No. 21-A8

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

Reply Brief in Support of Emergency Application for Writ of Injunction

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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.

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

In response to this application for an emergency writ to enjoin New York's eviction moratorium pending appeal, the State claims that COVID-related concerns justify continuing this moratorium. But it never meaningfully grapples with the fact that New York and its courts are open for business in virtually all other respects. Just last week, Governor Cuomo lauded the State's "extraordinarily high" vaccination rate—with 75% of all New York adults already vaccinated—and urged businesses to start bringing workers back to the office now that "[w]e can do it safely."[1] Indeed, Governor Cuomo ended New York's "state of emergency" in June, and virtually all statewide COVID-related restrictions—from capacity limits to mask mandates—have been lifted. Except this eviction moratorium.

The State's response ignores that New York has declared its "state of emergency" to be over. But New York cannot have it both ways. It cannot continue to cite COVID-19 as its excuse to trample on the constitutional rights of its property owners, as it has been doing for the past year and a half, yet at the same time declare victory over COVID and reopen in all other respects. New York's small landlords—some now homeless themselves, including at least one of the Applicants here—have been denied possession of their properties and barred from accessing the courts, and are enduring irreparable harms as a result. These deprivations of property owners'

[1] *Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces Patient-Facing Healthcare Workers at State-Run Hospitals Will Be Required To Get Vaccinated for COVID-19 by Labor Day* (July 28, 2021), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-announces-patient-facing-healthcare-workers.

due process and First Amendment rights have gone on long enough. As this Court recognized in blocking New York's capacity restrictions on houses of worship on First Amendment grounds, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam).

New York's draconian eviction moratorium law bars the courthouse door to its landlords, precluding them from even being heard to challenge tenants' unsworn and unsubstantiated claims of COVID-related "hardship." Indeed, a tenant's "hardship" claim alone brings eviction proceedings to a grinding halt, leaving the landlord no recourse against non-paying, holdover tenants. And this moratorium lasts through August 2021 and beyond, with a rebuttable presumption of "financial hardship" continuing indefinitely even after that date. Property owners have thus been and continue to be deprived of their real property interests, without being afforded an opportunity "to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and internal quotation marks omitted). Adding insult to injury, those owners have also been compelled to "speak a particular message" that they would never otherwise convey, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018), as CEEFPA forces them to provide tenants with government-drafted notices, instructing tenants how to forestall eviction and avoid paying rent, and with lists of third-party legal service providers who are available to assist tenants in doing so. Tellingly, the State's response fails to address these controlling authorities, ignoring *Mathews* and *Becerra* altogether.

Nor does the State meaningfully contest CEEFPA's devastating, real-life consequences for these Applicants and other New York property owners, who are enduring harms *now* that compound with each passing day and can never be remediated later. For example, military veteran Brandie LaCasse and her young daughter are effectively homeless, in desperate need of a non-"volatile" home now that her ex-fiancé has demanded they move out, yet she cannot access her own property because non-paying holdover tenants refuse to leave. Ex. E at 28:21-29:6, 35:7-20. Ms. Shi and Mr. Zhou likewise need a place to live with their two young children and three elderly parents, but even a pre-COVID judgment against their non-paying holdover tenants cannot help them retake possession. Ex. K ¶¶ 6, 9-12. Mr. Chrysafis remains unable to sell his property, despite securing an eviction warrant pre-COVID, and now faces financial ruin and the collapse of his marriage. Ex. L ¶¶ 6, 8, 12-13, 15. And Ms. Cohen, a retiree on a fixed income, is struggling to make ends meet because her tenant refuses to pay rent or leave. Ex. E at 61:11-14, 65:18-67:18, 72:8-12; Ex. I ¶ 11. The State ignores these irreparable harms—expressly found by the district court, *see* Dist. Ct. Order at 2, 10-12—and, instead, fixates on a red herring: the potential recoupment of "monetary losses." Resp. 17-18. But the Applicants here continue to suffer irreparable harms, with no prospect of being made whole later, because they can never retroactively regain *present* possession of their properties to exercise their rights as owners.

The State's response boils down to this: The Court should ignore these proven irreparable harms simply because, according to the State, CEEFPA's constitutional

violations *might* end a few weeks from now, assuming CEEFPA is not extended. But "so long as a case is not moot," this Court's intervention is necessary to redress ongoing constitutional violations and liberate these Applicants from the "constant threat" of further renewals. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (citation omitted). The need for immediate relief is particularly acute here, given the State's proclivity for "moving the goalposts on pandemic-related sacrifices" and "adopting new benchmarks that always seem to put restoration of liberty just around the corner." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (statement of Gorsuch, J.). Indeed, in a predecessor case to this one dismissed on procedural grounds, the State argued that the *original* iteration of CEEFPA—which was supposed to expire on May 1—would likely not be extended. Dkt. No. 29-1 at 12:10-25, *Chrysafis v. James*, No. 21-cv-998 (E.D.N.Y.). Just weeks later, however, the State Legislature extended CEEFPA. And now, there is growing momentum among New York officials to extend this moratorium yet again.[2] Thus, "one could be forgiven for doubting [the State's] asserted timeline." *S. Bay*, 141 S. Ct. at 720 (statement of Gorsuch, J.).

The CDC just extended its far less restrictive federal moratorium—which limits financial eligibility, permits landlords to initiate and continue eviction cases,

[2] *See* Julia Moro, *Queens Lawmakers Urge Cuomo to Protect Renters as Eviction Moratorium Expires Next Month*, QNS (Aug. 2, 2021), https://qns.com/2021/08/queens-lawmakers-urge-cuomo-to-protect-renters-as-eviction-moratorium-expires-next-month; Marina Villeneuve & Mike Catalini, *Will Eviction Relief Efforts in New York and New Jersey Be Enough?*, NBC N.Y. (July 31, 2021), https://www.nbcnewyork.com/news/local/will-eviction-relief-efforts-in-new-york-and-new-jersey-be-enough/3187847.

and would only apply to particular regions within New York—even though the CDC had represented that the prior iteration was "intended to be . . . final" in convincing a 5-4 majority of this Court to let it expire, instead of enjoining it.[3] So much for government promises. Yet the State repeatedly invokes the denial of emergency relief in the CDC case, ignoring that recent events have rendered it a cautionary tale.

The State seems to be talking out of both sides of its mouth. On the one hand, it urges this Court to withhold relief on the suggestion that Applicants' suffering should end in "just a few weeks" when this eviction moratorium is supposed to expire. On the other hand, the State simultaneously argues CEEFPA's continued enforcement is justified because of lingering COVID-19 concerns. Nowhere does the State explain, however, how simply granting landlords a *hearing*, or freeing them from being compelled to speak against their own interests, would undermine the State's efforts to combat COVID variants—particularly when litigants are allowed to appear in courts throughout the State for any other purpose, and when the State has otherwise reopened and remains open for business. The State simply cannot "show[] that public health would be imperiled if less restrictive measures were imposed."

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[3] Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34,010, 34,015 (June 28, 2021); *see also Ala. Ass'n of Realtors v. U.S. Dep't of Health & Human Servs.*, 141 S. Ct. 2320, 2321 (2021) (Kavanaugh, J., concurring) (relying on the CDC's "plans to end the moratorium in only a few weeks"). In *Alabama Association of Realtors*, before that case reached this Court, the D.C. Circuit had declined to enjoin the CDC's soon-to-expire moratorium, in part, because the applicants there had failed to make any concrete showing of irreparable harm. Here, in contrast, Applicants have demonstrated that they are suffering concrete irreparable harms warranting immediate relief. *See* Dist. Ct. Order at 2, 10-12; Appl. 7 n.3, 12-16. The landlords in the *Alabama Association of Realtors* case just filed an emergency motion asking the district court to vacate the extended CDC moratorium. *See* Dkt. No. 67, *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 20-cv-3377 (D.D.C.).

Roman Catholic Diocese, 141 S. Ct. at 68. Apparently aware of the flimsiness of its purported public health rationale, the State also trumpets that it is "in the process of distributing" rental-assistance benefits and needs a little more time to do so. These funds were federally appropriated in January 2021, yet New York is the only state in the nation to have distributed none of this aid through late July.[4] The notion that the State needs just a few more weeks to get this money into the right hands is the same false rationale given for the moratorium's extension back in April. *See* Resp. 8.

On the merits, the State offers no meaningful response to Applicants' due process and First Amendment claims. *See* Appl. 19-36. Indeed, the State ignores the controlling cases cited by Applicants, including this Court's instruction that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333. The State argues principally that CEEFPA's effects are temporary and therefore immune from Fourteenth Amendment scrutiny. But this Court's precedents have made plain that even "temporary or partial impairments to property rights . . . are sufficient to merit due process protection." *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991); *see also Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972). And although the State contends that lingering public health concerns outweigh this deprivation of foundational private property rights, it is precisely in "our most challenging and uncertain moments . . . that we

[4] *See Rep. Delgado Joins Republicans and Democrats to Demand NYS Distribute Emergency Rental Assistance Program Payments Immediately*, Press Release (July 28, 2021), https://delgado.house.gov/media/press-releases/rep-delgado-joins-republicans-and-democrats-demand-nys-distribute-emergency; *see also, e.g.*, Marina Villenueve, *New NY Rent Fund Sees Website Glitches, But Tenants Hopeful*, Associated Press (June 29, 2021), https://apnews.com/article/nyc-state-wire-ny-state-wire-business-health-coronavirus-pandemic-8e59caa61058394780169de9ce08aafb.

must preserve our commitment" to procedural due process. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality op.).

The lower courts' decisions here—like so many others over the past year and a half—appear to have been predicated on a fundamental misapplication of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), a century-old substantive due process case that has been misread as permitting the standard modes of constitutional analysis applicable in other settings (like *Mathews* balancing for the procedural due process claim here) to be put aside, instead giving *carte blanche* to the government during an emergency. Indeed, the State continues to seek such deference here, despite its Governor having declared an end to the "state of emergency" in New York. It is imperative that the Court intervene to resolve this "bedeviling" issue now. *Oakes v. Collier Cty.*, 2021 WL 268387, at *2 n.4 (M.D. Fla. Jan. 27, 2021).

The State's First Amendment arguments fare no better. Its response claims that the compelled speech in question is "factual." Resp. 20. But it ignores that the First Amendment right against compelled speech applies "equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). And contrary to the State's contention, the commercial speech doctrine—and the lesser constitutional scrutiny it warrants—has no application here. That doctrine applies only when "purely factual and uncontroversial" compelled speech relates to "the terms under which [the speaker's] services will be available." *Becerra*, 138 S. Ct. at 2372 (citation omitted). This case does not fit that mold. Strict scrutiny applies here, and the presence of numerous

less restrictive alternatives means that CEEFPA cannot possibly withstand that "searching examination" as to which the State "bears the burden" of proof. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013).

In light of the indisputably clear ongoing constitutional violations in this case, the concrete irreparable harms being suffered by these Applicants as a result, and the balance of equities weighing heavily in Applicants' favor, this Court should enjoin CEEFPA. The relief sought "not only will ensure that the [A]pplicants' constitutional rights are protected, but also will provide some needed clarity for the State," *Roman Catholic Diocese*, 141 S. Ct. at 74 (Kavanaugh, J., concurring), as well as for owners and tenants affected by CEEFPA, as the prospect of its further extension looms.[5]

Applicants therefore respectfully request that this application be immediately granted or referred to the full Court to decide.

ARGUMENT

I. The Violations Of Applicants' Constitutional Rights Are Indisputably Clear, And Exacerbate Confusion On A Nationally Important Issue.

A. CEEFPA Violates Applicants' Procedural Due Process Rights.

1. The Hardship Declaration Provisions Violate Due Process.

It is undisputed that, whenever a tenant submits an unsworn and unsubstantiated hardship declaration, CEEFPA bars the property owner from commencing or continuing an eviction proceeding against that tenant until "at least" August 31. *See* Resp. 6, 26 (conceding that owners are "unable to rebut" hardship

[5] In a desperate attempt to stave off emergency relief here, the State revives a meritless abstention argument that the district court already rejected. *See* Dist. Ct. Order at 9-10. For the reasons explained below, that argument is specious.

claims for the duration of the moratorium).[6] The private property interest impaired by this prohibition is one of the most fundamental of all—the right to control and possess one's own real property. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993). Because CEEFPA provides property owners with *no* opportunity to contest these "hardship" claims during the moratorium, the only purported procedural safeguards are tenants' unilateral determinations that they qualify for one or more of CEEFPA's vague and undefined hardship categories. And because "fairness can rarely be obtained by secret, one-sided determination[s] of facts decisive of rights," *Doehr*, 501 U.S. at 14 (citation omitted), CEEFPA indisputably deprives Applicants and other property owners of their procedural due process rights, *see* Appl. 19-26.

Recognizing that CEEFPA categorically bars Applicants from contesting tenants' hardship claims, Respondent urges that this deprivation is only temporary. Resp. 24-26. But that is no answer, as even "temporary or partial impairments to property rights . . . are sufficient to merit due process protection." *Doehr*, 501 U.S. at 12; *see also Fuentes*, 407 U.S. at 84-85. Respondent ignores these precedents, attempting to distinguish *Doehr* only on the separate issue of countervailing government interests. *See* Resp. 26. Despite never even mentioning the leading cases cited in the Application, the State cites—and criticizes *Applicants* for not

[6] Although the State purports to take issue with Applicants' characterization of the declarations as "unsworn" and "unsubstantiated," its response *confirms* that the declarations must only be signed under purported "penalty of law," not penalty of perjury, and that the only "proof" of the declaration's veracity is the submission of the declaration itself. Resp. 6, 26.

affirmatively raising—inapposite cases that did not involve imminent, irreparable deprivations of real property interests. *See id.* at 24.[7] None of those cases governs here. Indeed, as Respondent emphasizes, "the significance of . . . a delay cannot be evaluated in a vacuum." *Id.* at 26 (quoting *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988)).[8]

Here, as the district court found, Applicants have been unable to make any attempt to reclaim their properties for months or years, resulting in irreparable harm. Dist. Ct. Order at 8, 10-13. The State does not grapple with that finding, instead attacking a strawman argument about "protected property right in lost rents." Resp. 24-25. But CEEFPA deprives Applicants of any mechanism to regain control over their properties as long as the moratorium is in effect. As the district court put it, "the moratorium has precluded varying uses of property" by Applicants, "including planned sales or owner-occupancy." Dist. Ct. Order at 11. As such, Applicants are being deprived of their right to "maintain control over [their] home[s]," *James Daniel*, 510 U.S. at 53-54, with *no* process in place to guard against erroneous deprivations. This is a far cry from a mere "affirmative defense." Resp. 6.

Similarly, while Respondent maintains that evicting tenants was a lengthy

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[7] *See Sosna v. Iowa*, 419 U.S. 393, 410 (1975) (upholding one-year state residency requirement for divorce petitions); *Schroeder v. City of Chicago*, 927 F.2d 957, 959-60 (7th Cir. 1991) (delay in processing application for disability benefits did not violate due process because benefits were ultimately paid in full and there was no entitlement to receive benefits immediately upon applying, whereas "[i]f there is irreparable harm from delay, then delay injures, and by injuring deprives").

[8] *Mallen* is itself inapposite. It involved a statute allowing the FDIC to suspend bank officers who were indicted for certain felonies. 486 U.S. at 233. The plaintiff did "not contend that he was entitled to an opportunity to be heard prior to the order of suspension"; he had a right to a decision within 90 days upon request; and the fact that an "independent body" had already "determined that there [was] probable cause to believe that the officer has committed" a felony ensured that the interim suspension was not "arbitrary." *Id.* at 240, 242, 244-45.

process even before CEEFPA was enacted, *id.* at 25, that argument is self-defeating: CEEFPA prevents Applicants from even *commencing* that lengthy process until "at least August 31, 2021." The issue is not the timing of the "eviction remedy" itself, *ibid.*, but rather the lack of fundamental fairness in a process that allows tenants to unilaterally freeze entire *proceedings*, based on hardship criteria that are themselves vague and undefined (a point the State does not dispute). Moreover, even once CEEFPA 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, even though tenants need not even specify the purported facts that landlords are tasked with rebutting.

The State's asserted interest in responding to the (now-waning) pandemic cannot justify this wholesale abrogation of Applicants' due process rights. *See Hamdi*, 542 U.S. at 532; *Roman Catholic Diocese*, 141 S. Ct. at 74 (Kavanaugh, J., concurring). As the State observes (Resp. 4 n.2), Applicants have not challenged the TSHA, which already allows courts to take COVID-related financial hardship into account during eviction proceedings. Applicants simply challenge CEEFPA's effect of divesting property owners of any right to be heard *at all* until "at least" August 31. Opening the courts now will merely mean landlords will have the opportunity to be heard, not that tenants facing legitimate financial hardship will be evicted *en masse*.

In any event, any purported government interest has dissipated now that the State has lifted virtually all pandemic-related restrictions and declared that the state of emergency is over. As this Court instructed nearly a century ago, 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." *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924). Nowhere does the State explain why its purported public health interest demands that it deprive owners even of a hearing—a particularly incongruous result now that its courts have otherwise reopened *despite* the State's claimed public health concerns. *See* Appl. 12, 16-17, 29-30; *supra* note 1. Instead, the State doubles down on the district court's erroneous reliance on substantive due process cases, arguing that the CEEFPA Extension had a *rational basis* at the time of its enactment. *See* Resp. 26-27.

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

The district court's decision—left undisturbed by the court of appeals—sharpened a conflict among the lower courts on a pressing, fundamental legal question: whether *Jacobson* demands blanket deference to the government—in lieu of normal constitutional scrutiny—in cases challenging "emergency" government regulations. *See* Appl. 27 n.13. There has been "significant disagreement" on that question during the pandemic, *Lawrence v. Polis*, 505 F. Supp. 3d 1136, 1142 (D. Colo. 2020), even though *Roman Catholic Diocese* should have made the answer plain, *see* 141 S. Ct. at 68; *see also id.* at 70-71 (Gorsuch, J., concurring); *id.* at 74 (Kavanaugh, J., concurring); *id.* at 75-76 (Roberts, C.J., dissenting).

The State does not dispute that lower courts are divided on this issue. Instead, it erroneously suggests the issue is not presented here. But while the State contends that the district court "merely" cited *Jacobson* for the proposition that courts should

defer to the political branches' policy decisions in responding to emergencies, Resp. 19, 27, that is precisely where the district court went astray. Rather than applying an ordinary procedural due process analysis under *Mathews*, the district court relied on *Jacobson* in deferring to the State's purported justification for extending CEEFPA as a matter of *substantive* due process. *See* Dist. Ct. Order at 1, 19; *see also id.* at 23 (conducting a one-sentence strict scrutiny analysis—based entirely on the "public health emergency"—in rejecting Applicants' First Amendment claim).[9] The *Jacobson* question urgently demands this Court's attention—and even more so if States are now going to contend, as New York does here, that COVID variants justify the continued enforcement or promulgation of pandemic-related restrictions.

B. CEEFPA Violates Applicants' Free Speech Rights.

1. Strict Scrutiny Applies To The Compelled Speech Claim.

CEEFPA compels landlords "to speak a particular message," authored by the State, that they would not otherwise convey. *Becerra*, 138 S. Ct. at 2371; *supra* at 2-3. Because CEEFPA "alters the content" of their speech, strict scrutiny applies. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988); *see also* Appl. 32-34.

The State's observation that the speech in question is "factual," Resp. 20-22, is beside the point. This Court has made clear that, outside the commercial advertising

[9] Even as it seeks to downplay the *Jacobson* issue, the State invokes *Jacobson* and other inapposite cases dealing with the merits of separate claims in order to advocate for heightened deference, mistakenly suggesting that they should drive both the due process and public interest analyses. *See* Resp. 14, 19, 27; *see also Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) (deferring to state's determination *not* to loosen election laws during an earlier stage of the pandemic); *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (discussing whether medical uncertainty impacts the undue burden analysis in abortion cases); *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977) (discussing deference under the Contracts Clause); *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 234-35 (1945) (rejecting Contracts Clause challenge).

context, a speaker's "right to tailor" his or her speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. The State not only ignores *Hurley* and *Becerra*, but also seeks to rewrite the commercial speech analysis: The question is not simply whether the compelled speech is "factual and uncontroversial," Resp. 20-21, but also whether it pertains to "the terms under which services will be available," *Becerra*, 138 S. Ct. at 2372 (ellipsis omitted) (quoting *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)); *see also ibid.* (citing *Hurley* for the proposition that "*Zauderer* does not apply outside of these circumstances").

The State never mentions the proposed commercial transaction element of commercial speech, instead invoking this Court's characterization of commercial speech as "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 (1980); *see* Resp. 20. That argument ignores that *Central Hudson* itself explains that the commercial speech doctrine arises from "the commonsense distinction between speech proposing a commercial transaction . . . and other varieties of speech." 447 U.S. at 562 (citation and internal quotation marks omitted); *see also Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (describing proposed commercial transactions as "the test for identifying commercial speech"); Appl. 31.[10] The compelled speech here has nothing to do with a proposed

[10] This Court has invoked *Central Hudson*'s "economic interests" definition in just two subsequent cases, and never to expand the commercial speech doctrine beyond the narrow context of proposed commercial transactions. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416, 422

(Cont'd on next page)

commercial transaction; rather, the "NOTICE TO TENANT[S]" explains how tenants can *evade* the terms of existing or completed transactions. And, just as in *Becerra*, the State's list of *separate* services available elsewhere "in no way relates to the services that [Applicants] provide." *Becerra*, 138 S. Ct. at 2372. While the State catalogs various other compelled disclosures that it claims are analogous, *see* Resp. 21-22, it cites no caselaw analyzing them and does not explain how those separate provisions bear on the commercial speech inquiry. The commercial speech doctrine does not apply; CEEFPA is subject to strict scrutiny.[11]

2. CEEFPA Fails Strict Scrutiny.

There is no question that CEEFPA's compelled disclosures cannot withstand strict scrutiny. The district court's conclusory determination that "the magnitude of the public health emergency overwhelmingly justifies this minuscule burden on plaintiffs," Dist. Ct. Order at 23, is no substitute for strict scrutiny's "searching examination" on which the State "bears the burden" of proof, *Fisher*, 570 U.S. at 310. The State simply rehashes the court's one-line conclusion without addressing Applicants' arguments for why it was plainly erroneous, *see* Appl. 34-36.

(1993) (observing that the parties did not dispute that the speech in question was commercial and that, while *Central Hudson* suggested "a somewhat larger category of commercial speech," the Court "did not . . . use that definition" in subsequent cases); *In re R. M. J.*, 455 U.S. 191, 199, 204 n.17 (1982) (explaining that prior cases had established that attorney advertising constitutes commercial speech, and later observing in a footnote that speech "encourag[ing] members of the public to engage [an attorney] for personal profit" satisfies the *Central Hudson* definition).

[11] By contrast, the cases on which the State relies *do* invoke speech related to proposed commercial transactions. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) ("As in [*Zauderer*], [the] required disclosures are intended to combat the problem of inherently misleading commercial advertisements[.]"); *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 94 (2d Cir. 2010) (law required debt relief agencies to disclose "the services to be provided to the debtor, the fee the debtor will pay for those services, and the terms of payment").

The State still has not identified any evidence that forcing property owners to convey its message is the least restrictive means of serving a purported government interest. Nor could it. *See Becerra*, 138 S. Ct. at 2375-76. Indeed, the State *concedes* that it can provide and publicize the hardship declarations itself, as it already "has done both." Resp. 23; *see also* Ex. E at 108:9-19. Doing so would satisfy the State's purported interest without co-opting property owners as its messengers. And although the State again expresses a preference for directing its notices only to those specific tenants against whom eviction proceedings are imminent, *see* Resp. 23-24, it continues to overlook this Court's "simpl[e] and emphatic[]" instruction that "the First Amendment does not permit the State to sacrifice speech for efficiency," *Riley*, 487 U.S. at 795; *see also* Appl. 35 n.14. Because the State cannot carry its burden on strict scrutiny, the First Amendment violation is indisputably clear.[12]

[12] The State's abstention defense has no merit. Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," and this case does not present the "exceptional circumstances" that would warrant "[a]bdication" of that duty. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976). The State misleadingly suggests the district court "found" in its favor on abstention, Resp. 28, when in reality the district court *rejected* Respondent's "incongruous[]" arguments "mischaracteriz[ing] the nature of the relief sought," Dist. Ct. Order at 9. As the district court recognized, "there are no parallel civil or criminal proceedings into which this Court is asked to intrude that could implicate abstention concerns," as Applicants' "chief complaint centers around the absence of such [state] proceedings." *Id.* at 9-10. This dooms the State's argument. *See, e.g.*, *Disability Rights N.Y. v. New York*, 916 F.3d 129, 134 (2d Cir. 2019) (abstention is mandated "only when the plaintiff seeks to enjoin ongoing state proceedings," or when a "failure to [abstain] would result in an ongoing federal audit of state criminal proceedings" (citation and internal quotation marks omitted)). Here, enjoining CEEFPA will merely allow state courts to adjudicate eviction proceedings in the ordinary course, pursuant to pre-existing state court procedures. The cases Respondent cites are not to the contrary. *See, e.g.*, *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 679 (7th Cir. 2010) (plaintiff sought to enjoin a state judge's order and thereby "have a federal court tell state courts how to manage and when to decide a category of cases pending in the state courts"); *Kaufman v. Kaye*, 466 F.3d 83, 84 (2d Cir. 2006) (challenge to "procedure for assigning appeals among panels of judges").

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

A. Applicants Will Be Irreparably Harmed Absent Relief.

The district court expressly found—based on an unequivocal evidentiary record—that Applicants "satisfactorily demonstrated a risk of irreparable harm" and have faced "significant hardship" as a result of CEEFPA. Dist. Ct. Order at 2, 6. The Second Circuit motions panel did not disturb that finding of irreparable harm, Ex. A, which is indisputably correct, *see, e.g.*, *Roman Catholic Diocese*, 141 S. Ct. at 67-68; 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed. 2013); *see also* Appl. 36-38. The State does not even mention these irreparable harm findings, and it does not dispute the *per se* irreparable harm arising from the constitutional violations themselves.[13]

Instead, the State myopically focuses on Applicants' monetary losses and the theoretical potential for future recoupment of back rent. Resp. 17-18. In so doing, the State distorts the harms that Applicants actually alleged and proved, including devastating effects on Applicants and their families arising out of their loss of the present *use* of—and ability to sell—their properties. *See* App. 12-16; *see also* Ex. E at 34:5-35:6, 71:2-6; Ex. K ¶ 12; Ex. L ¶ 6. Speculation about future money damages is

[13] Respondent's separate contention that "temporary restrictions" on property rights cannot rise to the level of irreparable harm (Resp. 17) is thus beside the point and, in any event, unavailing. The State ignores the "substantial" period that Applicants have already been deprived of their properties—10 to 29 months (as of the date of the District Court Order) and counting, Dist. Ct. Order at 6-8, 11—not to mention the potential that CEEFPA may be further extended, *see supra* note 2. The cited lower court cases are inapposite. *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 *per se* harm arguments but also finding a "lack of evidence" establishing irreparable harm); *Skyworks, Ltd. v. CDC*, 2021 WL 911720, at *13 (N.D. Ohio Mar. 10, 2021) (no individual constitutional harms alleged); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 361-65 (E.D. Pa. 2020) (no constitutional violations, and "speculative" economic harms).

cold comfort; these ongoing deprivations have no adequate remedy at law.

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

In the face of the severe and ongoing irreparable harms that Applicants are being forced to endure, the public interest weighs strongly in favor of emergency injunctive relief. *See* Appl. 38-40.[14] In response, the State conjures a parade of horribles that is unmoored from the evidence and inconsistent with the State's own decision to lift its other COVID-19 restrictions and rescind the state of emergency.

There is no merit to Respondent's repeated suggestion that CEEFPA's potential expiration weighs against injunctive relief. Resp. 1, 11-12, 18-19. Even setting aside the indefinite rebuttable presumption, the reality is that Applicants' constitutional rights are being violated—and they are suffering extreme and irreparable hardships as a result—*every single day*. Nor is there any guarantee that the constitutional deprivations will actually be alleviated on September 1. CEEFPA has already been extended once—after the State Attorney General's Office had argued that it would likely *not* be extended, *see* Dkt. No. 29-1 at 12:10-25, *Chrysafis v. James*, No. 21-cv-998 (E.D.N.Y.)—and the State Attorney General's Office (as counsel for Respondent) offers this Court no assurances that CEEFPA will not be extended again. *See* Resp. 14.[15] Meanwhile, New York lawmakers are already calling

[14] As in *Alabama Association of Realtors*, the plaintiffs in the other cases cited by the State (*see* Resp. 12) did not establish irreparable harm.

[15] Indeed, the State seeks to defend CEEFPA's continued enforcement on the basis that the economy is "far from fully recovered," arguing that the recovery "will take time" and even citing an article to suggest that the economic concerns purportedly underlying the CEEFPA Extension may not dissipate until *2023*. Resp. 15.

for another extension. *See supra* note 2. "[O]ne could be forgiven for doubting [the State's] asserted timeline." *S. Bay*, 141 S. Ct. at 720 (statement of Gorsuch, J.).[16] Indeed, the federal moratorium at issue in *Alabama Association of Realtors*—cited repeatedly by Respondent—has now been extended.

The State also insists that enjoining CEEFPA will increase the risk of COVID-19 transmission. *See* Resp. 12-13. Those arguments—which largely restate legislative findings made months ago—ring hollow in light of the State's resumption of ordinary life in nearly all aspects *except* for this moratorium. Last week, Governor Cuomo lauded the State's "extraordinarily high" vaccination rate and urged businesses to bring workers back to their offices. *See supra* note 1. Yet, for litigation purposes, the State tries to instill fear of increased viral spread.[17]

Although, the State suggests widespread chaos will ensue if CEEFPA is enjoined, *see* Resp. 13, the relief Applicants seek in this application is limited: They simply want the doors of the housing courts opened so they can have their cases heard. The State does not dispute that tenants experiencing genuine COVID-related

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[16] The State would have this Court believe Applicants waited "months" to challenge the CEEFPA Extension, Resp. 9, but they in fact filed suit and sought a TRO and preliminary injunction just two days after its enactment. They then moved for an injunction pending appeal on the same day final judgment was entered and renewed that application in the court of appeals three days after the district court denied it. Despite Applicants' best efforts to expedite decision on their emergency motion, *see* Resp. 10-11, the court of appeals waited five weeks before summarily denying it. This adjudicative delay "only advances the case" for this Court to intervene now, as Applicants have been "subject to unconstitutional restrictions" for weeks while they "work[ed] their way through the judicial system." *Roman Catholic Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring).

[17] Applicants never argued that "the Legislature was required to lift CEEFPA's protections at the same time as the State relaxed other COVID-related restrictions." Resp. 15. Rather, the point is that the State cannot declare an emergency over and simultaneously argue that a public interest purportedly tied to that *same emergency* somehow outweighs Applicants' showing of irreparable harm. The State relies on an inapposite equal protection case. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) (applying rational basis review to absentee voting restrictions).

hardships can seek stays or extensions in housing court on a case-by-case basis, or that the federally funded relief program would itself provide eviction protections to those who need it. *See* Appl. 39-40. And it invokes its own witness's testimony that it takes an average of four to six months following the commencement of proceedings for an eviction warrant to be executed, Resp. 25 (citing Ex. E at 122:20-123:3), confirming that an injunction will not trigger an immediate flood of evictions.

Finally, the State's arguments about overwhelming the housing courts are circular, given that the backlog of cases only *increases* with each passing day. *See* Appl. 25 n.9. Moreover, government convenience—like "secular convenience"—cannot justify prolonged violations of express constitutional rights. *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring). And while the State suggests that the distribution of federal relief funds might moot some eviction proceedings in the future, Resp. 16, the proper recourse would be to dismiss any such mooted cases if and when that occurs—not to subject Applicants to a *present* deprivation of their property interests without any meaningful opportunity to be heard.

The relief sought here would simply restore the normal operations of the housing courts—without directing any particular outcome in a particular case—while safeguarding Applicants' constitutional rights. Because "[n]o public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal," *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020), CEEFPA should be immediately enjoined.

CONCLUSION

Applicants respectfully request that the application be granted.

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Respectfully submitted,

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