country with respect to whether and how *Jacobson* continues to apply to pandemic-related regulations. Some courts, as here, have continued to interpret *Jacobson* as requiring effectively blanket judicial deference to measures justified by asserted "emergency" public health needs; others have properly applied traditional constitutional analysis in lieu of any special "*Jacobson* deference"; and still others have undertaken both analyses in parallel.

Indeed, as one district court put it, the question of *Jacobson*'s continuing relevance has been "bedeviling federal courts during the pandemic." *Oakes v. Collier Cty.*, 2021 WL 268387, at *2 n.4 (M.D. Fla. Jan. 27, 2021).

Following this Court's directive in *Roman Catholic Diocese*, the correct answer should have been that, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese*, 141 S. Ct. at 68. Thus, courts must continue to employ traditional modes of constitutional analysis, even when evaluating claims during an asserted emergency. *See id.* at 66-67. Even *Jacobson* itself emphasized that a State's "discretion" to act in the interest of public health and safety must be "subject, of course, . . . to the condition that no rule prescribed by a state . . . shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." 197 U.S. at 25; *see also Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring) ("*Jacobson* hardly supports cutting the Constitution loose during a pandemic."); *id.* at 74 (Kavanaugh, J., concurring) ("[J]udicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised."). Put simply, the government's invocation of an emergency cannot justify the desertion of foundational constitutional principles in favor of blind deference to the State. Yet that is what the lower courts have allowed to occur here.

The constitutional violation here is even more acute because, leaving aside the *Jacobson* error, the COVID-19 pandemic can no longer justify the continued

enforcement of CEEFPA at the expense of these Applicants' constitutional rights (if it ever could have). As Governor Cuomo declared when he fully reopened New York State last month, "We're no longer just surviving—we're thriving." Virtually all other pandemic-related restrictions have been lifted in New York, including in almost every conceivable gathering place, from bars and restaurants to sports stadiums and music venues. Even New York's courts are fully staffed and operating at normal capacity. The State cannot declare that the emergency is over, on the one hand, and continue to use that same "emergency" to justify the ongoing implementation of a law that infringes upon its citizens' constitutional rights, on the other. The asserted State interest has therefore "expired according to its own terms." *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). As the country moves into its post-pandemic future, it is all the more imperative that this Court clarify that laws originally justified on the basis of a public health emergency cannot evade traditional constitutional analysis, particularly once the State—as New York has done here—declares the emergency to be over within its borders.

In addition to this indisputably clear due process violation, CEEFPA also violates these Applicants' First Amendment rights by compelling landlords to "speak a particular message" that they do not support and would not otherwise convey. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Under CEEFPA, landlords are obligated to provide tenants with a government-drafted notice and declaration form instructing the tenants on how to take advantage of the moratorium by claiming "hardship," thereby forestalling eviction and evading paying

rent. Landlords are further obligated to provide these tenants with a government-curated list of legal service providers who are available to assist tenants in avoiding eviction. In both instances, the government is commandeering private citizens to speak in service of a moratorium scheme that is directly adverse to their interests in reclaiming their private property. Strict scrutiny applies and, as in the *Roman Catholic Diocese* case, the State cannot carry its burden of proving that the law is narrowly tailored to a compelling government interest. Indeed, there are numerous less restrictive alternatives—including the government itself circulating and publishing this message, declaration form, and legal service provider list—that "would communicate the desired information to the public without burdening [Applicants] with unwanted speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988).

Applicants here include an immuno-compromised Air Force veteran and single mom who was living with her fiancé, broke up with him, and is now effectively homeless because she cannot obtain possession of her own house, which remains occupied by non-paying holdover tenants; an immigrant couple who can no longer afford to put a roof over their family's heads and wish to retake possession of their house to live in it; the owner of a single-family home who obtained an eviction warrant before the pandemic and has wanted to sell his property ever since; and a retiree on a fixed income who can no longer cover the ongoing expenses of her deteriorating property's ownership. As the district court found (Dist. Ct. Order at 2, 6), with each passing day, the "irreparable" and "significant hardship" confronting these

Applicants grows, as they continue to suffer these harms—and continue to be deprived of their constitutional rights to due process and free speech, and of their right to access their own properties—while their tenants are living on the properties rent-free. Meanwhile, there is no governmental or public interest in continuing to enforce an unconstitutional law premised on a public health emergency that the State itself has now announced is over. This is particularly so, given that the modest injunctive relief sought here would merely open the courthouse door to give these Applicants a chance to be *heard*, without directing any particular outcome in a particular case.[3]

Applicants therefore respectfully request that the Circuit Justice—or the full Court after referral—grant this application to enjoin Part A of CEEFPA, as extended, pending disposition of Applicants' expedited appeal in the United States Court of Appeals for the Second Circuit and disposition of any petition for a writ of certiorari and, if such writ is granted, until the rendering of this Court's judgment.

[3] The circumstances here stand in stark contrast to those in *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2320 (2021), in which this Court, by a 5-4 vote, declined to vacate a stay pending appeal after the court of appeals observed that the applicants had made only "conclusory reference to general financial harms" in prosecuting and appealing a statutory claim challenging far more limited federal eviction protections. *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 2021 WL 2221646, at *3 (D.C. Cir. June 2, 2021) (per curiam). Here, by contrast, Applicants have identified indisputably clear violations of their express constitutional rights, *and* have made an ample "showing"—recognized by the district court as a matter of fact (Dist. Ct. Order at 12)—as to the specific, crippling irreparable harms that they are being forced to endure on account of CEEFPA. Indeed, the immediate, irreparable harm is manifest.

STATEMENT OF THE CASE

A. New York's "Temporary" Eviction Moratoria In The Wake Of COVID-19.

Prior to the COVID-19 pandemic, tenants could be evicted pursuant to New York's Real Property Actions and Proceedings Law ("RPAPL") for, *inter alia*, violating the terms of their leases—including by failing to pay rent or holding over beyond the stated lease term—or creating a nuisance. *See* RPAPL § 711. On March 20, 2020, Governor Cuomo issued Executive Order No. 202.8, which prohibited the enforcement of evictions of residential and commercial tenants for 90 days. Dist. Ct. Dkt. No. 14-4. On May 7, 2020, via Executive Order No. 202.28, Governor Cuomo extended the moratorium through August 19, 2020, prohibiting both the initiation of proceedings and the enforcement of eviction warrants against tenants who were "eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic." Dist. Ct. Dkt. No. 14-5.

On June 30, 2020, the State enacted the Tenant Safe Harbor Act ("TSHA"), which further extended the eviction moratorium as to residential properties. Dist. Ct. Dkt. No. 14-6. The TSHA "prohibit[s] the eviction of residential tenants who have suffered financial hardship during the COVID-19 covered period." *Ibid.* However, it does not bar eviction proceedings. Rather, it provides that tenants "may raise financial hardship . . . as a defense in a summary proceeding." *Id.* § 2(2)(a). Under the TSHA, "[i]n determining whether a tenant . . . suffered a financial hardship during the COVID-19 covered period," the court is to consider, among other factors, a tenant's income prior to and during the pandemic; a tenant's liquid assets; and a

tenant's eligibility for public assistance benefits. *Id.* § 2(2)(b). But CEEFPA has effectively rendered the TSHA's financial hardship inquiry a dead letter by automatically staying all proceedings once a "hardship declaration" is submitted.

B. CEEFPA Extends And Expands New York's Eviction Moratorium.

Originally enacted on December 28, 2020, CEEFPA mandates that property owners must provide their tenants with a government-drafted "hardship declaration" before commencing eviction proceedings—or when serving a written rent demand or "any other written notice required by the lease" that would be a prerequisite to any such eviction proceedings. Ex. F ("CEEFPA Part A") § 3; *see also id.* § 5 (requiring property owners to file a sworn affidavit of service, and a sworn affidavit attesting that the tenant did not return a hardship declaration, in order to commence proceedings). The statute further provides that, if a tenant submits a hardship declaration, eviction proceedings against the tenant—both pending and new—must be stayed. *Id.* §§ 4, 6. The submission of a hardship declaration also stays the execution of any previously issued eviction warrants. *See id.* § 8(a)(ii). There is no exception unless the owner "establish[es]" that the tenant is causing a nuisance affecting other tenants or a "substantial" safety hazard to others. *Id.* § 9. The State extended CEEFPA on May 4, 2021, such that these stays will remain in effect "until at least August 31." Ex. G ("CEEFPA Extension").

The mandatory "pre-eviction notice" that landlords are forced to provide to their tenants consists of (1) the "hardship declaration," which includes a notice explaining to tenants that a completed, signed declaration form will bar any eviction proceedings until at least August 31, 2021; (2) "a list of all not-for-profit legal service

providers actively handling housing matters in the county where the subject premises are located," prepared by the Office of Court Administration; and (3) contact information that the tenant "can use to contact the landlord and return the hardship declaration." CEEFPA Part A §§ 1(4), 3.

While the Office of Court Administration is obligated to produce translated hardship declarations in "Spanish and the six [next] most common languages in the City of New York," *id.* § 10, it is "the landlord's responsibility to obtain a suitable translation of the hardship declaration in the tenant's primary language," if that language is not one of the seven, *id.* § 3. Nothing in the law authorizes property owners to obtain reimbursement for the associated expenses, nor does CEEFPA free them from the anti-discrimination laws that otherwise forbid landlords from inquiring about their tenants' national origin.

The hardship declaration begins with a "NOTICE TO TENANT." *Id.* § 1(4); Ex. H. That notice states that, "[i]f you have lost income or had increased costs during the COVID-19 pandemic . . . and you sign and deliver this hardship declaration form to your landlord, you cannot be evicted until at least [August 31, 2021] for nonpayment of rent or for holding over after the expiration of your lease." *Ibid.*; CEEFPA Extension § 1. The declaration form itself offers two "option[s]" via which tenants can effectuate a stay of existing eviction proceedings or a suspension of new proceedings—namely, asserting that they are "experiencing financial hardship" or that "moving . . . would pose a significant health risk" related to the pandemic. CEEFPA Part A § 1(4); Ex. H. The declaration invites the tenants to "select[]" either

or both "option[s]" by checking a box, with no further explanation or supporting documentation required. *Ibid.* Although the hardship declaration form contains another "notice" clause informing the tenant that he or she is "signing and submitting this form under penalty of law," *ibid.*, the declaration does not need to be signed under penalty of perjury.

There are five enumerated grounds for the financial hardship option: (1) a "[s]ignificant loss of household income," (2) increased "necessary out-of-pocket expenses related to performing essential work or related to health impacts," (3) "[c]hildcare [or other familial care] responsibilities . . . negatively affect[ing]" the tenant's ability "to obtain meaningful employment" or causing "increased . . . necessary out-of-pocket expenses," (4) "[m]oving expenses and difficulty . . . securing alternative housing," or (5) a catch-all category of unspecified "[o]ther circumstances related to . . . COVID-19" that have "negatively affected" the tenant's "ability to obtain meaningful employment or earn income," or that have "significantly reduced [the tenant's] household income or significantly increased . . . expenses." *Ibid.* Tenants are not required to identify which subcategory purportedly applies to them. *Ibid.*

In addition to staying proceedings, the submission of a hardship declaration claiming financial hardship also creates a "rebuttable presumption that the tenant is experiencing financial hardship" under the TSHA, an executive order, or any other state or local law restricting evictions based on asserted "financial hardship during or due to COVID-19." CEEFPA Part A § 11. This rebuttable presumption extends

indefinitely. *See id.* § 13 (excluding the rebuttable presumption from CEEFPA's sunset provision); CEEFPA Extension § 5 (same).

C. New York Ends Its State Of Emergency.

As the district court acknowledged, as of June 11, 2021, "65% [of] adults in New York State ha[d] received at least one vaccination, and the statewide positivity rate ha[d] hit a new low." Dist. Ct. Order at 13. Days later, the State achieved its goal of a 70% vaccination rate, lifted virtually all remaining COVID-related restrictions, and celebrated the State's emergence from the pandemic with fireworks displays at ten locations throughout the state.[4] On June 24, Governor Cuomo declared an end to the "state disaster emergency" based on "New York's dramatic progress against COVID-19, with the success in vaccination rates, and declining hospitalization and positivity statewide."[5]

D. Small-Scale Property Owners Continue To Be Irreparably Harmed By The Eviction Moratorium.

Applicant Master Sergeant Brandie LaCasse is a retired military veteran who served in the Air Force for 24 years. Ex. E at 23:14-24:14. She has a service-connected disability that renders her immuno-compromised. *Id.* at 23:22-23. She is also a single mother who owns and manages six single-family homes in New York. *Id.* at 25:9-10, 26:17-27:17. In November 2020, she decided to sell one of those

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[4] *See* Ex. M; *Governor Cuomo Announces State Landmarks to Be Lit Blue and Gold and Firework Displays Across the State in Recognition of Reaching 70% of Single Dose Vaccinations* (June 15, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-state-landmarks-be-lit-blue-and-gold-and-firework-displays-across.

[5] *Governor Cuomo Announces New York Ending COVID-19 State Disaster Emergency on June 24* (June 23, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-ending-covid-19-state-disaster-emergency-june-24.

properties, a single-family house in Rhinebeck, New York. *Id.* at 29:7-30:10. Accordingly, she served her tenants with a notice of nonrenewal pursuant to the terms of the lease. *Id.* at 30:6-10. In response, the tenants stopped paying rent altogether, and they have refused to vacate the property even though the lease term has expired. *Id.* at 36:5-14. Master Sergeant LaCasse filed a holdover proceeding against the tenants in December 2020, but that proceeding was immediately dismissed because she had not provided her tenants with a hardship declaration. *Id.* at 36:9-14, 37:11-15.

Immediately thereafter, the tenants completed a hardship declaration form, claiming hardship in connection with their need for childcare. Ex. J ¶¶ 6-7 (citing Ex. A thereto). However, there is no indication that the tenants' childcare situation has been affected by COVID-19. Ex. E at 42:7-14. Moreover, the tenants have violated numerous lease terms, causing significant property damage and triggering multiple police calls in response to their conduct. *Id.* at 30:18-31:5, 32:18-24. And yet, their mere submission of the hardship declaration—containing dubious representations that Master Sergeant LaCasse is not allowed to dispute—has barred her from even *commencing* eviction proceedings until at least August 31, 2021. Her tenants' conduct does not qualify for CEEFPA's nuisance exception because it does not affect others, as they occupy a single-family house on the property. *Id.* at 31:9-20. In a last-ditch effort, she filed an ejectment proceeding in May 2021, *id.* at 44:13-17, but the Attorney General's Office has since confirmed that "actions sounding in ejectment are covered by [CEEFPA]," Dist. Ct. Dkt. No. 66.

To make matters worse, Master Sergeant LaCasse's ex-fiancé recently asked her and her daughter to move out of his home. *Id.* at 27:19-20, 28:4-8. Unable to secure the financing she would need to purchase a new residence, she intended to move into the Rhinebeck property—the only one of her properties in which the current occupants' lease has expired—but the non-paying tenants still refuse to leave. Ex. J ¶ 14; Ex. E at 35:7-12. As a result, she and her daughter are effectively homeless. Ex. E at 48:15-19.

Applicants Mudan Shi and Feng Zhou are a married couple who own a single-family home, which they currently rent to tenants, in Staten Island, New York. Ex. K ¶ 1. The rental income from that house helps Ms. Shi and Mr. Zhou cover the rent on the leased home in which they reside with their two young children and three elderly parents. *Id.* ¶¶ 1, 3. Roughly one year before the pandemic, their tenants stopped paying rent. *Id.* ¶ 4. Ms. Shi and Mr. Zhou are now owed $57,600 in rent arrears and lack the necessary income that had allowed them to maintain the property while also paying their own rent. *Id.* ¶¶ 11-12. They commenced a non-payment action in October 2019—well before the coronavirus pandemic—and obtained a judgment. *Id.* ¶ 6. However, before that judgment could be enforced, the proceeding was stayed as a result of the State's eviction moratoria, and it remains stayed all these months later on account of CEEFPA. *Id.* ¶¶ 6, 9. Thus, even though their tenants' lease has expired and the tenants have not paid rent for two-thirds of the lease term (for reasons completely unrelated to COVID-19), Ms. Shi and Mr. Zhou

cannot move their own family into the house, forcing them to continue to rent a separate property that they can no longer afford. *Id.* ¶ 12.

Applicant Pantelis Chrysafis is the owner of a single-family home, located in Garden City, New York, that he rents to tenants. Ex. L ¶¶ 1, 3. In early 2019, Mr. Chrysafis informed the tenants that he intended to sell the house and that they would have a number of months to find a new residence. *Id.* ¶ 6. Instead of moving out, the tenants simply stopped paying rent. *Ibid.* In the spring of 2019—a year before the pandemic—Mr. Chrysafis was forced to hire an attorney to seek back rent. *Id.* ¶ 7. The parties temporarily settled, but the tenants failed to pay rent again in December 2019 and January 2020. *Id.* ¶ 8. In February 2020, still before the pandemic hit New York, Mr. Chrysafis obtained a judgment for unpaid rent, along with an eviction warrant ordering the tenants to vacate by April 1, 2020. *Ibid.* However, days before New York shut down, Mr. Chrysafis agreed to a month's extension to allow the tenants more time to find a suitable alternative residence. *Id.* ¶ 9. The tenants remain in the home to this day—and they now have not paid rent for almost a year and a half, totaling more than $80,000 in arrears. *Id.* ¶¶ 10, 15. As a result, Mr. Chrysafis has been forced to borrow money from his elderly parents to stay afloat, and the situation has caused unending strife within his family, including a near-divorce. *Id.* ¶¶ 11-12.

Applicant Betty S. Cohen is the owner of a single co-op unit, located in Brooklyn, New York, that she currently rents to a tenant. Ex. I ¶ 1; Ex. E at 61:5-62:13. Ms. Cohen is a retiree whose income is limited to the rent on the co-op unit

and her Social Security benefits. Ex. E at 61:11-14. In March 2020, Ms. Cohen's tenant stopped paying rent. *Id.* at 64:1-5. In September 2020, Ms. Cohen sent a notice of late payment and attempted to initiate an eviction proceeding, but the housing court has not even acknowledged the filing. *Id.* at 68:3-13. The lease expired altogether in December 2020. Ex. I ¶ 2.

On February 4, 2021, the tenant submitted a hardship declaration form, checking the box for financial hardship. *Id.* ¶ 7. He currently owes Ms. Cohen over $24,720 in unpaid rent, an amount that increases every month. Ex. E at 63:25-64:5. As a result, Ms. Cohen has been forced to ask friends for donations to help make ends meet. *Id.* at 67:3-10. Ms. Cohen is in dire need of immediate access to housing court. *See id.* at 65:18-21. CEEFPA stands in her way.

E. Procedural History.

On May 6, 2021, two days after the CEEFPA Extension was signed into law, Applicants filed this action and moved for a temporary restraining order and preliminary injunction.[6] The district court held an evidentiary hearing on June 1. Applicants LaCasse and Cohen testified regarding CEEFPA's devastating impacts, including on their ability to collect essential income and repossess their properties. *See, e.g.*, Ex. E at 32:25-34:4, 65:18-67:18. Declarations regarding Applicants Shi and Chrysafis were received into evidence in lieu of live testimony. *See* Exs. K, L. The State's sole live witness, the Chief Clerk of the New York City Civil Court, testified

[6] On February 24, 2021, some of the same Applicants brought suit challenging the original CEEFPA statute. *See Chrysafis v. James*, No. 21-cv-998 (E.D.N.Y.). That earlier lawsuit was dismissed on technical proper party grounds, without a decision on the merits. *See Chrysafis v. James*, 2021 WL 1405884 (E.D.N.Y. Apr. 14, 2021).

that the courts "have returned 100 percent of their staff," "[t]he majority of our court operations . . . are in the courtroom," and litigants without access to technology at home are permitted in the courtroom. Ex. E at 113:21-23, 115:18-116:7.

On June 11, 2021, the district court denied Applicants' preliminary injunction motion, which was consolidated with the merits of the underlying action, and directed entry of a final judgment on the merits in favor of Respondent. Dist. Ct. Order at 2, 26. The district court correctly found that Applicants "satisfactorily demonstrated a risk of irreparable harm" from both the ongoing deprivation of their constitutional rights and their evidentiary "showing" as to CEEFPA's crippling effects. *Id.* at 2, 6-8, 11-12. However, repeatedly deferring to the State's asserted "public health" interest, the district court held that Applicants' constitutional claims were unlikely to succeed and that the equities weighed against the issuance of an injunction. *Id.* at 2, 23-24. On June 14, the Clerk of the Court entered final judgment in favor of Respondent. Ex. C.

On June 14, Applicants moved before the district court for an injunction pending appeal, which application was denied on June 15. Ex. B. On June 16, Applicants filed a notice of appeal from the District Court Order and the Final Judgment and, two days later, moved for an injunction pending appeal before the Second Circuit.[7] That motion was considered first by a single judge, who declined to enter a "temporary injunction pending review by a three-judge panel" and referred

[7] Applicants did not appeal from the district court's Rule 12(b)(6) dismissal of their claims against certain other Defendants. *See* Dist. Ct. Order at 24, 26.

the matter to a motions panel. Ct. App. Dkt. No. 48. The merits appeal was expedited, *ibid.*, with briefing to be completed by August 27 and argument to be scheduled "on an expedited basis," Ct. App. Dkt. No. 72. On July 26, more than five weeks after the emergency motion was filed, the court of appeals summarily denied that motion based on Applicants' purported "fail[ure] to meet the requisite standard." Ex. A.

In light of the severe, ongoing nature of the constitutional violations and the irreparable nature of the harms resulting therefrom, Applicants now seek emergency equitable relief from this Court.

REASONS FOR GRANTING THE APPLICATION

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the full Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted). The Court also has discretion to issue an injunction "based on all the circumstances of the case," without its order "be[ing] construed as an expression of the Court's views on the merits" of the underlying claim. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014). The Court has previously granted emergency injunctive relief, on applications brought under the All Writs Act, where the applicants have "shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest."

Roman Catholic Diocese, 141 S. Ct. at 66. A Circuit Justice or the full Court may also grant injunctive relief "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (considering whether there is a "fair prospect" of reversal).

I. The Violations Of Applicants' Constitutional Rights Are Indisputably Clear, Applicants Are Therefore Likely To Succeed On The Merits, And The Lower Courts' Contrary Decisions Exacerbate Confusion On A Constitutional Issue Of Nationwide Importance.

A. CEEFPA Indisputably Violates Applicants' Procedural Due Process Rights.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. That requirement means exactly what it says. As this Court has explained, "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause." *Mathews*, 424 U.S. at 332. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 333 (citation and internal quotation marks omitted).

CEEFPA deprives Applicants of their procedural due process rights by mandating that a tenant's mere submission of a hardship declaration establishes a categorical bar to the commencement or continuation of an eviction proceeding until at least August 31, 2021. CEEFPA Part A §§ 4-6, 8; CEEFPA Extension §§ 2-3. Property owners are given no opportunity to rebut tenants' hardship declarations, for

which tenants need only check a box asserting that eviction would result in either a "significant health risk" or a "financial hardship" to the tenants, with the latter category covering several vague and undefined subcategories. Property owners are not given a chance to be heard at a "meaningful time" or in a "meaningful manner," because they are not given a chance to be heard *at all* through at least August 31, 2021, with further extensions possibly to follow. And even when CEEFPA eventually expires, a tenant's unsubstantiated claim of financial hardship creates an *indefinite* rebuttable presumption of such hardship in any eviction proceedings that are based on failure to pay rent during the pandemic. CEEFPA Part A § 11.

It is indisputably clear that CEEFPA violates Applicants' procedural due process rights. Indeed, the district court readily acknowledged that Applicants "seemingly lack recourse to challenge the hardship declarations" while CEEFPA is in effect and that they have suffered irreparable harm as a result. Dist. Ct. Order at 10-13. However, relying on this Court's decision in *Jacobson* and other substantive due process cases to assess whether CEEFPA survives rational basis review, the court refused to "second-guess" the State's decision to impose and extend CEEFPA through August 31. Dist. Ct. Order at 18-19. In so doing, the court erroneously cast aside the ordinary mode of constitutional analysis, ignoring this Court's recent admonition that "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese*, 141 S. Ct. at 68. The district court's decision—left undisturbed by the Second Circuit's summary denial of Applicants' motion for an injunction pending appeal—also deepened an existing division among the lower courts regarding

Jacobson's application to pandemic-related constitutional challenges in the wake of *Roman Catholic Diocese*, an issue of immense constitutional importance as the Nation navigates and recovers from the pandemic.

1. The Hardship Declaration Provisions Violate Due Process.

While due process is "not a technical conception . . . unrelated to time, place and circumstances," this Court has adopted a "familiar threefold inquiry" for assessing what process is due when the government seeks to alter procedures in private disputes to provide one party "the overt, significant assistance of state officials." *Doehr*, 501 U.S. at 10-11 (citation and internal quotation marks omitted). That inquiry considers: (1) the private interest affected by the official action; (2) the "risk of an erroneous deprivation of such interest" via the existing procedures, and "the probable value, if any, of additional or substitute safeguards"; and (3) the interest of the party seeking the procedure, with "due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Ibid.* (quoting *Mathews*, 424 U.S. at 335). For purposes of the first *Mathews* factor, the focus is on "the *erroneously* [deprived] individual," rather than on those for whom the deprivation may have been justified irrespective of the procedures afforded. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality op.) (emphasis in original).

The private interest impacted by CEEFPA is of the highest order: Applicants' right to regain possession of and maintain control over their own real property. In the civil forfeiture context, this Court has observed that this private interest is of "historic and continued importance." *United States v. James Daniel Good Real Prop.*,

510 U.S. 43, 53-54 (1993); *see also Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) (Sotomayor, J.) ("The deprivation of real or personal property involves substantial due process interests."). And, just last month, the Court reaffirmed that "protection of property rights is necessary to preserve freedom and empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Cedar Point Nursery*, 141 S. Ct. at 2071 (citation and internal quotation marks omitted).

It is indisputably clear that CEEFPA deprives Applicants of their due process rights with respect to these core property interests, because it fails to provide any process at all. Once a tenant submits a hardship declaration in a pending proceeding—including one commenced before the pandemic—the proceeding "shall be stayed" until at least August 31, 2021. CEEFPA Part A § 6; CEEFPA Extension § 2. The owner's hands are completely tied: Tenants are not required to submit any proof of their claimed hardships, and Applicants and other property owners are given no opportunity to present contrary evidence. Those same rules apply even if the court had already issued an eviction warrant before CEEFPA took effect. *See* CEEFPA Part A § 8. For landlords who have not yet initiated eviction proceedings, the submission of a hardship declaration precludes them even from *commencing* such a proceeding in the first place, *see* CEEFPA Part A § 4—even though, as the State's own witness testified, it takes an average of four to six months following the

commencement of the proceeding for an eviction warrant to be executed. Ex. E at 122:18-123:3.[8]

The only exception to this sweeping stay of eviction proceedings is CEEFPA's narrow nuisance exception, which does not apply to Applicants here. *See* Ex. E at 31:9-20. Thus, as the district court put it, Applicants "lack recourse to challenge the hardship declarations" while CEEFPA is in effect, Dist. Ct. Order at 13, based purely on tenants' say-so. That is not due process, but rather "no process at all." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

CEEFPA has thus deprived Applicants of "valuable rights of ownership," *James Daniel*, 510 U.S. at 54, including the ability to personally inhabit or sell their properties, or collect rent. Ex. E at 33:2-35:6, 65:21-67:18; Ex. K ¶ 12; Ex. L ¶ 6. Instead, Applicants are left only with the ability to pursue those rights at an "unscheduled future hearing," *James Daniel*, 510 U.S. at 54, after CEEFPA expires on August 31, 2021 (at the earliest), with its rebuttable presumption continuing indefinitely thereafter. Erroneous deprivation of such foundational property rights works a grave injury on Applicants and other New York property owners.

CEEFPA is also likely to result in erroneous deprivations because "the procedures used," *Doehr*, 501 U.S. at 10, to determine whether an eviction proceeding will be barred or halted are essentially nonexistent. A tenant's unilateral submission of a hardship declaration halts an eviction proceeding or prevents one from beginning.

[8] The State's witness further acknowledged that, even when a landlord obtains a judgment of nonpayment, there are many instances in which the tenant does not ultimately satisfy that judgment, meaning property owners may *never* be made whole for the rent lost because of CEEFPA. *See* Ex. E at 123:10-124:22.

Compounding that lack of process, CEEFPA's hardship declaration categories are themselves vague, capacious, and undefined. For example, CEEFPA permits tenants to declare financial hardship based on "[o]ther circumstances related to the COVID-19 pandemic" that have "negatively affected" their "ability to obtain meaningful employment or earn income," or that have "significantly reduced" household income or "significantly increased" expenses. CEEFPA Part A § 1(4). None of these terms is defined, and all of them are hopelessly vague. Worse still, the tenant does not need to indicate whether he or she is relying on this catch-all "other" category or on one of the other enumerated (though similarly vague) "financial hardship" criteria; the tenant makes the eligibility determination unilaterally and then can simply check a box claiming general "financial hardship," without specifying the claimed statutory basis. And while tenants purport to submit their declarations under "penalty of law," *ibid.*, there is no way to test their claims because property owners are unable to challenge them.

Thus, the only "procedures" safeguarding owners from erroneous deprivations of their property rights are tenants' subjective determinations as to whether they fall within one of the hardship declaration's vague categories. It is well-settled that "fairness can rarely be obtained by secret, one-sided determination[s] of facts decisive of rights." *Doehr*, 501 U.S. at 14 (citation omitted).

The State's asserted interest in responding to the COVID-19 pandemic—and tenants' related interest in avoiding eviction—cannot possibly provide a basis for completely denying Applicants the right to be heard for the duration of the emergency

and beyond. As a plurality of this Court has observed, "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment" to those principles. *Hamdi*, 542 U.S. at 532; *see also Roman Catholic Diocese*, 141 S. Ct. at 74 (Kavanaugh, J., concurring) (cautioning that "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication"). The countervailing interests asserted here are all the less weighty now that the pandemic in New York has waned and the State has lifted essentially all other pandemic-related restrictions.[9]

Nor is CEEFPA saved from its constitutional infirmities by the fact that it will eventually expire. This Court has made clear that "temporary or partial impairments to property rights . . . are sufficient to merit due process protection." *Doehr*, 501 U.S. at 12; *see also Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972) ("[I]t is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment."). The undisputed evidence—as the district court recognized—demonstrates that Applicants have been deprived of their rights for months or years without any legal recourse, Dist. Ct. Order at 8, and CEEFPA ensures that they will continue to be deprived of those rights until "at least August 31, 2021." These longstanding impairments of Applicants' real property rights are

[9] To the extent the State's interest is purportedly rooted in concerns about burdening the court system itself, *see* Ct. App. Dkt. No. 34 at 2, CEEFPA's extension will only exacerbate the issue by increasing the backlog of stalled or barred proceedings—which, in turn, will only further extend the period during which Applicants are effectively locked out of court.

clearly "sufficient to merit due process protection." *Doehr*, 501 U.S. at 12. CEEFPA utterly fails to protect those property interests, depriving Applicants and other owners of their foundational due process rights.[10]

2. The Erroneous Application Of *Jacobson* Below Deepened Disagreement In The Lower Courts On An Urgent Constitutional Issue Of Nationwide Importance.

This Court's due process jurisprudence, properly understood, leads inexorably to the conclusion that CEEFPA's hardship declaration procedures violate the Due Process Clause. Indeed, the district court expressly acknowledged that the facts Applicants put forward "might appear to raise due process concerns" under *Mathews*. Dist. Ct. Order at 13. Nevertheless, relying on *Jacobson*, the district court refused to "second-guess" the State's decision to extend CEEFPA until at least August 31, 2021. *Id.* at 18-19.[11] That deferential approach permeated the entire due process analysis; in fact, the district court headlined its opinion with a block quote from *Jacobson*. *Id.* at 1. By invoking *Jacobson*—and citing a host of other *substantive* due process cases to assess whether CEEFPA survives rational basis review, rather than applying the

[10] For essentially the same reasons, CEEFPA violates Applicants' right to access the courts under the First Amendment's Petition Clause. *See, e.g.*, *Bill Johnson's Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983). Although this Court need not reach Applicants' Petition Clause claim in order to grant this emergency application, Applicants expressly reserve their right to continue pursuing that claim in the lower courts, including in their pending appeal to the Second Circuit.

[11] The district court also erroneously concluded that CEEFPA "does not lend itself to review under *Mathews*" because CEEFPA's provisions "represent legislative, rather than adjudicative acts" under *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), and its progeny. Dist. Ct. Order at 13-15. That was a fundamental misconception of Applicants' due process challenge. Applicants do not challenge the process afforded with respect to the State Legislature's enactment of CEEFPA, but instead challenge the statute's *effect* of depriving Applicants and other owners of their property interests without due process. Tellingly, the State did not even attempt to defend the district court's application of *Bi-Metallic* in its briefing before the Second Circuit, *see* Ct. App. Dkt. No. 34, implicitly conceding that the analysis was erroneous.

more rigorous *Mathews* balancing test, *see id.* at 14-19—the district court erroneously displaced ordinary principles of constitutional analysis in favor of undue deference to the State.[12] It also perpetuated confusion among the lower courts as to *Jacobson*'s applicability to constitutional challenges following this Court's decision in *Roman Catholic Diocese*,[13] and the court of appeals allowed that confusion to deepen by

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[12] In addition to citing this Court's substantive due process precedent, *see E. Enters. v. Apfel*, 524 U.S. 498, 550 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-17 (1976); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 676 (1976), the district court relied on this Court's decisions under the Takings Clause, *see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341 (2002); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982), and the Contracts Clause, *see Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 236 (1978); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 198 (1921). None of these cases is relevant to Applicants' procedural due process claim here. To the extent the district court relied on three of this Court's wartime-era decisions that touch on procedural due process, those cases long predate *Mathews* and *Hamdi*, do not apply the modern due process test, and are materially distinguishable in ways that only serve to highlight the infirmities present in CEEFPA. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 416, 418, 425, 441-42, 447 (1934) (mortgage foreclosure moratorium allowed owners seeking protection to *apply to a court* for a discretionary extension of the redemption period; the court could revise or alter the terms of any such extension "as changed circumstances may require"; rental payments were required in the interim so as to give the mortgagor "the equivalent of possession"; and "the operation of the statute itself could not validly outlast the emergency"); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 243 (1922) (statute allowed tenants to hold over beyond the expiration of their leases "by the payment, or securing the payment, of a reasonable rental, to be determined by the courts"); *Block v. Hirsh*, 256 U.S. 135, 153-541, 158 (1921) (tenant's right to hold over was expressly conditioned on payment of rent; owner retained the ability to evict in order to repossess the property for personal use upon thirty days' notice; and the due process challenge—which the Court evaluated only for "reasonable[ness]"—went to whether a court or a jury would serve as the adjudicator).

[13] *Compare Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) (calling reliance on *Jacobson* "misplaced"), *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 470-71 (5th Cir. 2021) (Willett, J., concurring) ("*Jacobson* was decided 116 years ago. And I do not believe it supplies the standard by which courts in 2021 must assess emergency public health measures."), *Culinary Studios, Inc. v. Newsom*, 2021 WL 427115, at *12 (E.D. Cal. Feb. 8, 2021) (concluding, in a case involving a procedural due process claim, that "the normal constitutional standards of review should apply, not a separate '*Jacobson* standard,'" because "[a] public health emergency does not give rise to an alternative standard of review"), *Plaza Motors of Brooklyn, Inc. v. Cuomo*, 2021 WL 222121, at *5 (E.D.N.Y. Jan. 22, 2021) (applying "usual tiers of scrutiny" following *Roman Catholic Diocese*), *and Lawrence v. Polis*, 505 F. Supp. 3d 1136, 1143 (D. Colo. 2020) ("*Jacobson* does not mean that ordinary constitutional review of state action is suspended when that action is taken in response to a pandemic or other public-health emergency[.]"), *with Stewart v. Justice*, 2021 WL 472937, at *3 (S.D.W. Va. Feb. 9, 2021) ("Though it is clear that *Jacobson's* ultimate fate is unsettled, the Court declines to read the tea leaves of *Roman Catholic Diocese* and will follow the

(Cont'd on next page)

denying Applicants' emergency motion. As one district court put it earlier this year, the proper application of *Jacobson* has been "a question bedeviling federal courts during the pandemic." *Oakes*, 2021 WL 268387, at *2 n.4.

Neither *Jacobson* nor this Court's other substantive due process precedent supports abandoning regular constitutional rules in the presence of an emergency. *Jacobson* itself expressly cautions that a State's "discretion" to protect public health and safety is "subject, of course, . . . to the condition that no rule prescribed by a state . . . shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." 197 U.S. at 25. The plaintiff in *Jacobson* had alleged that a generally applicable vaccination law violated his liberty interests under the Constitution's Preamble and the Fourteenth Amendment. *Id.* at 22, 25-26, 29-30. The Court upheld the law because it was not "in palpable conflict with the Constitution." *Id.* at 31. But the Court was unequivocal in stating that where, as here, a law "violate[s] rights secured by the Constitution," it remains the "duty" of the courts "to hold such laws invalid." *Id.* at 28; *see also Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring) ("*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so.").

[*Jacobson*] rule adopted by a majority of courts."), *Hopkins Hawley LLC v. Cuomo,* 2021 WL 465437, at *5 (S.D.N.Y. Feb. 9, 2021) (acknowledging "doubts about *Jacobson*'s continuing viability," but concluding that its "deferential standard of judicial review is still applicable"), *Delaney v. Baker*, 2021 WL 42340, at *13 (D. Mass. Jan. 6, 2021) (applying both tiers of scrutiny and *Jacobson* to free exercise claims), *and Heights Apartments, LLC v. Walz*, 510 F. Supp. 3d 789, 808 (D. Minn. 2020) (stating that "the Court will apply *Jacobson*, but it does so bearing in mind the many arguments against doing so," and applying both *Jacobson* and "ordinary constitutional analysis" "for the sake of completeness"), *appeal filed*, No. 21-1278 (8th Cir. Feb. 5, 2021).

In addition to being legally unsound, judicial abdication of constitutional scrutiny during an emergency is dangerous. As Justice Jackson famously explained, the Framers intentionally "omitted" the "existence of inherent powers ex necessitate to meet an emergency." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring). "They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation." *Id.* at 650. The courts must not "distort the Constitution to approve all that [government officials] may deem expedient." *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting), *adopted by a majority of the Court in Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Indeed, "[t]he court of history has rejected [such] jurisprudential mistakes and cautions . . . against an unduly deferential approach." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting). The presence of a pandemic cannot justify abandonment of bedrock due process principles in favor of deference to the State.

Moreover, whatever appeal a blanket (albeit erroneous) application of *Jacobson* may have had during the early days of the pandemic, there is certainly no justification for relying on that case now that conditions have improved dramatically, with State officials removing virtually all other pandemic-related restrictions and declaring the emergency to be over, as is the case in New York. That is, the rationale for any additional deference has "expired according to its own terms." *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring); *see also Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) ("A law depending upon the existence of an

emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (similar). The district court acknowledged that "[t]he pandemic has evolved" in 2021, with 65% of adults in New York having received at least one dose of one of "several effective vaccines," and the statewide positivity rate hitting a "new low." Dist. Ct. Order at 13. Conditions in New York have improved even more since the district court's June 11 decision—to the point that Governor Cuomo lifted virtually all COVID-related restrictions on June 15, *see* Ex. M, and declared an outright end to the "state disaster emergency" as of June 24, *see supra* note 5. As other States similarly return to normal life, it is especially important for this Court to clarify the appropriate level of judicial scrutiny for evaluating regulations that States previously justified as "emergency" measures.

Put simply, the question here is whether CEEFPA deprives Appellants of their due process right "to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (citation and internal quotation marks omitted). Because Applicants "lack recourse to challenge the hardship declarations" while CEEFPA is in effect, Dist. Ct. Order at 13, and will be subject to a continuing rebuttable presumption thereafter, the answer to that question is plainly "yes." The due process violation is indisputably clear. It is thus likely that at least four Justices of this Court would vote to grant certiorari—especially given the confusion among lower courts on *Jacobson*, which is of immense national significance—and that a majority of the Court would hold that CEEFPA violates Applicants' procedural due process rights.

B. CEEFPA Indisputably Violates Applicants' Free Speech Rights.

The First Amendment's Free Speech Clause provides that the government "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (citation omitted). Therefore, the Free Speech Clause "prohibits the government from telling people what they must say," *ibid.* (citation omitted), and prevents the government from "interfer[ing] with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995).

When the government "mandat[es] speech that a speaker would not otherwise make," *Riley*, 487 U.S. at 795, or "compel[s] individuals to speak a particular message," thereby "alter[ing] the content" of an individual's speech, those "content-based regulations" are subject to strict scrutiny, *Becerra*, 138 S. Ct. at 2371 (citation omitted). Lesser scrutiny applies in cases involving "commercial speech, that is, expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-63 (1980). That is because of "the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Id.* at 562 (citation and internal quotation marks omitted).

"Strict scrutiny is a searching examination, and it is the government that bears the burden" of proof. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013). Specifically, the government must establish that the law is "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). Thus, "if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Ibid.*

Here, because CEEFPA mandates speech that Applicants would not otherwise make, and compels them to speak a particular message—outside the context of a proposed commercial transaction—strict scrutiny applies. And, because the State cannot possibly establish that CEEFPA's requirements are narrowly tailored to a compelling government interest, CEEFPA cannot withstand that strict scrutiny.

1. Strict Scrutiny Applies Because CEEFPA Compels Property Owners To Endorse Messages That They Oppose.

"Although the State may at times 'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information,' outside that context it may not compel affirmance of a belief with which the speaker disagrees." *Hurley*, 515 U.S. at 573 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). This rule extends "equally to statements of fact the speaker would rather avoid." *Ibid.*

Here, CEEFPA plainly compels landlords to "speak a particular message" that they would not otherwise convey. *Becerra*, 138 S. Ct. at 2371. The first page of the hardship declaration is a "NOTICE TO TENANT[S]," informing them that, "[i]f you have lost income or had increased costs during the COVID-19 pandemic . . . and you

sign and deliver this hardship declaration form to your landlord, you cannot be evicted" until the moratorium expires. Ex. H. By requiring landlords to supply (and, in some cases, translate) a notice instructing tenants on how to avoid their rental obligations and/or hold over beyond the expiration of their leases without risking eviction, the law compels and co-opts landlords' speech in service of the government's message.

CEEFPA also mandates that property owners include, with any hardship declaration, a State-curated list of legal service providers who are available to assist tenants in avoiding eviction. CEEFPA Part A § 3. CEEFPA thus forces owners to provide information about, and effectively recommend and vouch for, the organizations included on the list—despite the fact that they would not do so of their own volition because this information is directly adverse to their interests. *See Becerra*, 138 S. Ct. at 2371; *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding that a law requiring individuals to use their private property to broadcast a State message with which they disagree violates the First Amendment). Because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," CEEFPA imposes "a content-based regulation of speech" and is therefore subject to strict scrutiny. *Riley*, 487 U.S. at 795.

Nor do these compelled disclosures constitute commercial speech within the meaning of *Zauderer*. *Zauderer* applied lesser scrutiny to a "requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful," to avoid potential

deception as to the distinction between "fees" and "costs." 471 U.S. at 652. As this Court recently clarified, the "*Zauderer* standard" only applies when, as in *Zauderer* itself, the government mandates the disclosure of "purely factual and uncontroversial information about the terms under which [the speaker's] services will be available." *Becerra*, 138 S. Ct. at 2369, 2372. The compelled disclosures at issue here do not even remotely fit that bill. The government-drafted "notice" does not speak to the terms under which landlords will offer services to tenants; rather, it compels landlords to convey instructions on how *tenants* can *evade* the terms of existing (or expired) leases. And the government-curated list of legal service providers "in no way relates to the services that [Applicants] provide," but instead "requires these [Applicants] to disclose information" about separate legal services available elsewhere. *Becerra*, 138 S. Ct. at 2372 (holding that *Zauderer* "does not apply" to a law requiring pregnancy clinics to "disseminate a government-drafted notice" regarding the availability of state-sponsored abortion services). Strict scrutiny applies.

2. CEEFPA Fails Strict Scrutiny.

Because CEEFPA is subject to strict scrutiny, the government must prove that it is narrowly tailored to a compelling government interest. *See Playboy*, 529 U.S. at 813. The district court summarily concluded that, "even if" strict scrutiny applied, "the magnitude of the public health emergency overwhelmingly justifies this minuscule burden on plaintiffs." Dist. Ct. Order at 23. However, the State offered no evidence below that forcing property owners to supply this government-authored notice to tenants was the least restrictive means of serving the purported public health interest. Therefore, the government cannot possibly establish that the notice

is narrowly tailored. Indeed, "[t]he whole point of strict scrutiny is to test the government's assertions, and [this Court's] precedents make plain that it has always been a demanding and rarely satisfied standard." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.).

As a threshold matter, to the extent the purported compelling government interest in forcing landlords to provide the hardship declarations to tenants is tied to concerns about risks associated with evictions in a public health emergency, that government interest no longer exists. *See supra* at 29-30. The State simply cannot claim a compelling public health interest in requiring property owners to convey the State's messaging about CEEFPA at the same time that conditions have improved dramatically and the State is lifting virtually all other COVID-related restrictions.

In any event, the disclosure requirement is not narrowly tailored, as there are multiple less restrictive alternatives that the State could adopt to inform tenants about CEEFPA's provisions. "Most obviously, [the State] could inform [them] itself with a public-information campaign." *Becerra*, 138 S. Ct. at 2375-76 (holding that the mandatory notice requirement in that case would not even survive *intermediate* scrutiny). For instance, the State could mail the notices directly to tenants. Indeed, the Office of Court Administration already mailed close to 500,000 hardship declarations to tenants in early February. *See* Ex. E at 108:9-19.[14] The State could

[14] The State suggested below that direct mailings would not be viable unless the State could specifically identify "which tenants are in pre-eviction status," the implication being that an overinclusive direct mailing campaign would be unduly burdensome to the *government*. Ct. App. Dkt. No. 34 at 25. But this Court has "reaffirm[ed] simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795.

also direct tenants to the hardship declaration posted on government websites. *See Riley*, 487 U.S. at 800 ("the State may itself publish the detailed . . . disclosure forms it requires"); *see also* Dist. Ct. Dkt. No. 14 ¶ 8 (linking to the hardship declaration available on the New York State Unified Court System website). Any of these alternatives—or a combination thereof—"would communicate the desired information to the public without burdening a speaker with unwanted speech." *Riley*, 487 U.S. at 800. CEEFPA's disclosure requirements cannot withstand strict scrutiny.

In refusing to enjoin CEEFPA, the district court misapplied the threshold level-of-scrutiny analysis; improperly credited the State's asserted public health interest (even though the State itself has rescinded the COVID-19 state of emergency); and ignored the many less restrictive alternatives that were available to the State. The violation of Applicants' First Amendment rights is therefore indisputably clear—and yet the Second Circuit denied Applicants' motion for an injunction pending appeal without analysis. Emergency injunctive relief is needed to bring an immediate end to an ongoing First Amendment violation that has now outlived the very emergency it was purportedly designed to remediate.

II. The Equities Weigh Strongly In Favor Of Injunctive Relief.

A. Applicants Will Be Irreparably Harmed Absent Injunctive Relief.

The district court expressly and correctly found, based on the evidence presented, that Applicants "satisfactorily demonstrated a risk of irreparable harm." Dist. Ct. Order at 2. The Second Circuit's summary denial of emergency relief did not disturb that finding. Ex. A. As this Court recently reiterated, "[t]he loss of First

Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Roman Catholic Diocese*, 141 S. Ct. at 67 (citation omitted), and the same typically holds true for the deprivation of other constitutional rights, *see* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed. 2013); *see also, e.g.*, *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *but see Brown v. Sec'y, U.S. Dep't of Health & Human Servs.*, 2021 WL 2944379, at *3-6 (11th Cir. July 14, 2021) (rejecting arguments for a *per se* rule and finding a "lack of evidence" establishing irreparable harm in that case challenging the legality of the CDC's more limited national moratorium).

The irreparable harm in this case arises not just from the ongoing deprivation of Applicants' constitutional rights, but also from Applicants' "showing" as to the interference with their real property interests and the crippling "hardship[s]" they are enduring as a result—harms that cannot be adequately remedied through money damages. Dist. Ct. Order at 6, 11-12. Indeed, the irreparable harm here is—and, absent an emergency injunction, will continue to be—particularly severe. Applicant LaCasse is now effectively homeless, unable to move into her own house because her tenants refuse to move out following the expiration of their lease and have caused substantial damage to the property itself. Ex. J ¶¶ 3, 14. Applicants Shi and Zhou "can no longer pay the rent" on their current residence, and yet they cannot move into their own home because their tenants—against whom they obtained a pre-COVID judgment of nonpayment, and whose lease has expired—refuse to leave. Ex. K ¶¶ 6, 9-12. Applicant Chrysafis, who secured a pre-COVID warrant of eviction against his

tenant, is suffering emotionally and has wanted to sell his property for well over a year. Ex. L ¶¶ 6, 12-13, 15. And Applicant Cohen, who relied on the rent from her tenant to cover her fixed costs in her retirement, now fears losing her property altogether. Ex. I ¶ 11.

Because these irreparable harms continue to compound with each passing day, the need for relief here is indisputably "critical and exigent."

B. The Balance Of Hardships And Public Interest Likewise Favor Injunctive Relief.

The public interest in restoring property owners' constitutional rights and stanching the irreparable harm caused by CEEFPA weighs heavily in favor of emergency relief. *See, e.g.*, *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("[T]here is always a strong public interest in the exercise of free speech rights[.]").

The purported countervailing interest pales in comparison. As a threshold matter, there is no public interest "in enforcing an unconstitutional law." *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010); *see also, e.g.*, *Agudath Israel*, 983 F.3d at 637. In any event, the district court erred in viewing the equities through the prism of a "continuing public health crisis," Dist. Ct. Order at 24, which the State continues to invoke in asserting a potential "increase" in "the spread of COVID-19" if CEEFPA is enjoined, Ct. App. Dkt. No. 34 at 13-14. But handwaving at "public health" does not satisfy the State's obligation to "show[] that public health would be imperiled if less restrictive measures were imposed." *Roman Catholic Diocese*, 141 S. Ct. at 68. Indeed, the State declined to call *any* witnesses and failed to submit

any evidence at the evidentiary hearing supporting the claim that enjoining the eviction moratorium will result in "the spread of the disease." *Ibid*. And for good reason: The only studies the State identified (but tellingly did not attempt to move into evidence) were conducted earlier in the pandemic (well before vaccination efforts commenced), and did not control for numerous relevant state-by-state factors (such as compliance with mask and social distancing requirements). Enjoining CEEFPA, moreover, will merely permit the housing courts to operate according to their usual practices, which include granting stays and extensions. *See* RPAPL §§ 751-56.

Regardless, there cannot possibly be a public interest in maintaining the eviction moratorium on the basis of a "continuing public health crisis" when infection rates have fallen dramatically as a result of widespread vaccinations, Dist. Ct. Order at 13, the State has lifted its pandemic-related restrictions in light of "the diminished risk of COVID-19 within the community," Ex. M, and it has rescinded the state of emergency, *see supra* note 5. Restaurants, bars, theaters, and stadiums are all permitted to operate normally. The courts have returned to 100% staffing and resumed in-person proceedings. Ex. E at 120:11-17; Dist. Ct. Dkt. No. 64-13. And yet, property owners still cannot even be heard in their attempts to reclaim their own properties from non-paying or holdover tenants. The pre-pandemic *status quo ante* has been restored in New York, in recognition of the reality on the ground, *except* for this moratorium.

Given these circumstances, the State cannot "show[] that public health would be imperiled by employing less restrictive measures" that respect property owners'

constitutional rights. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (citation and internal quotation marks omitted); *see also Roman Catholic Diocese*, 141 S. Ct. at 68 (explaining that, although the members of this Court "are not public health experts," the Court has a "duty to conduct a serious examination of the need for such a drastic measure," in the face of alleged constitutional violations). Indeed, as the State itself highlighted in the court of appeals, there is a "new government-funded relief program" for tenants who meet need thresholds, Ct. App. Dkt. No. 34 at 2—which includes an eviction moratorium for participants, but gives property owners an opportunity to challenge assertions of hardship and does not block cases from being filed or proceeding—that will protect tenants who have truly "suffered financial or health-related harms due to COVID-19," *ibid.*, while also preserving owners' constitutional rights. There is simply no public interest in CEEFPA's continued enforcement.

CONCLUSION

For the reasons stated in this application, Applicants respectfully request that the Circuit Justice or the Court enjoin Part A of CEEFPA, as extended, pending disposition of Applicants' expedited appeal in the United States Court of Appeals for the Second Circuit and disposition of any petition for a writ of certiorari and, if such writ is granted, until the rendering of this Court's judgment.

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Respectfully submitted,

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