UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PANTELIS CHRYSAFIS, BETTY S. COHEN, BRANDIE LACASSE, MUDAN SHI, FENG ZHOU, and RENT STABILIZATION ASSOCIATION OF NYC, INC., *Plaintiffs-Appellants*, -against- LAWRENCE K. MARKS, in his official capacity as Chief Administrative Judge of the Courts of New York State, *Defendant-Appellee*.	Case No. 21-1493 Emergency Motion

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS' EMERGENCY MOTION TO ENFORCE U.S. SUPREME COURT ORDER AND STAY ENFORCEMENT OF NEW YORK'S RESIDENTIAL EVICTION MORATORIUM PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Rent Stabilization Association of NYC, Inc. hereby certifies that it is a non-profit membership organization with no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The district court's entry of final judgment and the pendency of proceedings in this Court "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *United States v. Jacques*, 6 F.4th 337, 342 (2d Cir. 2021) (citation and emphasis omitted).

PRELIMINARY STATEMENT

Four weeks ago, the U.S. Supreme Court enjoined New York's residential eviction moratorium—Part A of the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2021 ("CEEFPA")—in its entirety. *Chrysafis v. Marks*, 2021 WL 3560766, at *1 (U.S. Aug. 12, 2021). That very night, incoming Governor Hochul announced plans to "quickly address the Supreme Court's decision & strengthen the eviction moratorium legislation."[1] Then, last week, New York's Legislature enacted, and Governor Hochul signed into law, a bill expressly purporting to "extend" the very "residential eviction moratorium" enjoined by "the Supreme Court," until at least January 2022. *See* Ex. A (S50001) § 2; *see also id*. at p. 1 ("AN ACT . . . extending the prohibition on the eviction of residential tenants who have suffered financial hardship during the COVID-19 covered period[.]")

[1] https://twitter.com/GovKathyHochul/status/1425999585214963713.

(referring to Part C, Subpart A (the "Extension")).[2] This latest extension, while tweaked at the margins, has simply stepped into the unconstitutional shoes of the already-enjoined CEEFPA Part A and is functionally a continuation of the moratorium the Supreme Court enjoined—sharing, for example, "the same structure and design," almost all of the same "definitions," the same presumption against eviction simply on the tenant's unsworn say-so, and explicit continuity with CEEFPA Part A's earlier version "as it exempts persons covered under those antecedents from filing new declarations of eligibility." *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 2021 WL 3577367, at *3 (D.D.C. Aug. 13, 2021). In fact, Defendant Marks issued a memorandum yesterday confirming that the Extension "reinstates many COVID-19 related protections for respondents in residential and commercial eviction proceedings that were previously set forth in statute and in part invalidated by the United States Supreme Court" and describing how the Extension "continues" nearly every one of the prior moratorium's provisions. Ex. C. Therefore, the Supreme Court's injunction necessarily bars enforcement of this latest moratorium extension as well. *See Ala. Ass'n of Realtors*, 2021 WL 3577367, at *3-4 (holding that "the current [CDC] eviction moratorium is

[2] References to "Ex. __" are to the exhibits attached to the Declaration of Randy M. Mastro, submitted herewith. References to "Shi Decl. ¶ __" are to the Declaration of Mudan Shi, also submitted herewith.

an extension of the vacated moratoria, such that it is subject to this Court's [earlier] order," despite certain "substantive differences" between the versions).

Yet the State has now taken the position that the marginal tweaks made in the new law take it outside the scope of that injunction. *See* Ex. E. In a vain attempt to elude that bar, the State appears to be following the ill-fated eviction moratorium playbook tried by federal authorities—nominally amending a moratorium that the Supreme Court has already instructed does not pass muster. It didn't work in the CDC case, and it shouldn't be given any credence here either, especially where—unlike in the CDC case—the Defendant is *already* under a direct injunction from the Supreme Court. Judicial authority and the rule of law are not so easily sidestepped. The State's attempt to evade the Supreme Court's order must be thwarted.

While the Supreme Court's order mentioned just one aspect of the procedural due process violation—which is not surprising, since it granted emergency relief on an expedited basis—it expressly enjoined the entirety of CEEFPA Part A. It is not for the Legislature or a Defendant under a direct injunction to anoint themselves the arbiters of which arguments the Supreme Court credited in this multi-layered constitutional challenge. Nor can the government "replac[e]" a challenged law with one that "disadvantages [Plaintiffs] in the same fundamental way" in order to evade an injunction—even if it were true that the extension "may disadvantage [Plaintiffs] to a lesser degree." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City*

of Jacksonville, 508 U.S. 656, 662 (1993). Yet that is exactly what the State seeks to do here. This latest residential moratorium extension clearly falls within the scope of the Supreme Court's injunction; because the State has refused Plaintiffs' request to consent to an order so directing, *see* Ex. E, Plaintiffs are forced to seek relief from this Court to effectuate and enforce the Supreme Court's injunction pending appeal. And it is this Court's "principled responsibility as an inferior federal court to apply the spirit of the rulings of the Supreme Court without resorting to hairline distinctions." *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 715 n.7 (2d Cir. 1979).

The gravamen of Plaintiffs' procedural due process claim is that the State's eviction moratorium denies Plaintiffs an adequate opportunity "to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted); Dkt. 80 (Br. for Appellants) at 6-8. That claim is based on *numerous* problematic features of the eviction moratorium law, including that "a tenant's unilateral assertion of 'hardship' need not be substantiated"; "the basis for the asserted hardship need not be specified"; the "unsworn" nature of the hardship declaration; "once the tenant checks a box stating that he or she is suffering from 'financial hardship' due to COVID-19[,] no new eviction proceedings can be commenced," except in "narrow" circumstances; the "hardship categories" are "vague"; and "even when CEEFPA eventually expires, a tenant's unsubstantiated

claim of financial hardship creates an indefinite rebuttable presumption of such hardship." *See* Dkt. 80 at 7-8, 33, 35. All of these features contribute to the inevitable conclusion that this process is a "secret, one-sided determination of facts decisive of rights." *Id*. at 7-8 (quoting *Connecticut v. Doehr*, 501 U.S. 1, 14 (1991)). As a result, the Supreme Court expressly recognized that "this scheme violates the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause." *Chrysafis*, 2021 WL 3560766, at *1 (citation omitted). Hence, the Supreme Court enjoined Part A of CEEFPA in its entirety.

The latest extension of the residential moratorium law continues every single one of these deeply problematic features. The central structure and mechanism is still an unsworn hardship declaration in which the tenant merely checks a box—without specifying what kind or type of hardship he or she claims, and without providing any documentation of the hardship—thereby blocking the filing or prosecution of eviction lawsuits and the issuance of eviction warrants. And the Extension does not even try to address Plaintiffs' First Amendment arguments.

Moreover, to the extent this Extension purports to "modify" CEEFPA Part A in one narrow respect "to address," according to the State, "the Supreme Court's due process concern," S50001 § 2—namely, by purporting to provide landlords a circumscribed opportunity to contest a tenant's assertion of hardship—it, in practice,

continues to bar the courthouse doors to property owners by limiting them to initiating a court action only if the landlord *first* is able to swear "under penalty of perjury"—as contrasted with the tenant's unsworn hardship declaration—that "the petitioner believes in good faith that the hardship certified in the hardship declaration does not exist," *id*., Part C, Subpart A § 3(c). But this information on whether a tenant has suffered one of numerous vague, unspecified COVID-related "hardships" is solely in that tenant's possession. For example, Plaintiff Shi's tenants have not paid rent in over 27 months but "refuse to speak to [her] and have even changed their phone number so [she] can't reach them"—meaning she has no way of knowing their "financial or health situation since the pandemic" and certainly "cannot swear under penalty of perjury whether or not [her] tenants have been facing any of these alleged hardships during the pandemic." Shi Decl. ¶¶ 7, 9, 10, 11. As Plaintiff Shi now explains, "[T]he only way I can seek to evict my tenants is by swearing under penalty of perjury to something that I and so many other landlords cannot possibly know without questioning tenants about what they may or may not be enduring during COVID-19. We have to be able to go to court to do that, yet this latest extension, like before, bars us from doing so." *Id.* ¶ 13. In other words, the tenant is once again "a judge in his own case," to these small landlord Plaintiffs' detriment and irreparable harm. *Chrysafis*, 2021 WL 3560766, at *1 (citation omitted). The due process that the Extension purports to afford is a mirage.

Requiring property owners to "attest" that a tenant is *not* suffering hardship as a prerequisite to opening the courthouse door is, furthermore, an insurmountable hurdle because landlords typically lacking access to this kind of information about tenants will have to be able to swear to it "under penalty of perjury"—a criminal felony carrying up to seven years of prison time. N.Y. Penal Law §§ 70.00(2)(d), 210.15; *cf. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 2021 WL 3783142, at *1 (U.S. Aug. 26, 2021) (per curiam) (emphasizing possibility of "criminal penalties on violators" in enjoining CDC's eviction moratorium). And as Plaintiffs have explained about the prior iteration of this already-enjoined law, the availability of "narrow" exceptions to an otherwise "sweeping stay of eviction proceedings" does not save the law or alter the reality that Plaintiffs "lack recourse to challenge the hardship declarations" that are based on tenants' say-so alone, which is "no process at all." Dkt. 80 at 35 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). Put simply, the State is attempting to reimplement CEEFPA Part A under a different name, but it still clearly violates Plaintiffs' due process rights.

Indeed, this latest extension continues to impose the same irreparable harms on these small landlord Plaintiffs that led the Supreme Court to enjoin its enforcement. Because of the Supreme Court's injunction, for example, Plaintiff LaCasse, an Air Force veteran and single mother who has been rendered effectively homeless by the eviction moratorium, was able to return to court and obtain a default

judgment "awarding [her] possession" of her property. Ex. D. But now, if the Extension is allowed to take effect, that default judgment will not only be stayed before she can evict her tenant and take possession of her property, but also "shall be vacated," S50001, Part C, Subpart A § 5, undoing the very relief the Supreme Court awarded here—which opened the courthouse door for her to convince a court to permit her to live in her own home, pending the disposition of this appeal and any Supreme Court review. And Plaintiff Shi will be back in "exactly the same position" as before the Supreme Court enjoined CEEFPA, "with eviction proceedings stayed simply on [her] tenants' say-so." Shi Decl. ¶¶ 8, 10.

Finally, even if this Court were to apply the traditional preliminary injunction factors anew, this latest moratorium extension should be enjoined pending appeal. The Supreme Court has already determined that Plaintiffs' constitutional rights were violated by CEEFPA Part A, and the Extension tramples them in fundamentally the same ways. In addition, by issuing its injunction, the Supreme Court necessarily found that Plaintiffs were irreparably harmed and that the balance of equities weighed in their favor. It then explicitly found as much in enjoining the far narrower CDC eviction moratorium, which merely afforded a potential defense to eviction. *Ala. Ass'n of Realtors*, 2021 WL 3783142, at *4 ("landlords across the country" of "modest means" are put "at risk of irreparable harm" by eviction moratoria, while "the Government's interests have decreased" over time).

Plaintiffs obtained an emergency injunction from the Supreme Court so they would not have to suffer further irreparable harm during the pendency of this appeal. The State has now cruelly continued to impose the exact same irreparable harm. This Court should not stand for it.

Accordingly, this Court should now issue an order enjoining New York's latest eviction moratorium extension, as it is covered by the emergency injunction already entered by the Supreme Court or, alternatively, as independently subject to an injunction pending appeal.

BACKGROUND

I. The U.S. Supreme Court Enjoins New York's Residential Eviction Moratorium In Its Entirety.

On August 12, the Supreme Court granted in full Plaintiffs' application to "enjoin[] the enforcement" of New York's residential eviction moratorium law, Part A of CEEFPA. *Chrysafis*, 2021 WL 3560766, at *1. The Court did not enjoin the Tenant Safe Harbor Act ("TSHA"), 2020 N. Y. Laws ch. 127, §§1, 2(2)(a), which Plaintiffs "d[id] not challenge," and which allows a tenant to raise COVID-19 financial hardship as an affirmative defense in eviction proceedings. *Id*.

In dissent, Justice Breyer noted *four times* that CEEFPA was set to "expire in less than three weeks." *Id.* at *1-2 (Breyer, J., dissenting). And he concluded by indicating that he would be willing to entertain a renewed "request for an injunction" "if New York extends CEEFPA's provisions in their current form." *Id*. at *3.

II. In Response To The Supreme Court's Ruling, New York's Legislature And Governor Resolved To "Extend" And "Strengthen" The Moratorium.

In response to the Supreme Court's injunction, the incoming Governor and CEEFPA's New York State Senate sponsor immediately vowed to "strengthen" and extend the State's eviction moratorium.[3] And while Senator Kavanagh purported to "respect" the Supreme Court's decision, in the same breath he doubled down on his "belie[f] that CEEFPA was a constitutional exercise of [the State's] authority," as set out in "Justice Stephen Breyer's dissent."[4]

On September 1, the Legislature and Governor followed through on their promises to enact a law "extending" and "strengthen[ing]" the residential eviction moratorium. S50001 at p. 1, § 2. This law is unchanged from CEEFPA Part A in almost all material respects: It includes a nearly identical hardship declaration form; continues to permit tenants to claim financial "hardship" by checking a box without

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[3] Nick Reisman, *After Court Ruling, Hochul Wants to Strengthen Eviction Ban*, SPECTRUM NEWS 1 (Aug. 13, 2021), https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2021/08/13/after-court-ruling--hochul-wants-to-strengthen-eviction-ban; Briana Supardi, *Supreme Court Ends Biden's Eviction Ban, What This Means for New York*, CBS 6 ALBANY (Aug. 27, 2021), https://cbs6albany.com/news/local/supreme-court-ends-bidens-eviction-ban-what-this-means-for-new-york.

[4] Press Release, New York State Senate, Sen. Kavanagh Statement on U.S. Supreme Court Invalidating Part of NY COVID-19 Emergency Eviction & Foreclosure Prevention Act (Aug. 13, 2021), https://www.nysenate.gov/newsroom/press-releases/brian-kavanagh/sen-kavanagh-statement-us-supreme-court-invalidating-part-ny.

identifying which of the categories applies; continues not to require tenants to substantiate the asserted hardship; continues to permit claims of "hardship" by reference to numerous vague categories; continues to bar the initiation or prosecution of eviction proceedings upon the tenant's delivery of a completed hardship declaration form, with only narrow exceptions; continues to require property owners to provide tenants with hardship forms, a government-drafted notice, and a government-curated list of legal service providers; continues to establish a "rebuttable presumption" of hardship that continues indefinitely, even after expiration of the extension; and purports to give effect to hardship declarations previously completed under the now-enjoined CEEFPA eviction moratorium, thus reviving hardship declarations already declared invalid by the Supreme Court. S50001 Part C, Subpart A §§ 1(4), 2-4, 6, 9-10.

The Extension also "vacate[s]" default judgments awarded "between August 13, 2021," the day after the Supreme Court injunction, and "the effective date of this act," and automatically "restore[s]" these matters to the court calendar upon the tenant's request. *Id.* § 5. In other words, property owners who obtained default judgments while CEEFPA was enjoined now must start all over again—including Plaintiff LaCasse, who obtained such a judgment on August 30. Ex. D.

While the Extension purports to "modify" CEEFPA in one respect "to address the Supreme Court's due process concern," S50001 § 2, by providing landlords an

opportunity to contest a tenant's assertion of hardship, it in practice continues to bar the courthouse door by allowing a property owner to initiate an eviction action only if the landlord first swears an affidavit—"under penalty of perjury"—that "the petitioner believes in good faith that the hardship certified in the hardship declaration does not exist." S50001, Part C, Subpart A § 3. In stark contrast, tenants need only sign a hardship declaration under "penalty of law." S50001, Part C, Subpart A § 1(4). And that "hardship" does not need to be specified beyond a check-the-box form. The Extension does not address any of the First Amendment concerns raised by Plaintiffs. *See* Dkt. 80 at 47-56.

III. Defendant Refuses To Agree That The Supreme Court Injunction Covers The Extended Eviction Moratorium.

On September 3, Defendant filed a letter asserting that the Extension "renders moot plaintiffs' procedural due process claim." Dkt. 127. On September 7, Plaintiffs responded and explained that the Extension does not render any of their claims moot, for numerous reasons. Dkt. 131.

Also on September 7, counsel for Plaintiffs sought the position of Defendant Marks's counsel as to whether he agrees that the Supreme Court's injunction covers the Extension and enjoins Defendant Marks from enforcing or implementing Part C, Subpart A of S50001. Ex. E. On September 8, the Attorney General's office responded that it did not agree and would not consent to the entry of any such order.

Id. That same day, Defendant issued a Memorandum and Administrative Order implementing the Extension in full. Exs. C, F.

LEGAL STANDARD

Federal courts are "entitled to rely on the axiom that 'courts have inherent power to enforce compliance with their lawful orders.'" *Spallone v. United States*, 493 U.S. 265, 276 (1990) (citation omitted); *Peacock v. Thomas*, 516 U.S. 349, 356 (1996) (federal courts have the "inherent power to enforce [their] judgments"). This court must "pull back the curtain" to determine if the moratorium extension is sufficiently "related" to the one enjoined by the Supreme Court such that the former is covered by the latter. *See Wash. Metro. Area Transit Auth. Comm'n v. Reliable Limousine Serv., LLC*, 776 F.3d 1, 9 (D.C. Cir. 2015).

ARGUMENT

I. The State's Latest Extension Of The Eviction Moratorium Is Subject To The Supreme Court's Injunction.

The Supreme Court has made clear that the government cannot replace a challenged law "with one that differs only in some insignificant respect" to frustrate the judicial process. *Ne. Fla. Chapter*, 508 U.S. at 662. It does not matter if the new law "differs in certain respects from" the original iteration—or even that it "may disadvantage [plaintiffs] to a lesser degree" than the original—as long as it "disadvantages them in the same fundamental way." *Id.* Courts accordingly treat such a replacement policy "as merely a renewal of the challenged conduct, such that

it is reviewable in the same action" and subject to prior court orders. *Ala. Ass'n of Realtors*, 2021 WL 3577367, at *3 (finding new CDC eviction moratorium, despite multiple "substantive differences" between it and prior versions, "fundamentally similar to its predecessors" and thus "fall[ing] within" the court's order governing those previous iterations); *accord, e.g.*, *Nutritional Health All. v. Shalala*, 144 F.3d 220, 227 n.13 (2d Cir. 1998).

The Extension has merely stepped into CEEFPA's unconstitutional shoes and inflicts the same irreparable harms on landlords as its predecessor. *See supra* pp. 7-8. As detailed above, the law is virtually identical in all material respects. *See supra* pp. 4-5, 10-12. The filing of a hardship declaration still largely bars a landlord from initiating or continuing eviction proceedings or enforcing an eviction warrant, S50001 Part C, Subpart A §§ 3, 4, 6, 10, and the Extension continues to compel landlords to speak by forcing them to distribute hardship declarations and lists of legal service providers to tenants, *id*. §§ 1(4)(b), 2.

The only thing that has changed is that there is now a narrow (and phantom, *see supra* pp. 5-6) exception from the blanket moratorium if a landlord swears under "penalty of perjury" to a "good faith" basis to assert that the tenant's claimed hardship "does not exist," and then convinces a court to find a tenant's claim of hardship invalid, or if the tenant is damaging the property. *Id.* §§ 3, 7, 10.

But "[a]part from these differences, the moratoria are virtually identical," both in their particulars and in that they "share[] the same structure and design." *Ala. Ass'n of Realtors*, 2021 WL 3577367, at *3. Indeed, the State "designed the current moratorium to be continuous with [the prior iteration], insofar as it exempts persons covered under those antecedents from filing new declarations of eligibility." *Id.*; S50001 Part C, Subpart A § 1(4)(a) (valid "Hardship declaration" includes those previously filed "pursuant to" CEEFPA Part A); *see also* Ex. C (Sept. 8, 2021 Memo from Defendant Marks). The new law is thus "sufficiently similar to [CEEFPA] that it is permissible to say that the challenged conduct continues." *Ne. Fla. Chapter*, 508 U.S. at 662 n.3; *see also, e.g.*, S50001 at p. 1. But that "challenged conduct" is at this very moment subject to an injunction issued by the Supreme Court that the Court has instructed should bind Defendant until this Court rules on the merits of Plaintiffs' claims and the Supreme Court resolves any petitions for a writ of certiorari and issues any judgment. *Chrysafis*, 2021 WL 3560766, at *1. Viewing the Extension as anything other than a continuation of the law that the Supreme Court enjoined just weeks ago would require turning a blind eye to reality. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). The State cannot be permitted to so transparently evade the Supreme Court's injunction, and in the process reimpose the very irreparable harms that led to the injunction in the first place.

II. The Superficial Changes To The Moratorium Do Not Negate The Supreme Court's Injunction.

A. The Supreme Court Enjoined CEEFPA In Its Entirety Based On A Lack Of Meaningful Opportunity To Be Heard, And The State Does Not Have The Authority To Parse That Injunction.

As the Legislature acknowledged, *see* S50001 § 2, the Supreme Court made clear that it was "enjoin[ing] the enforcement of [] Part A of [CEEFPA]" in its entirety, *Chrysafis*, 2021 WL 3560766, at *1. The State, moreover, has codified the intent of the Extension—to "extend" the very "residential eviction moratorium" enjoined by "the Supreme Court." S50001 § 2. The State also asserts a "need for *continued* statutory protections" for tenants. *Id.* (emphasis added). Defendant Marks himself has announced that the Extension "reinstates" the provisions "that were previously set forth" in CEEFPA but struck down. Ex. C. But any "reinstate[d]," "extend[ed]," or "continued" eviction moratorium falls within the Supreme Court's injunction.

The State, in effect, has claimed for itself the authority to decide what pieces of CEEFPA the Supreme Court did or did not find objectionable and on what grounds. Both the Legislature and Defendant Marks thus assert that the minor changes the Legislature has made in extending the moratorium yet again "address the Supreme Court's due process concern," S50001 § 2, and take the extension outside the ambit of "the Supreme Court's injunction," Ex. E. But that is not up to the State. It is the "Judicial Branch" alone that "say[s] what the law is." *City of*

Boerne v. Flores, 521 U.S. 507, 536 (1997). And this Court, as an "inferior federal court," must "apply the spirit of the rulings of the Supreme Court without resorting to hairline distinctions." *Ambach*, 598 F.2d at 715 n.7; *see also Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (Kavanaugh, J.) ("Vertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary").

In taking the position that it has "address[ed]" the Supreme Court's due process holding, the State ignores that Plaintiffs' procedural due process claim—that the eviction moratorium denies Plaintiffs an opportunity "to be heard at 'a meaningful time and in a meaningful manner,'" *Eldridge*, 424 U.S. at 333 (citation omitted); Dkt. 80 at 6-8—is based on numerous problematic features of the eviction moratorium. *See supra* pp. 4-5, 10-12. All of these features combine to create a "secret, one-sided determination of facts decisive of rights," Dkt. 80 at 8 (quoting *Doehr*, 501 U.S. at 14), as a result of which the Supreme Court recognized that "this scheme violates the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause," and enjoined CEEFPA Part A in its entirety. *Chrysafis*, 2021 WL 3560766, at *1 (citation omitted). Nor does the State even argue that the First Amendment violations have been addressed.

The State has merely dressed CEEFPA up in an attempt to retain "the same fundamental" constitutional violations as its predecessor. *Ne. Fla. Chapter*, 508

U.S. at 662. "Such an attempt to circumvent a lawful order" of the Supreme Court cries out for this Court's intervention. *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 923 (D.C. Cir. 1984) (per curiam).

B. The Extension's Minor Changes Do Not Rectify The Due Process Violation.

In any event, the Extension does not rectify the due process problems that proved fatal to CEEFPA Part A. While the State purports to fix the due process infringement with one minor tweak of the legislative scheme, the scheme still "violates the [Supreme] Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause." *Chrysafis*, 2021 WL 3560766, at *1 (citation omitted).

As the Supreme Court recently reaffirmed, "preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Ala. Ass'n of Realtors*, 2021 WL 3783142, at *4 (citation omitted). CEEFPA deprived Plaintiffs of this and related core property rights without due process by allowing a tenant's "self-certific[ation] [of] financial hardship" to shut down eviction proceedings and "den[y] the landlord a hearing." *Chrysafis*, 2021 WL 3560766, at *1. Specifically, under the Extension, tenants are still permitted to self-certify hardship merely by checking a box, and thereby block the initiation or prosecution of eviction actions. *See* S50001 Part C, Subpart A §§ 3, 4, 6, 9.

As discussed, the State nevertheless asserts that a minor tweak in the law—to in theory provide a narrow avenue for landlords to challenge assertions of hardship if they can first "attest" under "penalty of perjury" to a "good faith" belief the tenant is *not* suffering from any hardship, S50001, Part C, Subpart A § 3—fixes the due process problem. But the State ignores the reality that prior to initiating a lawsuit, a landlord—Plaintiff Shi, for example, whose tenant stopped paying rent a year prior to the pandemic and then refused to communicate with her, Shi Decl. ¶ 9—typically would not have access to facts such as, for example, whether the tenant has taken on more childcare responsibilities during the pandemic or whether public assistance does not make up for the loss of household income. *See* S50001, Part C, Subpart A § 5 (defining "Hardship"). Even the sponsor of the Extension acknowledged during the bill's legislative hearing that "it is unlikely there's going to be depositions or elaborate discovery" for landlords who seek information from tenants regarding the hardship they are claiming.[5] It would, moreover, be remarkably risky for a landlord, without such personal knowledge, to swear under oath—hazarding a seven year prison sentence, N.Y. Penal Law §§ 70.00(2)(d), 210.15—before being allowed to *file* a suit in the ordinary course. This is, in another words, an empty procedure meant to give the State cover without meaningfully addressing the due process issue.

[5] New York Senate Chamber, Statement by Senator Kavanagh, at 1:05:20, YouTube (Sept. 1, 2021) youtube.com/watch?v=oZUO9IGWB18.

Meanwhile, a tenant can still rely solely on an unsworn self-attestation to bar the courthouse door. The onus falls on the landlord to make assertions under oath—while a tenant's claim of hardship is not—regarding facts that only the tenant knows. *Cf. Campbell v. United States*, 365 U.S. 85, 96 (1961) (noting that "considerations of fairness" militate against "plac[ing] the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"). Tenants thus remain the judge and jury in their own cases, exactly the issue identified by the Supreme Court.

Moreover, the State acknowledges that the Supreme Court found that CEEFPA Part A "violated constitutional rights to due process" by merely "*delay[ing]* a landlord from contesting the [hardship] certification." S50001 § 2 (emphasis added); *see also Doehr*, 501 U.S. at 12 ("temporary or partial impairments to property rights . . . merit due process protection"). The State's revised scheme fails to remedy this defect. Indeed, the "temporary" delay recognized by the Supreme Court as violative of Plaintiffs' constitutional rights was set to expire in mere weeks; now, Plaintiffs are again effectively prevented from contesting hardship declarations for *months*. Thus, tenants can unilaterally shut landlords out of court until at least January 15, 2022, effectively restoring the *status quo ante* that the Supreme Court enjoined. Indeed, tenants need not do anything at all: Despite the Court's order, a tenant's hardship declaration submitted as far back as December

2020 can once again serve to deprive a landlord of his or her property rights without a hearing. S50001, Part C, Subpart A § 1(4)(a).

III. Under Traditional Preliminary Injunction Factors, The Extension Should Be Enjoined.

The Court should enforce the Supreme Court's injunction. But even evaluated anew, this Court should enjoin the Extension pending appeal.[6]

First, the Supreme Court has already determined that CEEFPA violates due process, and, as discussed *supra* at 8, the Extension is materially the same. Thus, Plaintiffs are likely to succeed on the merits.

Second, by enjoining CEEFPA, the Supreme Court necessarily found that Plaintiffs are suffering irreparable harm from New York's eviction moratorium. *Chrysafis*, 2021 WL 3560766, at *1. If this Court allows Defendant to defy the Supreme Court's injunction, Plaintiffs will continue to suffer these harms, which the State has never meaningfully contested. Plaintiffs are exactly the kinds of "landlords across the country" of "modest means" that the Supreme Court just weeks ago expressly held were put "at risk of irreparable harm" by even the far narrower CDC eviction moratorium. *Ala. Ass'n of Realtors*, 2021 WL 3783142, at *4.

[6] A court may grant preliminary injunctive relief if the plaintiff demonstrates "(1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020) (citation omitted).

Third, in granting an injunction, the Supreme Court necessarily determined that the equities strongly favor Plaintiffs. And, as in the CDC case, "[w]hatever interest the Government had" has "since diminished," while the "harm to [Plaintiffs] has increased." *Id.*

CONCLUSION

For the foregoing reasons, this Court should enforce the Supreme Court's injunction and direct Defendant to stay enforcement of Part C, Subpart A of S50001.

Dated: September 9, 2021

Respectfully submitted,

By: /s/ *Randy M. Mastro*

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Date: September 9, 2021 By: /s/ *Randy M. Mastro*

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I HEREBY CERTIFY that on this 9th day of September, 2021, a true and correct copy of the foregoing Memorandum of Law in Support of Plaintiffs-Appellants' Emergency Motion for an Expedited Appeal and an Injunction Pending Appeal was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2).

Date: September 9, 2021 By: /s/ *Randy M. Mastro*