Nos. 21A8

In The
Supreme Court of the United States

PANTELIS CHRYSAFIS, et al.,

Applicants,

v.

LAWRENCE K. MARKS,

Respondent.

BRIEF IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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PRELIMINARY STATEMENT

In December 2020, the New York State Legislature enacted the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPA) to temporarily pause judicial proceedings seeking the evictions of certain tenants who are suffering financial or health-related hardships due to COVID-19. CEEFPA's temporary pause is set to expire in just a few weeks, at the end of August. In the meantime, New York is in the process of distributing billions of dollars of congressionally appropriated rental-assistance benefits to landlords and their tenants, which will render many eviction proceedings unnecessary. Despite this ongoing aid and CEEFPA's imminent expiration, plaintiffs here—five individual landlords and a landlord group—ask this Court to enjoin the enforcement of this duly enacted state law and to effectively direct New York's courts to immediately resume eviction proceedings. This Court should deny such extraordinary relief.

Under comparable circumstances, this Court recently denied a group of landlords' request to enjoin the federal eviction moratorium imposed by the U.S. Centers for Disease Control and Prevention (CDC). *Alabama Ass'n of Realtors v. United States Dep't of Health & Human Servs.*, 141 S. Ct. 2320 (2021). Although some members of this Court expressed doubts about the CDC's statutory authority to issue such a moratorium, the equities nonetheless weighed against any stay of the moratorium in light of its scheduled expiration "in only a few weeks" and the need for time to ensure "more orderly distribution of the congressionally appropriated rental assistance funds." *Id.* (Kavanaugh, J., concurring).

The same equitable considerations apply here and weigh heavily against enjoining CEEFPA, especially when the record below demonstrated that prematurely ending CEEFPA would disrupt the State's fragile and ongoing recovery from the pandemic by abruptly inundating the courts with eviction proceedings before they are fully equipped to resume such actions. Moreover, the case against a stay is stronger here because plaintiffs' merits arguments against CEEFPA are weaker than the arguments against the CDC eviction moratorium. Unlike *Alabama Association of Realtors*, this case does not involve agency action that assertedly exceeds statutory authority, but instead a duly enacted state law exercising the State's core police powers. The district court here carefully considered and properly rejected plaintiffs' constitutional challenges to CEEFPA. And independent of the merits, principles of comity and federalism require abstention here because plaintiffs' requested relief directly and impermissibly seeks to dictate state-court procedures. Plaintiffs' application for an emergency injunction should accordingly be denied.

STATEMENT

A. New York's Response to COVID-19

On March 7, 2020, the Governor of New York declared a disaster emergency for the State due to the extraordinary COVID-19 pandemic. To date, COVID-19 has infected more than 2.1 million New Yorkers and caused more than 53,000 deaths in the State. *Tracking Coronavirus in New York*, N.Y. Times (last updated Aug. 4, 2021). The pandemic also has caused devastating economic harms, with New York's unemployment rate rising to 16.2% in April 2020 from the historic low of 3.7% in

December 2019. U.S. Bureau of Labor Statistics, *Local Area Unemployment Statistics: New York* (data extracted Aug. 4, 2021).[1]

State and local officials took many actions to protect the physical and economic well-being of the State and its residents. These measures included closing schools and nonessential businesses. *See, e.g.*, Exec. Order (EO) No. 202.4, 9 N.Y.C.R.R. § 8.202.4 (2020); EO No. 202.8, 9 N.Y.C.R.R. § 8.202.8 (2020). Although many of these measures have been lifted as of mid-June 2021, *see, e.g.*, EO No. 202.111, 9 N.Y.C.R.R. § 8.202.111 (2021), the State has not fully recovered from the pandemic's impacts. As of June 2021, unemployment continues to hover just under 8%—more than double the pre-pandemic rate—with more than 720,000 persons still looking for work. *See* Bureau of Labor Statistics, *supra*. And COVID-19 and its new variants are still causing hospitalizations and deaths in the State, albeit at lower rates than at the pandemic's height.

1. New York's housing-related pandemic responses before December 2020

Between March and December 2020, consistent with other emergency measures responding to the pandemic and its consequences, the Governor, the Chief Administrative Judge of the New York Court System (defendant Lawrence Marks), and the State Legislature instituted various measures affecting the courts, including restrictions on certain eviction proceedings brought under New York's Real Property

[1] All websites last visited August 4, 2021.

Actions and Proceedings Law (RPAPL).[2] *E.g.*, Admin. Order of Chief Admin. Judge, AO/68/20, at 1-2 (Mar. 16, 2020); EO No. 202.28, 9 N.Y.C.R.R. § 8.202.28 (2020).

As relevant here, on June 30, 2020, the Legislature enacted the Tenant Safe Harbor Act (TSHA). Ch. 127, 2020 N.Y. Laws (internet). TSHA permitted tenants to avoid eviction based on unpaid rent that had accrued while the tenant's county was subject to COVID-related restrictions, if the tenant was able to prove a COVID-related financial hardship as defined by the statute. *Id.* §§ 1, 2(2), 2020 N.Y. Laws, p. 1. TSHA did not preclude evictions on other grounds—such as for creating nuisances—and did not affect a landlord's ability to obtain monetary judgments for "the rent due and owing." *Id.* § 2(1), (3).

New York was not alone in enacting housing-related measures in response to COVID-19. Many States and localities also temporarily restricted evictions during the pandemic.[3] And the federal CDC similarly imposed a temporary bar on residential evictions, which expired on July 31, 2021. Temporary Halt in Residential

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[2] Plaintiffs do not challenge any of the eviction-related measures instituted by the Governor, Judge Marks, or the Legislature before December 2020.

[3] *See, e.g.*, *Heights Apartments, LLC v. Walz*, 510 F. Supp. 3d 789, 797-98 (D. Minn. 2020) (Minnesota), *appeal docketed*, No. 21-1278 (8th Cir. Feb. 4, 2021); *El Papel LLC v. Inslee*, No. 20-cv-1323, 2020 WL 8024348, at *1-4 (Dec. 2, 2020) (report & recommendation) (Washington and Seattle), *report adopted*, 2021 WL 71678 (W.D. Wash. Jan. 8, 2021); *Apartment Ass'n of Los Angeles Cnty., Inc. v. City of Los Angeles*, 500 F. Supp. 3d 1088, 1093 (C.D. Cal. 2020) (Los Angeles), *appeal docketed*, No. 20-56251 (9th Cir. Nov. 25, 2020); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 368-69 (D. Mass. 2020) (Massachusetts); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 344-45 (E.D. Pa. 2020) (Philadelphia); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 209 (D. Conn. 2020) (Connecticut). *See generally* Eviction Lab, *COVID-19 Housing Policy Scorecard* (cataloging all restrictions on evictions imposed by states and localities).

Evictions to Prevent Further Spread of COVID-19, 86 Fed. Reg. 34,010 (June 28, 2021). On August 3, 2021, the CDC issued another sixty-day moratorium targeted to areas with high COVID-19 transmission rates. CDC, Order, Temporary Halt in Residential Eviction in Communities with Substantial or High Levels of Community Transmission of COVID-19 to Prevent the Further Spread of COVID-19 (Aug. 3, 2021).

2. The COVID-19 Emergency Eviction and Foreclosure Prevention Act (CEEFPA)

On December 28, 2020, the Legislature enacted the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (CEEFPA)—the sole focus of plaintiffs' challenge here. Ch. 381, 2020 N.Y. Laws (internet). In response to the "widespread economic and societal disruption" caused by COVID-19, CEEFPA provided a number of temporary measures designed to stabilize "the housing situation for tenants, landlords, and homeowners," in order to help the State and its residents "address the pandemic, protect public health, and set the stage for recovery." *Id.* § 3, 2020 N.Y. Laws, pp. 2-3.

CEEFPA was intended to achieve three legislative aims. First, CEEFPA sought to address the pandemic's "historic threat to public health" by preventing mass evictions that would force people into crowded shared housing, which could be vectors for increased COVID-19 transmission. *Id.*; *cf.* Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,294 (Sept. 4, 2020). Second, CEEFPA sought to mitigate the economic and social harms caused

by COVID-19 by pausing eviction or foreclosure proceedings that were the direct result of "necessary disease control measures that closed businesses and schools, and triggered mass-unemployment." CEEFPA § 3, 2020 N.Y. Laws, p. 1. Third, CEEFPA aimed to alleviate the logistical burdens that the pandemic caused for courts and litigants, including difficulties getting to and appearing for court. *Id.*

Based on the finding that "[h]undreds of thousands of residents are facing eviction" due to COVID-19's effects, the Legislature sought to simplify the process for tenants to invoke pandemic-related hardships as an affirmative defense in eviction proceedings. *Id.* To that end, CEEFPA enacted a form hardship declaration, which tenants can use to make a sworn attestation that they are facing a COVID-related financial or health hardship that makes them unable to pay rent or move. *Id.* pt. A, § 1(4), 2020 N.Y. Laws, p. 2. The form expressly advises tenants that their hardship requests are made "under penalty of law," and that "it is against the law to make a statement on the form that you know is false." *Id.* pt. A, § 1(4), 2020 N.Y. Laws, pp. 3-4.

CEEFPA requires landlords to provide the blank hardship declaration, along with a list of local tenant-assistance organizations, to tenants "with every written demand for rent," "any other written notice required by the lease . . . law or rule," and "with every notice of petition served on a tenant" seeking eviction. *Id.* pt. A, § 3, 2020 N.Y. Laws, p. 4. A tenant's submission of the sworn attestation of a financial or health hardship suspends the commencement of new eviction proceedings and stays all pre-judgment pending eviction proceedings, as well as the execution of already-issued

evictions warrants, originally until May 1, 2021. *Id.* pt. A, §§ 2, 4, 6, 8, 2020 N.Y. Laws, pp. 4-6.

The sole effect of CEEFPA is to temporarily pause eviction proceedings. CEEFPA does not otherwise relieve a tenant's obligation to pay rent or abide by lease terms, and the hardship form makes clear to tenants that they remain liable for all unpaid rents, "lawful fees, penalties or interest." *Id.* pt. A, § 1(4), 2020 N.Y. Laws, p. 2. Landlords are also free to commence plenary actions for unpaid rents or other damages, notwithstanding a tenant's claim of hardship under CEEFPA, or to enforce preexisting money judgments against tenants. And landlords may move forward with eviction proceedings where the tenant does not submit the sworn attestation or is engaging in nuisance conduct. *Id.* pt. A, § 9, 2020 N.Y. Laws, pp. 6-7.

CEEFPA further provides that when eviction proceedings go forward, a sworn hardship attestation creates a rebuttable presumption that the tenant has experienced COVID-related hardship for purposes of TSHA's limited affirmative defense. *Id.* pt. A, § 11, 2020 N.Y. Laws, p. 7. Nothing in CEEFPA alters the types of evidence landlords have long been permitted to offer to rebut tenants' claims of financial hardship.

CEEFPA did not only provide benefits to tenants: the New York Legislature also made sure to provide corresponding protections for landlords like plaintiffs who have been harmed by the pandemic. For example, CEEFPA permits property owners with ten or fewer dwelling units to submit similar sworn hardship declarations in

order to temporarily stay foreclosure proceedings based on the nonpayment of mortgages or property taxes. *Id.* pt. B, subpts. A-B, 2020 N.Y. Laws, pp. 8-11.

In May 2021, upon consideration of the pandemic's ongoing public health and economic consequences, the Legislature extended CEEFPA's expiration by four months, through August 31, 2021. Ch. 104, 2021 N.Y. Laws (internet). When the extension was being debated in April 2021, New York's COVID-19 transmission rates were still "among the highest in the nation" despite vaccination progress: 87% of state counties had a high rate of transmission under the CDC's metrics. (CA2 JA 362 (Senate sponsor's memorandum).) Given data demonstrating "that evictions substantially contribute to COVID-19 transmission," the legislation's sponsor explained that temporarily extending CEEFPA "ward[s] off an unprecedented wave of evictions, which would threaten new spikes in [virus] transmission at a critical juncture in the fight against COVID-19." (CA2 JA 361-362 (quotation marks omitted).)

The sponsor further explained that extending CEEFPA by four months would allow the State to distribute over $2 billion in government-funded rental-assistance benefits through a new program that had recently been authorized, but not yet operationalized, thus avoiding a flood of evictions that this new funding could prevent. (CA2 JA 362.) The new $2.4 billion program is funded primarily through the $25 billion of relief funds that Congress appropriated for distribution to the States in early 2021. *See* Ch. 53, 2021 N.Y. Laws, p. 635 (internet); Department of Housing and Urban Development Appropriations Act, 2021, H.R. 133, 116th Cong., at 686-92 (enrolled bill) (enacted as part of Consolidated Appropriations Act, 2021, Pub. L. No.

116-260). The program began accepting applications in June 2021 and provides for up to a year's worth of rental arrearages and up to three months of prospective rent for eligible tenants, which will be paid directly to landlords like plaintiffs. N.Y. State Office of Temp. & Disability Assistance, *Emergency Rental Assistance Program*. The State has received over 160,000 completed applications for rent relief through the program, and recently started distributing benefits to eligible landlords, with distribution expected to continue well through August. *See* Matthew Haag, *500,000 New Yorkers Owe Back Rent. What Happens When Evictions Resume?* N.Y. Times (July 27, 2021).

B. Procedural Background

In February 2021, two months after CEEFPA was enacted, five residential landlords filed a lawsuit against the New York State Attorney General alone, alleging that the statute violated their constitutional rights. In April 2021, the U.S. District Court for the Eastern District of New York (Seybert, J.) dismissed the lawsuit because the Attorney General is not charged with enforcing CEEFPA. *Chrysafis v. James*, No. 21-cv-998, 2021 WL 1405884 (E.D.N.Y. Apr. 14, 2021).

In May 2021, more than four months after CEEFPA's enactment, and nearly three weeks after the first lawsuit was dismissed, plaintiffs here—the same five landlords who filed the first suit, along with the Rent Stabilization Association of NYC, Inc., a landlord group—filed this lawsuit against Judge Marks and several local

officials who execute eviction warrants.[4] Plaintiffs sought a declaration that CEEFPA was unconstitutional on various grounds and moved for a preliminary injunction.

After a hearing, on June 11, 2021, the district court (Brown, J.) denied plaintiffs' preliminary-injunction motion, directed that judgment be entered for Judge Marks, and dismissed the complaint as to the remaining defendants for failure to state a claim. (Ex. D, Dist. Ct. Mem. at 26.[5]) The court found that the balance of hardships and public interest weighed against preliminary relief given the "continuing public health crisis" (*id.* at 24) caused by "the most deadly pandemic in a century" (*id.* at 19). The court also determined that plaintiffs were not entitled to any relief in any event because all their constitutional claims lacked merit. (*Id.* at 12-24.)

After the district court denied plaintiffs' request to enjoin CEEFPA's enforcement pending appeal (Ex. B), plaintiffs filed an emergency motion in the U.S. Court of Appeals for the Second Circuit seeking the same relief. (CA2 Dkt. No. 25.) On June 25, 2021, a judge of the Second Circuit (Nardini, J.) denied an administrative stay, granted plaintiffs' request to expedite the appeal, and referred the matter to be submitted to a motions panel "as early as the week of July 19, 2021." (CA2 Dkt. No. 44.) A three-judge panel (Sullivan, Park, Menashi, JJ.) denied plaintiffs' reconsideration motion seeking to have their motion immediately submitted for

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[4] This brief is filed on behalf of Judge Marks. The other defendants are separately represented.

[5] Plaintiffs consented to the consolidation of their preliminary-injunction motion with the underlying merits. (Ex. D, Dist. Ct. Mem. at 25-26.) All citations to "Ex. __" refer to the exhibits attached to the Emergency Application for Writ of Injunction.

consideration. (CA2 Dkt. No. 63.) On July 27, 2021, a three-judge panel (Carney, Sullivan, Nardini, JJ.) denied plaintiffs' motion on the merits, concluding that plaintiffs had not satisfied the requisite factors for an injunction. (Ex. A.)

ARGUMENT

Plaintiffs ask a Justice or this Court to enjoin the enforcement of a duly enacted state law—"extraordinary relief" that "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). Such drastic relief is issued solely where "the legal rights at issue are indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quotation marks omitted). Plaintiffs do not come close to satisfying this stringent standard here.

I. THE BALANCE OF THE EQUITIES WEIGHS HEAVILY AGAINST AN INJUNCTION.

A. Disrupting the Status Quo Mere Weeks Before CEEFPA's Expiration Would Threaten the State's Fragile Recovery and Severely Injure the Public.

CEEFPA has been in place for over seven months and is set to expire in less than four weeks. The temporary pause on eviction proceedings imposed by CEEFPA has provided stability and predictability to the State's residents and its court system, and has permitted the State to distribute $2.4 billion of federal and state rental relief

funds to eligible landlords and tenants. Under comparable circumstances, this Court recently declined to enjoin the CDC's eviction moratorium, with one member of this Court expressly noting that the equities weighed against such an injunction given the moratorium's expiration "in only a few weeks" and the ongoing "distribution of the congressionally appropriated rental assistance funds." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2320 (Kavanaugh, J., concurring). The same factors apply with equal force here.

The lower federal courts have also consistently held that equitable considerations weigh against emergency injunctions of COVID-related eviction moratoriums, including state-imposed pauses. *E.g.*, *Alabama Ass'n of Realtors v. United States Dep't of Health & Human Servs.*, No. 21-5093, 2021 WL 2221646, *3-4 (D.C. Cir. June 2, 2021); *Alabama Ass'n of Realtors v. United States Dep't of Health & Human Servs.*, No. 20-cv-3377, 2021 WL 1946376, *4-5 (D.D.C. May 14, 2021); *Apartment Ass'n of Los Angeles Cnty., Inc. v. City of Los Angeles*, 500 F. Supp. 3d 1088, 1103-04 (C.D. Cal. 2020); *El Papel LLC v. Inslee*, No. 20-cv-1323, 2020 WL 8024348, at *13-15 (Dec. 2, 2020) (report & recommendation), *report adopted*, 2021 WL 71678 (W.D. Wash. Jan. 8, 2021). Although courts have differed in their views as to the merits of the various legal challenges to eviction moratoria, no court has questioned the underlying empirical premise that temporarily halting evictions—and thus preventing people from being forced to move into crowded housing conditions or to become homeless—will aid public health efforts by substantially reducing the movement of potentially contagious persons. *See* 85 Fed. Reg. at 55,294.

Here, too, the New York Legislature found when enacting CEEFPA that evictions substantially contribute to COVID-19 transmission and that lifting of eviction moratoria prematurely "'would threaten new spikes' in transmission 'at a critical juncture in the fight against COVID-19.'" (CA2 JA 362 (quoting 86 Fed. Reg. 16,731, 16,737 (Mar. 31, 2021)).) In addition to these public-health harms, allowing all residential eviction matters to proceed immediately would exacerbate the "widespread economic and societal disruption" caused by COVID-19, which "closed businesses and schools, and triggered mass-unemployment across the state," CEEFPA § 3, 2020 N.Y. Laws, p. 2, and placed "hundreds of thousands of residents . . . at risk of losing their homes" (CA2 JA 361). The state-court system too would be immensely burdened by the immediate resumption of eviction proceedings, weeks in advance of CEEFPA's scheduled expiration date. (CA2 JA 362.) The state courts are currently preparing for the resumption of eviction proceedings in September. *See* Haag, *500,000 New Yorkers Owe Back Rent*, *supra.* Although court staff have returned to courthouses and courts have reopened, the court system experienced increased attrition during the pandemic, and is not yet fully staffed. (Ex. E, Hr'g Tr. at 114:2-14.) The State is currently trying to hire additional staff in order to be able to accommodate the anticipated influx of court proceedings once CEEFPA expires. (*Id.* at 117:14-118:11.) Advancing that schedule would strain the court system and its limited resources. (*Id.* at 116:15-117:13 (testimony of Alia Razzaq, the Chief Clerk of the New York City Civil Court, that courts would likely not be able to accommodate immediate influx of eviction proceedings).)

Contrary to plaintiffs' contention (Mot. 35, 39-40), the harms that would follow from enjoining CEEFPA remain serious despite progress in distributing vaccinations and the lifting of certain other COVID-related restrictions. Although plaintiffs may disagree with the New York Legislature's policy judgment about the precise schedule for transitioning the State away from its COVID-19 policies, this Court has long emphasized that state legislatures must be accorded "wide discretion . . . in determining what is and what is not necessary" to protect the public welfare. *See, e.g.*, *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232-33 (1945) (foreclosure moratorium); *Jacobson v. Massachusetts*, 197 U.S. 11, 27-28 (1905) (vaccination requirement); *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22-23 (1977) (bond agreement). Deference to such legislative judgment is particularly important when "there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring).

Such uncertainty continues to exist here. As the district court found, "the Legislature—and the world—remain in the midst of a struggle against the most deadly pandemic in a century." (Ex. D, Dist. Ct. Mem. at 19.) Despite widespread vaccination, COVID-19 infection rates have begun to climb again across New York, in part because of new variants. *See* Tracking Coronavirus in New York, *supra* (showing rising infection rates in the State); *see also Alabama Ass'n of Realtors*, 2021 WL 2221646, at *3 (recognizing continued harms of COVID-19). And vaccination rates vary geographically and are frequently lower in areas with high eviction rates, such as Bronx and Kings Counties. *Compare* N.Y. City Dep't of Health, *Summary:*

People Vaccinated and Doses Administered (last updated Aug. 4, 2021) (46% of Bronx, 48% of Brooklyn fully vaccinated), *with* N.Y. City Council, *Evictions: Eviction Rates* (borough eviction rates).

The State's economy is also still far from fully recovered. The latest unemployment rate remains nearly double what it was before the pandemic, with more than 720,000 residents still searching for work and continuing to suffer COVID-related economic hardships. Bureau of Labor Statistics, *supra*. Although the Governor has, as of June 15, lifted most of the COVID-related restrictions on economic activity, *see* EO No. 202.111, the impacts of such actions will take time to ripple through the economy: employers need to restart hiring, workers need to apply for and get jobs that have returned, and start work and get paid, all before they can afford to pay rent again. *See* Jeanna Smialek, *One Big Question for the Fed: When Will Jobs Come Back?* N.Y. Times (July 28, 2021) (reporting that national economy still has 6.8 million fewer jobs than it had pre-pandemic); Rahul Karunakar & Shrutee Sarkar, *Global Economy to Stage Growth; Jobs Growth to Lag*, Reuters (Apr. 22, 2021) (predicting U.S. employment will not return to pre-pandemic levels in 2021 or 2022).

For these reasons, plaintiffs are wrong to insist that the Legislature was required to lift CEEFPA's protections at the same time as the State relaxed other COVID-related restrictions. "[A] legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McDonald v. Board of Election Comm'rs of*

Chicago, 394 U.S. 802, 809 (1969) (quotation marks omitted). Here, given the unique public-health and economic harms that would be caused by the immediate resumption of evictions, as well as the need for the rest of the economy to restart before tenants can afford to pay rent again, it made sense for the Legislature to preserve CEEFPA's protections for a short while even while phasing out other restrictions.

CEEFPA's temporary pause also provided a separate benefit, unique to the eviction context: additional time for the State to continue distributing the $2.4 billion in relief funds to eligible landlords through the State's newly operationalized rental-assistance program. This program is primarily funded by federal relief funds appropriated by Congress for distribution to the States to provide for rent relief. The State has received over 160,000 applications for benefits, and is actively working to process these applications. *See* Haag, *500,000 New Yorkers Owe Back Rent*, *supra*. The distribution of these rental relief benefits, which will cover up to one year of rent arrearages and three months of future rent, will likely obviate a large number of nonpayment eviction proceedings—one of the reasons cited for extending CEEFPA in May 2021. (CA2 JA 362.) This Court relied the same need to provide for "orderly distribution" of the same funds in *Alabama Association of Realtors* in denying an injunction against the CDC eviction moratorium. *See* 141 S. Ct. at 2321 (Kavanaugh, J., concurring).

B. The Public Interest Vastly Outweighs Any Harms to Plaintiffs from the Status Quo.

On the other side of the ledger, federal courts have consistently concluded that landlords like plaintiffs suffer no irreparable harms as a result of temporary COVID-related restrictions on evictions. *See, e.g.*, *Brown v. Secretary, U.S. Dep't of Health & Human Servs.*, No. 20-14210, 2021 WL 2944379, at *3-4 (11th Cir. July 14, 2021) (landlords' claimed denial of "access to their unique property" and alleged inability to recoup unpaid rents from "insolvent" tenants not irreparable harms); *Alabama Ass'n of Realtors*, 2021 WL 222146, at *3 (harms not irreparable absent showing that landlords are likely to "lose their businesses . . . or that financial shortfalls are unlikely ultimately to be mitigated"); *Skyworks, Ltd. v. Centers for Disease Control & Prevention*, No. 20-cv-2407, 2021 WL 911720, at *13 (N.D. Ohio Mar. 10, 2021) (no irreparable injury; collecting other eviction moratorium cases); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 363-64 (E.D. Pa. 2020) (potential foreclosures due to unpaid rents insufficient to establish irreparable harm). Any temporary restrictions on plaintiffs' ability to obtain possession of their property thus do not present the "critical and exigent circumstances" required for an injunction that will upend the status quo and deeply harm the public. *See Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (quotation marks omitted).

For one thing, plaintiffs have suffered no irreparable monetary losses because nothing in CEEFPA relieves tenants of their obligations to pay rent, impedes plaintiffs from obtaining a money judgment for unpaid rent or other damages through

a common-law action, or prevents landlords from enforcing preexisting money judgments for unpaid rents. For example, plaintiffs Mudan Shi and Feng Zhou (co-owners) and Pantelis Chrysafis had obtained money judgments against their respective tenants prior to the pandemic (CA2 JA 487, 493; Ex. K, Shi Decl. at 2; Ex. L, Vekiarellis Decl. at 3), and face no impediments under CEEFPA from enforcing those money judgments.

Although other plaintiffs claim, without support, that their tenants will be unable to satisfy any future money judgments, those assertions are belied by their simultaneous allegations that their tenants are not suffering COVID-related financial hardships at all. (*E.g.*, Ex. L, Vekiarellis Decl. at 2 (claiming tenant earns $200,000 salary); Ex. J, LaCasse Decl. at 3 (asserting tenants had no change in financial circumstances due to COVID and recently received a large settlement award).) And even crediting plaintiffs' allegations, their financial injuries may nonetheless be addressed by various government benefit programs, including the State's new $2.4 billion rental-assistance program as well as other COVID relief programs for small businesses. For example, one plaintiff, Betty Cohen, claims that her tenant owes approximately $23,000 in rent arrearages, but acknowledges that she has received over $20,000 in COVID-related grants and loans from the government to cover the temporary shortfall. (Ex. E, Hr'g Tr. at 74:1-76:15.)

The district court thus correctly found that an emergency injunction's devastating public-health and economic effects would decisively outweigh any claimed

irreparable harms to plaintiffs from maintaining the status quo for just a few more weeks. (Ex. D, Dist. Ct. Mem. at 24.)

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

This Court should also deny plaintiffs' motion because they have failed to make a "strong showing" of likely success on the merits of their appeal, *see Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation marks omitted), let alone an "indisputably clear" constitutional violation, *South Bay*, 140 S. Ct. at 1613 (Roberts, J., concurring) (quotation marks omitted). The district court did not improperly rely on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), as a "blanket" defense (Mot. 3-4) to plaintiffs' constitutional claims. To the contrary, the court applied the appropriate levels of scrutiny for each of plaintiffs' constitutional claims, and merely cited *Jacobson* for the longstanding rule that the federal courts must defer to the Legislature's reasonable policy decisions about how best to protect the public welfare during an unprecedented public-health and economic emergency—particularly in the absence of any burden on religious exercise or discriminatory classification that might trigger strict scrutiny. *See Jacobson*, 197 U.S. at 31, 35; *East N.Y. Sav. Bank*, 326 U.S. at 234-35; *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J. concurring); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Indeed, in evaluating recent challenges to governmental responses to the COVID-19 pandemic, Justices of this Court have reaffirmed the continuing vitality of the longstanding *Jacobson* rule that courts should defer to the reasoned determinations of "the political accountable officials" of the States on how best "to guard and protect" the public

welfare. *See South Bay*, 140 S. Ct. at 1613-14 (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38); *Andino*, 141 S. Ct. at 10 (Kavanaugh, J., concurring). No reason exists to depart from this settled rule here.

A. Plaintiffs Cannot Establish an "Indisputably Clear" Violation of Their First Amendment Rights.

The district court properly adhered to this Court's precedents in concluding that CEEFPA does not violate plaintiffs' free speech rights. CEEFPA's disclosure mandates apply only in the context of purely commercial speech: landlords are required to include the hardship form "with every written demand for rent," "any other written notice required by the lease or tenancy agreement," and "every notice of petition served on a tenant" in connection with a contemplated eviction proceeding. CEEFPA pt. A, § 3, 2020 N.Y. Laws, p. 4. Demanding rent and notifying a tenant about the commencement of legal proceeding for breach of a lease agreement is commercial speech—that is, "expression related solely to the economic interests" of the landlord and tenant, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). There is no basis for applying strict scrutiny here, as plaintiffs insist (Mot. 32-34). *See id.* at 562-63.

As the district court correctly concluded, the notices that CEEFPA requires—a blank hardship form and a list of legal-services providers—are routine factual disclosures that comport with the First Amendment (Ex. D, Dist. Ct. Mem. at 22-23): they inform tenants of what the law is and where tenants can obtain assistance, and thus concern "purely factual and uncontroversial information" that is "reasonably

related" to a state interest and is not "unduly burdensome," *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

New York has long required similar disclosures when landlords seek to evict their tenants. For example, to commence an eviction proceeding, landlords must already provide the tenant with a notice advising of the tenant's right to trial, and the longstanding form notice required for commencing an eviction already lists available legal resources for tenants. N.Y.C. Civ. Ct. Rules (22 N.Y.C.R.R.) § 208.42(c), Exhibit A; *see* RPAPL §§ 731, 732(2)-(4). Similarly, before commencing a residential foreclosure proceeding, a lender must give a homeowner a ninety-day notice including: an attached list of housing counseling agencies providing free services; government hotline numbers and websites with mortgage-assistance information; and disclosures about the owner's legal rights and ability to seek grants to cure a default. RPAPL § 1304. Myriad other federal and state laws and regulations require analogous factual disclosures informing individuals about their rights. *See, e.g.*, 12 C.F.R. § 1006.9(c) (requiring debt collectors to inform tenants, when providing eviction notices during the pandemic, that tenants may be eligible for temporary COVID-related relief from evictions); 12 C.F.R. § 1006.34(c)(2)-(3) (eff. Nov. 30, 2021) (requiring debt collectors to advise debtors how to cease collections, dispute debts, and access information about consumer protections and rights); 11 U.S.C. §§ 526-528 (requiring persons or entities offering bankruptcy relief assistance to provide disclosures about consumer rights and options in bankruptcy); 23 N.Y.C.R.R. § 1.3(c)

(mandating debt collectors to inform debtors if statute of limitations applicable to debt has expired).

As plaintiffs do not dispute, CEEFPA's disclosures here are reasonably related to the State's interests in informing tenants about CEEFPA's temporary eviction procedures and alleviating burdens on the courts. The disclosures are not unduly burdensome given that they are available on the court's website, in many translated languages, *see* CEEFPA pt. A, § 3, 2020 N.Y. Laws, p. 4, as are other RPAPL-required disclosures, *see* N.Y.C. Civ. Ct. Rules § 208.42. *See* N.Y. State Unified Court Sys., *Coronavirus and the New York State Courts: Emergency Eviction & Foreclosure Prevention Act of 2020* (updated May 26, 2021).

CEEFPA does not, as plaintiffs claim, require them to endorse tenants' assertions of financial hardship, or "effectively recommend and vouch for" the reputability of legal-services organizations or any government policy. *See* Mot. 32-33. CEEFPA merely adds further factual disclosures to the notices that landlords were always required to submit prior to commencing an eviction proceeding. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010); *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 94-95 (2d Cir. 2010).

Nor does CEEFPA "compel landlords to convey instructions on how tenants can *evade*" lease obligations, as plaintiffs claim. *See* Mot. 34. To the contrary, the hardship form requires the tenant to affirm, "under penalty of law," the opposite:

> I understand that I must comply with all other lawful terms under my tenancy, lease agreement or similar contract. I further understand that lawful fees, penalties or interest for not having paid rent in full or met other financial obligations as required by

> my tenancy, lease agreement or similar contract may still be charged or collected and may result in a monetary judgment against me.

(Ex. H, Notice to Tenant.)

In any event, CEEFPA comports with the First Amendment even if strict scrutiny were to apply. As the district court properly found, the State's compelling public-health and economic interests "overwhelmingly justif[y] this miniscule burden on plaintiffs." (Ex. D, Dist. Ct. Mem. at 23.) And as with other pre-lawsuit disclosure requirements, requiring landlords to provide information about the law prior to commencing litigation is narrowly tailored to ensuring that tenants receive information about their legal rights at the time it is needed—i.e., when tenants learn of an impending eviction petition and must start to prepare their response.

In contending otherwise, plaintiffs argue that the State can simply provide the hardship forms to tenants directly or publicize the information about tenant rights under CEEFPA. *See* Mot. 35-36. But the State has done both: it has widely publicized CEEFPA, published the hardship forms to legal assistance organizations and on the court system's website, and mailed approximately 500,000 hardship forms to tenants with pending eviction proceedings—the only people that the State has reason to believe may benefit from CEEFPA. (Ex. E, Hr'g Tr. at 110:17-24.) Beyond that, however, the State has no meaningful way of even *identifying* which of its millions of residents are (1) tenants (2) who are behind on their rent and (3) may be suffering from COVID-related financial or medical hardships to be able to communicate with those residents at all. *Cf.* Mot. 35 n.14. Landlords, on the other hand, are the ones

with the relevant information. Requiring landlords to provide tenants with notices about their legal rights at the time landlords are seeking to commence evictions directly and substantially furthers the State's compelling interests, without infringing on any protected First Amendment rights.

B. CEEFPA Does Not Violate Procedural Due Process.

Plaintiffs' claim that their procedural due process rights are violated by CEEFPA's temporary restrictions on their ability to obtain evictions and to have their actions adjudicated is foreclosed by *Sosna v. Iowa*, 419 U.S. 393 (1975). Where, as here, "the gravamen of [the] claim is not total deprivation . . . but only delay," there is no due process violation. *Id.* at 410; *cf. Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (mandatory filing fee that served to forever exclude an indigent individual from obtaining a divorce violated due process). Plaintiffs make no mention of *Sosna* in their moving papers, or explain why it should not control here.

CEEFPA does not definitively deprive plaintiffs of any protected property right in lost rents because the statute does not relieve tenants of the obligation to pay rent, nor does it forgive any past-due rents owed to the landlord. Indeed, tenants are expressly advised of their continuing obligations to pay rent in the form hardship declaration that CEEFPA requires landlords to provide to tenants. CEEFPA pt. A, § 1(4), 2020 N.Y. Laws, p. 3. And both before and after CEEFPA, landlords like plaintiffs are entitled to commence plenary actions for money judgments against tenants for unpaid rents and property damage. Here, the record indicates that three of the individual plaintiffs here, Pantelis Chrysafis, Mudan Shi and Feng Zhou,

already obtained money judgments and a judgment or warrant of eviction against their respective defaulting tenants prior to March 2020. (CA2 JA 487, 493; Ex. K, Shi Decl. at 2; Ex. L, Vekiarellis Decl. at 3.) Nothing in CEEFPA—or any of the COVID-related restrictions on evictions that predated CEEFPA—prevent plaintiffs from enforcing these money judgments against their tenants, such as through attaching bank accounts or income executions.

Nor does CEEFPA's limited delay in evictions due to COVID-19 effect such a fundamental change from preexisting eviction procedures so as to violate due process. New York law has never permitted evictions on demand. To the contrary, even before the pandemic and CEEFPA's enactment, the law already permitted courts to stay the execution of an eviction for up to one year, upon a showing of tenant hardship. RPAPL § 753(1). And tenants' own due process rights required housing courts to carefully evaluate affirmative defenses to eviction, which could delay judgments of evictions by months. (*See* Ex. E, Hr'g Tr. at 122:20-123:3 (stating that eviction proceedings typically take "four to six months" to complete).) Given that landlords thus never had any preexisting, legally enforceable entitlement to obtain an eviction remedy within a set period of time, a mere delay of that remedy does not implicate procedural due process. *See Schroeder v. City of Chicago*, 927 F.2d 957, 959 (7th Cir. 1991) (delay in receiving disability benefit did not deprive plaintiff of property for due process purposes because no law established his entitlement to receive the benefit "on the day he applies . . . or within a month, or a year").

Plaintiffs are wrong in premising their due process arguments on the claim that tenants can temporarily avoid eviction without "submit[ting] any proof of their claimed hardship." *See* Mot. 22. To the contrary, CEEFPA's relief is available only if tenants submit such proof in the form of a sworn attestation of financial or health hardship, with the form advising tenants that "it is against the law to make a statement on this form that you know is false." (Ex. H, Notice to Tenant.) While plaintiffs are temporarily unable to rebut that proof with their own sworn testimony (or other evidence) while CEEFPA remains in effect, they will regain that opportunity in just a few weeks, when CEEFPA expires.

Even assuming that CEEFPA's temporary delay implicates plaintiffs' due process rights, courts must nonetheless consider "the justification offered by the Government for delay [of the post-privation remedy] and its relation to the underlying governmental interest" in determining whether the delay has violated due process. *See Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 242 (1988) ("the significance of the delay cannot be evaluated in a vaccum"). Unlike the circumstances in *Connecticut v. Doehr*, where no governmental administrative or other interests were furthered by the challenged summary pre-judgment attachment procedures, 501 U.S. 1, 16 (1991), here, the State's justifications for temporarily modifying certain of its judicial procedures for evictions are several and compelling.

In April 2021, when the Legislature was considering a four-month extension of CEEFPA, the State's COVID transmission rates continued to be "among the highest in the nation." (Ex. D, Dist. Ct. Mem. at 5 (quoting sponsor's memorandum).) General

vaccine distribution was just beginning, and only 31.4% of New Yorkers were fully vaccinated, with recovery very much uncertain, in light of the emergence of variants and slowing vaccination rates.[6] The State had just authorized—but not implemented—a program to distribute $2.4 billion in emergency rental assistance funds for eligible tenants and landlords—the benefits of which would take time to be felt. In light of these circumstances, the Legislature rationally concluded that a brief extension to CEEFPA was warranted to allow the anticipated economic and public-health progress to take effect. (CA2 JA 362.)

Thus, as the district court properly found, the temporary restrictions imposed by CEEFPA were "reasonably related to [the] COVID crisis," and not "clearly arbitrary and unreasonable." (Ex. D, Dist. Ct. Mem. at 17.) In reaching this conclusion, the district court did not "erroneously cast aside the ordinary mode of constitutional analysis," as plaintiffs claim (Mot. 20), but merely properly adhered to the "customary" rule that federal courts "defer to legislative judgment as to the necessity and reasonableness of a particular measure" governing "economic and social regulation," *United States Trust Co.*, 431 U.S. at 22-23, including measures aimed at protecting the public "against an epidemic threatening the safety of all," *Jacobson*, 197 U.S. at 27-28.

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[6] *See* PIX11, *NY COVID Latest: Tuesday, April 27, 2021* (vaccination rates); Sharon Otterman & Joseph Goldstein, *New York's Spring of Optimism: Finally, the Second Virus Wave Is Ebbing*, N.Y. Times (Apr. 28, 2021).

C. Abstention Principles Independently Require Dismissal and Make Plaintiffs Unlikely to Succeed on the Merits.

Finally, principles of federalism and comity here require abstention and thus independently support denial of the motion. As this Court has made clear, federal courts should abstain from issuing equitable relief that would impermissibly intrude in a State's "administration of its own law[s]." *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (quotation marks omitted). The courts of appeals have also relied on settled principles of abstention and comity to uniformly decline to interfere with the administration of state courts, including by compelling state courts to "process evictions more quickly," *SKS & Assocs. v. Dart*, 619 F.3d 674, 676-77 (7th Cir. 2010), to "apply[] a certain burden of proof," *Disability Rights N.Y. v. New York*, 916 F.3d 129, 132-33 (2d Cir. 2019), to undertake particular methods of assigning judges, *Kaufman v. Kaye*, 466 F.3d 83, 86 (2d Cir. 2006), or to dictate clerk's office functions and procedures for filings, *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1070-71 (7th Cir. 2018).

Plaintiffs' requested relief would result in precisely such inappropriate federal intrusion. As the district court found, CEEFPA "governs the timing, format and litigation of eviction proceed[ing]s" in the state courts. (Ex. D, Dist. Ct. Mem. at 15.) Enjoining CEEFPA would displace current state-court eviction procedures and peremptorily require state courts to conduct hearings, issue judgments in proceedings that would otherwise be stayed, and apply different evidentiary burdens than those the Legislature prescribed. Such a result would improperly "legislate and engraft new procedures upon existing state . . . practices," *Wallace v. Kern*, 520 F.2d 400, 404 (2d

Cir. 1975); dictate how state courts manage civil proceedings and "perform their judicial functions," *Disability Rights*, 916 F.3d at 133-34 (quotation marks omitted); and impose federal "monitoring of the operation of state court functions," *O'Shea*, 414 U.S. at 500-01.

Where, as here, plaintiffs seek sweeping relief designed to alter the entire "course of future state" court proceedings, *id.* at 500, abstention is mandatory and does not depend on the pendency of any state proceeding, *see Disability Rights*, 916 F.3d at 134. Requiring state courts to accept new cases in disregard of the prerequisites for filings established by the Legislature, and to advance pending cases using procedures different from those the Legislature selected, would run afoul of bedrock principles of federalism and comity.

CONCLUSION

The emergency application for a writ of injunction should be denied.

Dated: New York, New York
August 4, 2021

Respectfully submitted,

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