SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Maoli Soriano and Shealean Smith, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

- against -

Index No. 450315/2021

New York State Office of Temporary and Disability Assistance; Michael P. Hein, as Commissioner of the New York State Office of Temporary and Disability Assistance,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND A PRELIMINARY INJUNCTION

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Barbes Rest. Inc. v. ASRR Suzer 218, LLC, 140 A.D.3d 430 (1st Dep't 2016).....14

Basank v. Decker, No. 20 Civ. 2518 (AT), 2020 WL 1953847 (S.D.N.Y. Apr. 23, 2020).....24

Bingham v. Struve, 184 A.D.2d 85 (1st Dep't 1992).....14

Borden v. 400 E. 55th St. Assoc., L.P., 105 A.D.3d 630 (1st Dep't 2013).....10, 12

Borden v. 400 E. 55th St. Assoc., L.P., 24 N.Y.3d 382 (2014).....10

Brownley v. Doar, 811 N.Y.S.2d 894 (Sup. Ct. 2006).....22, 23

City of New York v. Maul, 59 A.D.3d 187 (1st Dep't 2009), *aff'd*, 929 N.E.2d 366 (2010).....10, 11

Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473 (2d Cir. 1995).....10

Cooper v. Sleepy's, LLC, 120 A.D.3d 742 (2d Dep't 2014).....13

Dabrowski v. Abax Inc., 84 A.D.3d 633 (1st Dep't 2011).....13

DeLuca v. Tonawanda Coke Corp., 134 A.D.3d 1534 (4th Dep't 2015).....11

Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp., 69 A.D.3d 212 (4th Dep't 2009).....23

Doe v. Axelrod, 73 N.Y.2d 748 (1988).....14

Grand River Enter. Six Nations, Ltd. v. Pryor, 425 F.3d 158 (2d Cir. 2005).....24

Handler v. 1050 Tenants Corp., 295 A.D.2d 238 (1st Dep't 2002).....14

Henrietta D. v. Giuliani, 119 F. Supp. 2d 181 (E.D.N.Y. 2000), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).....18

Hurrell-Harring v. State, 81 A.D.3d 69 (3d Dep't 2011).....10, 11, 12

Jiggetts v. Grinker, 75 N.Y.2d 411 (1990).....15

Mays v. Dart, 453 F. Supp. 3d 1074 (N.D. Ill. 2020).....19

McNeill v. N.Y.C. Hous. Auth., 719 F. Supp. 233 (S.D.N.Y. 1989) 22

Mixon v. Grinker, 157 Misc.2d 68 (Sup. Ct. N.Y. Cnty. 1993).....18

N.Y.C. Hous. Auth. v. Hart, 147 Misc. 2d 56, 554 N.Y.S.2d 979 (Civ. Ct. 1990) 16

NRI Grp. LLC v. Crawford, 36 N.Y.S.3d 48 (Sup. Ct. 2016) 22

Pludeman v. N. Leasing Sys., Inc., 74 A.D.3d 420 (1st Dep't 2010).....11, 12

Republic of Lebanon v. Sotheby's, 167 A.D.2d 142 (1st Dep't 1990).....17

Seitzman v. Hudson Riv. Assocs., 126 A.D.2d 211 (1st Dep't 1987) 23

Stecko v. RLI Ins. Co., 121 A.D.3d 542 (1st Dep't 2014).....10

Tejada v. Roberts, No. 453245/2015 (Sup. Ct.) 13

Thrower v. Perales, 523 N.Y.S.2d 933 (Sup. Ct. 1987) 23

Williams v. Air Serv. Corp., 121 A.D.3d 441 (1st Dep't 2014).....12

Wright v. Lewis, 873 N.Y.S.2d 516 (Sup. Ct. 2008).....22

Government Data, Notices, and Reports

Community-Related Exposure, Ctrs. for Disease Control and Prevention, updated Oct. 21, 2020, https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html.....20

COVID-19: Data, N.Y.C. Dep't of Health, https://www1.nyc.gov/site/doh/covid/covid-19-data.page (last visited Feb. 8, 2021) 7, 19

COVID-19: People with Certain Medical Conditions, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited Feb. 8, 2021).....18

Federal Register Notice: Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, Ctrs. for Disease Control and Prevention, Sept. 2, 2020, https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html 9, 22

Have NYC's cash assistance rolls grown following the pandemic-related rise in unemployment?, N.Y.C. Indep. Budget Off., July 9, 2020, https://ibo.nyc.ny.us/cgi-park2/2020/07/have-nycs-cash-assistance-rolls-grown-following-the-pandemic-related-rise-in-unemployment/ 8

Health Equity Considerations & Racial & Ethnic Minority Groups, Ctrs. for Disease Control and Prevention, July 24, 2020, https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html 7

Labor Statistics for the New York Region, N.Y. State Dep't of Labor, https://www.labor.ny.gov/ stats/nyc/ (last visited Feb. 8, 2021) 8

November HRA Monthly Fact Sheet, N.Y.C. Hum. Res. Admin., https://www1.nyc.gov/assets/hra/ downloads/pdf/facts/hra_facts/2020/hra_facts_2020_11.pdf (lasted visited Feb. 8, 2021) 8

N.Y.C. Hous. Ct.: Court Statistics 2019, https://www.nycourts.gov/courts/nyc/housing/statistics.html (last visited Feb. 8, 2021) 19

NYSDOH COVID-19 Tracker, N.Y. State Dep't of Health, https://covid19tracker.health.ny.gov/ (last visited Feb. 8, 2021).....7, 19

Scott Stringer, *Census and the City: Overcoming NYC's Digital Divide in the 2020 Census*, Off. of the N.Y.C. Comptroller, July 2019, https://comptroller.nyc.gov/wp content/uploads/documents/Census_and_The_City_ Overcoming_NYC_Digital_Divide_Census.pdf 21

News Reports

Apoorva Mandavilli & Roni Caryn Rabin, *C.D.C. Warns the New Virus Variant Could Fuel Huge Spikes in Covid-19 Cases*, N.Y. Times, Jan. 26, 2021, https://www.nytimes. com/2021/01/15/health/covid-cdc-variant.html 8

Coronavirus in the U.S.: Latest Map and Case Count, N.Y. Times, https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html (last visited Feb. 8, 2021).....6

Craig Clough, *NY Court Cops Sue Over Inadequate COVID-19 Protections*, Law360, July 1, 2020, https://www.law360.com/articles/ 1288654/ny-court-cops-sue-over-inadequate-covid-19-protections.....21

Jeremy Kahn, *Highly transmissible U.K. virus strain is also 30% more lethal, Boris Johnson warns*, Fortune, Jan. 22, 2021, https://fortune.com/2021/01/22/uk-virus-strain-more-lethal/ 7

Michael Gartland, *First two cases of U.K. strain of COVID identified in NYC: officials*, N.Y. Daily News, Jan. 13, 2021.....8

Statutes, Rules, and Regulations

18 N.Y.C.R.R. § 352.3 16

Administrative Directive 03 ADM 7, N.Y. State Off. of Temp. and Disability Assistance, Aug. 4, 2003, https://otda.ny.gov/policy/directives/2003/ADM/03_ADM-07.pdf 16

COVID-19 Emergency Eviction and Foreclosure Prevention Act 3, 9

CPLR § 901(a) 10

CPLR § 6301 14

N.Y. Social Services Law § 131(1) 1, 15

N.Y. Social Services Law § 350(1)(a) 1, 15, 16

Policy Directive #17-26-ELI, N.Y.C. Hum. Res. Admin., Dec. 14, 2017, http://onlineresources.wnylc.net/nychra/docs/new_pd_17-26-eli.pdf 17

Other

@NYGovCuomo, Twitter, Apr. 26, 2020, https://twitter.com/NYGovCuomo/status/1254448716188135424 7

Age-Adjusted Mortality Rate for Sheltered Homeless New Yorkers, Coal. for the Homeless, https://www.coalitionforthehomeless.org/age-adjusted-mortality-rate-for-sheltered-homeless-new-yorkers/ (last visited Feb. 8, 2021) 22

Coronavirus Resource Center, Johns Hopkins Univ. of Med., https://coronavirus.jhu.edu/ (last visited Feb. 8, 2021) 6

J. Public Hearing Before the S. Standing Comms. on Judiciary, Codes, and Hous., Constr. and Cmty. Dev., Aug. 21, 2020, https://www.nysenate.gov/calendar/public-hearings/august-21-2020/joint-public-hearing-examine-re-opening-and-operation-new 19

Plaintiffs Maoli Soriano and Shealean Smith, by and through their undersigned attorneys, respectfully submit this memorandum of law in support of their motion for (1) class certification, and (2) a preliminary injunction preventing Defendants New York State Office of Temporary and Disability Assistance ("OTDA") and Michael P. Hein, as Commissioner of OTDA from denying Plaintiffs and all similarly situated families in New York City access to rental assistance through the Family Homelessness and Eviction Prevention Supplement ("FHEPS") program on the basis that their landlords have not yet sued them for eviction.

PRELIMINARY STATEMENT

The COVID-19 pandemic is a public health and economic crisis that has devastated New York City. Since March 2020, New York City has reported more than 642,000 cases and nearly 28,000 deaths. At the same time, public health restrictions on businesses and gatherings have resulted in historically high unemployment rates, and the number of New York City residents who receive public cash assistance has ballooned by more than 55,000. With temporary moratoriums on evictions about to expire and no end to the pandemic in sight, the City now faces the possibility of an eviction and homelessness crisis unlike any it has ever seen.

In the face of this unprecedented public health and economic emergency, Defendants refuse to comply with their legal obligation to provide low-income New York City families with access to crucial housing subsidies. Plaintiffs and all similarly situated New York City families are entitled to a preliminary injunction to preserve their access to those subsidies in order to avoid eviction and homelessness, and protect their health and safety.

Under Sections 131(1) and 350(1)(a) of the New York Social Services Law, Defendants have an obligation to provide an adequate shelter allowance for needy families. For families in New York City, where rent is the highest in the State, Defendants previously met their obligation by providing both a statewide shelter allowance and an additional rental subsidy through the

FHEPS program. New York State's basic shelter allowance program provides only a fraction of the amount needed to pay a typical monthly rent in New York City. FHEPS assistance is therefore critical to protecting low-income New York City families from losing their homes.

In order to qualify for FHEPS, a family must show that, among other things, their landlord has sued them for eviction for failure to pay rent (the "Lawsuit Requirement"), and their rent arrears do not exceed $9,000. Out of six family rent supplement programs that Defendants oversee statewide, FHEPS is the only one that includes a Lawsuit Requirement.

Before the pandemic, appearing at Housing Court was a burden for many families who have to juggle childcare, employment, and other responsibilities during the day. During the pandemic, however, appearing in Housing Court is no longer merely a burden—it poses a serious risk to a family's health and safety, as well as to the health and safety of the public. COVID-19 spreads primarily through the air and is most contagious indoors, particularly in settings where adequate social distancing is impossible. The risk of transmission in courtrooms and hallways of the Housing Court—small, enclosed spaces through which many potentially infected persons must pass—is high. That risk is compounded for older adults, those with pre-existing health conditions, and low-income individuals who most often travel to and from Housing Court via public transportation. The risk of COVID-19 exposure is particularly dangerous for tenants in the Black and Hispanic communities, which have suffered the highest infection and fatality rates in New York City. Many families forced to appear in Housing Court in order to access FHEPS subsidies will be part of one or more of those especially vulnerable populations.

In June 2020, recognizing the serious risk to public health and safety that would result from enforcing the Lawsuit Requirement during the COVID-19 pandemic, the New York City

Department of Social Services ("NYC DSS") requested that Defendants temporarily waive the Lawsuit Requirement. Defendants summarily denied that request.

In response to the pandemic, New York State, the Office of Court Administration ("OCA"), and the Centers for Disease Control and Prevention ("CDC") put in place temporary, partial moratoriums on new evictions. Those moratoriums have now expired. On December 28, 2020, the State passed the COVID-19 Emergency Eviction and Foreclosure Prevention Act ("EEFPA"), which prohibits the filing of any new eviction proceedings based on nonpayment of rent through at February 26, 2021, and through May 1, 2021 where a tenant submits a hardship declaration. As a result, New York City families are currently completely unable to access FHEPS benefits because their landlords cannot initiate eviction proceedings—no new applicant for the FHEPS program can satisfy the Lawsuit Requirement.

By the time the current eviction moratorium expires, it will be too late for many families to apply for FHEPS benefits because their rent arrears will have accumulated far beyond the $9,000 limit for FHEPS eligibility. For families who are still eligible for FHEPS once eviction proceedings resume, continued enforcement of the Lawsuit Requirement will force them into an impossible choice: risk potentially deadly exposure to COVID-19 in order to contest their eviction proceeding in Housing Court, or stay home and risk a default judgment of eviction. *Pro se* tenants who choose the latter will likely be evicted pursuant to a default judgment before they can get approval for FHEPS assistance. Placing needy families in this position violates Defendants' legal obligation to provide an adequate shelter allowance.

On February 8, 2021, Plaintiffs commenced a class action for declaratory and injunctive relief against Defendants for their failure to provide an adequate shelter allowance. But New York City's most vulnerable families need immediate injunctive relief to access their statutorily

guaranteed benefits and to avoid having to choose between the risk of infection or death, or the risk of eviction and homelessness.

To protect themselves and all similarly situated New York City families, Plaintiffs seek certification of this action as a class action. Plaintiffs' proposed class would consist of all individuals residing in New York City who are eligible to receive FHEPS benefits but for the fact that their landlords have not sued them for eviction for failure to pay rent (the "Class"). Class certification is appropriate in this case because (i) there are thousands of Class members, (ii) the predominant legal and factual questions in this action are common across the Class, (iii) the claims of the Class representatives are typical of the class, (iv) Plaintiffs and their counsel will fairly and adequately protect the interests of the Class, and (v) class certification is superior to any other method of adjudication of the issues raised in this action.

Plaintiffs and the Class are also entitled to a preliminary injunction preventing Defendants from enforcing the Lawsuit Requirement during the COVID-19 pandemic.

First, Plaintiffs are likely to succeed on the merits of this action. New York law imposes an affirmative obligation on Defendants to provide adequate shelter allowances for needy families. Defendants' insistence on enforcing the Lawsuit Requirement makes FHEPS benefits either entirely inaccessible or contingent on a family risking exposure to COVID-19 or a default judgment of eviction. A shelter allowance that families either cannot access at all or cannot access without confronting such grave risks is necessarily inadequate.

Second, absent a preliminary injunction, Plaintiffs and the Class families would suffer imminent, irreparable harm. Families whose accumulated rent arrears make them ineligible for FHEPS after the expiration of the eviction moratoriums face a serious risk of eviction and homelessness. Families still eligible for FHEPS face an equally serious risk, either of eviction

and homelessness if they default in an eviction proceeding, or of contracting and spreading COVID-19 if they choose to defend against a default judgment in Housing Court. Courts routinely find risks such as these to constitute irreparable harm justifying preliminary injunctive relief.

Finally, the balance of the equities weighs heavily in favor of a preliminary injunction. Plaintiffs and the Class face infection, death, or homelessness as a result of Defendants' enforcement of the Lawsuit Requirement during the pandemic. By contrast, the only supposed "harm" to Defendants that would result from a preliminary injunction would be the monetary consequence of providing FHEPS assistance to families not yet subject to eviction proceedings. Moreover, a preliminary injunction would serve the significant public interest of protecting public health and safety during a pandemic.

Accordingly, Plaintiffs are entitled to (1) certification of a class of New York City families with minor children who would be eligible for the FHEPS subsidy but for the fact that they have not been sued in Housing Court; and (2) a preliminary injunction preventing Defendants from enforcing the Lawsuit Requirement to deny FHEPS assistance to Plaintiffs and all similarly situated New York City families during the COVID-19 pandemic.

FACTUAL BACKGROUND

I. THE FHEPS PROGRAM

The FHEPS program is a shelter supplement program that provides rental subsidies to low-income New York City families with minor children. (Affirmation of Fara Tabatabai ("Tabatabai Affirm."), Ex. 1 ("Compl.") ¶ 2.) The purpose of FHEPS is to prevent at-risk families with minor children from entering into the shelter system. (*Id.* ¶ 3.) Access to FHEPS is often critical to ensuring that vulnerable families do not lose their homes. (*Id.*)

To be eligible for FHEPS, a family must demonstrate that: (i) at least one minor child lives in the household, (ii) at least one family member in the household receives public assistance, (iii) the family has a lease for at least one year or an apartment subject to rent regulation, (iv) the family's rent arrears do not exceed $9,000, and (v) the family has been sued for eviction in Housing Court for failure to pay rent. Tabatabai Affirm., Ex. 2 at 1-2, 6. Except in extremely limited circumstances, such as where an apartment building is subject to a foreclosure action, a family cannot access FHEPS subsidies unless and until they have been sued for eviction in Housing Court. *See id*. at 1.

FHEPS is one of six family shelter supplement programs that Defendants oversee and the *only* program to include a Lawsuit Requirement. To qualify for a rent supplement in Westchester County, a letter from the family's landlord indicating an intent to start an eviction proceeding is sufficient. Tabatabai Affirm., Ex. 3 at 4. In Nassau and Orange Counties, a family need only prove a "legitimate, verifiable threat of eviction." Tabatabai Affirm., Ex. 4 at 3, Ex. 5 at 1. Suffolk County "will accept a notarized statement from [a family's] landlord," and in Monroe County, a landlord "must give the agency a full accounting," without the need to initiate eviction proceedings. Tabatabai Affirm., Ex. 6 at 4, Ex. 7 at 4.

II. THE COVID-19 PANDEMIC

Since February 2020, the rapid spread of COVID-19 has plunged the world into the deadliest pandemic in more than a century. The pandemic has been particularly devastating in the United States, which has reported more than 27 million cases of COVID-19 and more than 464,000 deaths. *Coronavirus Resource Center*, Johns Hopkins Univ. of Med., https://coronavirus.jhu.edu/ (last visited Feb. 8, 2021).

New York City, the global epicenter of the pandemic, has suffered more than 642,000 cases and 27,768 deaths. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times,

https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html (last visited Feb. 8, 2021). Death rates in Black and Hispanic communities are significantly higher than other communities: 34% of COVID-19 deaths in the City are Hispanic residents, and another 28% are Black residents. *NYSDOH COVID-19 Tracker*, N.Y. State Dep't of Health, https://covid19tracker.health.ny.gov/ (last visited Feb. 8, 2021). Consistent with this data, the CDC has identified racial and ethnic minorities as particularly vulnerable to COVID-19. *Health Equity Considerations & Racial & Ethnic Minority Groups*, Ctrs. for Disease Control and Prevention, July 24, 2020, https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.

During March and April 2020, the number of COVID-19 cases and deaths in New York City rose exponentially. (Compl. ¶ 41.) In the summer months that followed, due to public health mandates and restrictions on businesses and gatherings, the City's infection and mortality rates began to decline. (*Id*.) Unfortunately, in the fall and winter, New York City experienced a surge in COVID-19 cases and hospitalizations. New York State Governor Andrew Cuomo indicated that, in order to manage the spread of COVID-19, New York's infection rate needed to stay below 1%. @NYGovCuomo, Twitter, Apr. 26, 2020, https://twitter.com/NYGovCuomo/status/1254448716188135424. The City's current seven-day average positivity rate is nearly 9%. *COVID-19: Data*, N.Y.C. Dep't of Health, https://www1.nyc.gov/site/doh/covid/covid-19-data.page (last visited Feb. 8, 2021). The Bronx and Queens Housing Courts are located in zip codes with positivity rates over 10%. *See id*.

Over the last few months, COVID-19 has mutated to become deadlier and more transmissible. A strain of the virus that originated in the United Kingdom, which is up to 70% more transmissible and 30% more lethal than the original strain, has already arrived in New York

City. Jeremy Kahn, *Highly transmissible U.K. virus strain is also 30% more lethal, Boris Johnson warns*, Fortune, Jan. 22, 2021, https://fortune.com/2021/01/22/uk-virus-strain-more-lethal/; Michael Gartland, *First two cases of U.K. strain of COVID identified in NYC: officials*, N.Y. Daily News, Jan. 13, 2021, https://www.nydailynews.com/coronavirus/ny-covid-vaccines-uk-strain-yankees-de-blasio-20210113-gj6v3jbqszdgrg5yskjwsd4vyq-story.html. Officials have warned that the United Kingdom strain could become the dominant source of COVID-19 infection in the United States as soon as March 2021. Apoorva Mandavilli & Roni Caryn Rabin, *C.D.C. Warns the New Virus Variant Could Fuel Huge Spikes in Covid-19 Cases*, N.Y. Times, Jan. 26, 2021, https://www.nytimes. com/2021/01/15/health/covid-cdc-variant.html.

The pandemic has also economically devastated New York City. In March 2020, New York State instituted public health restrictions that required all non-essential businesses to close, resulting in thousands of New York City residents losing their jobs. (Compl. ¶ 40.) Between March and June 2020, the City's unemployment rate skyrocketed from 4.1% to 20.4%. *Labor Statistics for the New York Region*, N.Y. State Dep't of Labor, https://www.labor.ny.gov/stats/nyc/ (last visited Feb. 8, 2021). Even now, with many businesses open again, the unemployment rate is still over 11%. *Id*. To survive, many New York City residents have turned to cash assistance. Between March and November 2020, the number of New Yorkers receiving cash assistance increased by more than 55,000. *Have NYC's cash assistance rolls grown following the pandemic-related rise in unemployment?*, N.Y.C. Indep. Budget Off., July 9, 2020, https://ibo.nyc.ny.us/cgi-park2/2020/07/have-nycs-cash-assistance-rolls-grown-following-the-pandemic-related-rise-in-unemployment/; *November HRA Monthly Fact Sheet*, N.Y.C. Hum. Res. Admin., https://www1.nyc.gov/assets/hra/downloads/pdf/facts/hra_facts/2020/hra_facts_2020_11.pdf (lasted visited Feb. 8, 2021).

III. DEFENDANTS' REFUSAL TO WAIVE THE LAWSUIT REQUIREMENT

On March 20, 2020, Governor Cuomo issued an executive order halting all eviction and foreclosure actions. N.Y. State Exec. Order No. 202.8. On May 7, 2020, Governor Cuomo narrowed that ban to bar any eviction or foreclosure action against any individual eligible for unemployment benefits or otherwise facing financial hardship due to the COVID-19 pandemic. That narrower ban expired on August 20, 2020. N.Y. State Exec. Order No. 202.28.

On June 19, 2020, recognizing the adverse public health and economic consequences that would result from Housing Court reopening to a flood of new eviction cases, NYC DSS requested that OTDA temporarily waive the Lawsuit Requirement and allow NYC DSS to approve FHEPS assistance where a family had received a written rent demand from their landlord. Tabatabai Affirm., Ex. 8. On July 9, 2020, OTDA denied NYC DSS's request for waiver of the Lawsuit Requirement. Tabatabai Affirm., Ex. 9.

After Governor Cuomo's partial moratorium on evictions expired, the OCA temporarily continued the stay on evictions. OCA Administrative Order 160A/20. On October 14, 2020, the OCA permitted all eviction proceedings statewide to resume. New York tenants were then protected only by a partial eviction moratorium instituted by the CDC, which expired on December 31, 2020. *Federal Register Notice: Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, Ctrs. for Disease Control and Prevention, Sept. 2, 2020, https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html.

On December 28, 2020, the New York State Legislature passed EEFPA, which established a moratorium on all evictions based on nonpayment of rent through February 26, 2021 and further prohibited through May 1, 2021 nonpayment eviction proceedings against tenants who submitted a hardship declaration. EEFPA §§ 2, 4.

ARGUMENT

I. PLAINTIFFS' PROPOSED CLASS SHOULD BE CERTIFIED.

Certification of a class is appropriate where "(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CPLR § 901(a); *see also City of New York v. Maul*, 59 A.D.3d 187, 189 (1st Dep't 2009), *aff'd*, 929 N.E.2d 366 (2010). Plaintiffs' proposed Class meets all of the requirements for class certification.

A. The Class Is So Numerous That Joinder of All Members Would Be Impracticable.

For purposes of class certification, "numerosity is presumed at a level of 40 members." *Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 399 (2014) (quoting *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)). Here, the Class consists of thousands of members. (Compl. ¶ 67.) Thus, the Class is sufficiently numerous that joinder would be impracticable.

B. The Predominant Questions of Law and Fact Are Common to All Class Members.

To establish commonality of legal and factual questions across a proposed class, "it is predominance, not identity or unanimity, that is the linchpin." *Hurrell-Harring v. State*, 81 A.D.3d 69, 73 (3d Dep't 2011); *see also Stecko v. RLI Ins. Co.*, 121 A.D.3d 542, 543 (1st Dep't 2014) (commonality requirement satisfied where class members alleged that defendant-employer failed to pay required prevailing wage and supplemental benefits); *Borden v. 400 E. 55th St.*

Assoc., L.P., 105 A.D.3d 630, 630-31 (1st Dep't 2013) ("The issues of when defendant received J-51 benefits, whether defendant deregulated apartments while receiving those benefits, which tenants resided in those apartments during those time periods, and whether defendant wrongfully charged market rents . . . are common issues that 'predominate'.").

Class actions are appropriate where the central legal and factual questions are common to all class members, even if there are additional factual or legal questions that need to be resolved with respect to particular members. *Hurrell-Harring*, 81 A.D.3d at 73; *Maul*, 14 N.Y.3d at 514. A determination of commonality also requires an inquiry into "whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Pludeman v. N. Leasing Sys., Inc.*, 74 A.D.3d 420, 423 (1st Dep't 2010).

Here, there is substantial legal and factual commonality across the Class. The only legal questions in this action—whether Defendants' enforcement of the Lawsuit Requirement during the COVID-19 pandemic violates their obligations under N.Y. Social Services Law and the Class's due process rights—is identical across the claims of all Class members. Likewise, the key factual questions in this case—concerning the impact of the pandemic on New York City residents and Housing Court operations—are the same across the Class. Any minor factual differences among Class members would not affect the predominant legal or factual issues that would determine liability. *See DeLuca v. Tonawanda Coke Corp.*, 134 A.D.3d 1534, 1536 (4th Dep't 2015) ("Although the individual class members may have sustained differing amounts of damages . . . that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class."); *Maul*, 14 N.Y.3d

at 504, 513-14 (affirming class certification order where determination of appropriate placements in New York City's foster care system would require individualized inquiry).

Given the high degree of commonality across the claims in the Class, litigating this matter as a class action would be the most efficient use of judicial and party resources. Requiring Class members to pursue individual claims would lead to multiple identical lawsuits against Defendants, which would unnecessarily burden the courts and could result in inconsistent judgments. Accordingly, the commonality requirement weighs in favor of certifying the Class.

C. The Claims of the Representative Parties Are Typical of the Claims of the Class.

To establish typicality, the claims of the named representatives and other class members must arise from the same wrongful course of conduct and be based on the same legal theories. *See Pludeman*, 74 A.D.3d at 424; *Hurrell-Harring*, 81 A.D.3d at 73. "[T]hat the underlying facts of each individual plaintiff's claim vary . . . does not preclude class certification." *Borden*, 105 A.D.3d at 631; *see also Williams v. Air Serv. Corp.*, 121 A.D.3d 441, 442 (1st Dep't 2014) ("[T]he minor differences in each individual class member's claim do not defeat typicality."); *Pludeman*, 74 A.D.3d at 423 (typicality does not require "identity of issues").

Here, the claims of the named Plaintiffs and the rest of the Class arise from the same conduct: Defendants' refusal to waive the Lawsuit Requirement during the COVID-19 pandemic. The named Plaintiffs and proposed Class members have the same claims: that enforcement of the Lawsuit Requirement during the pandemic does not comply with Defendants' obligation under New York Social Services Law and violates the due process rights of Plaintiffs and the Class. Any slight differences in the underlying facts of the Class representatives' claims do not change the legal claims or theories they are asserting on behalf of the Class. The typicality requirement is therefore satisfied.

D. Plaintiffs and Their Counsel will Fairly and Adequately Protect the Interests of the Class.

"The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (*e.g.*, familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel." *Cooper v. Sleepy's, LLC*, 120 A.D.3d 742, 743-44 (2d Dep't 2014); *see also Dabrowski v. Abax Inc.*, 84 A.D.3d 633, 634-35 (1st Dep't 2011).

Those factors support class certification here. First, Plaintiffs and their counsel are not aware of any conflicts of interest. Second, the proposed Class representatives are familiar with and committed to pursuing the lawsuit, and understand the relevant issues. Third, Class counsel are high-quality, experienced lawyers at The Legal Aid Society and Hughes Hubbard & Reed LLP ("HHR"). The Legal Aid Society is the oldest and largest not-for-profit legal services organization in the United States, and the attorneys working on this case are well-versed and accomplished in complex litigation, the subject matter of this litigation, and in representing recipients of cash assistance and other government benefits in New York City. HHR is a large, international law firm with significant expertise in complex litigation. Fara Tabatabai, lead counsel from HHR, successfully represented the plaintiffs in *Tejada v. Roberts*, No. 453245/2015 (Sup. Ct.), the class action litigation that spawned the FHEPS program.

E. Class Action Adjudication of the Claims is Superior to All Other Available Methods of Adjudication.

A class action is the most efficient and appropriate means of adjudicating the issues in this case. Cases, such as this one, in which plaintiffs seek to remedy widespread, systematic failures, are most commonly litigated as class actions. That is for good reason: pursuing multiple individual lawsuits for systematic failures could result in inconsistent judgments, which

would create uncertainty and require expensive court resolution. Here, Plaintiffs seek a program-wide temporary waiver of the Lawsuit Requirement that would affect thousands of Class members. Accordingly, litigating this case as a class action would be superior to all other methods of adjudication, and the Court should certify this action as a class action.

II. PLAINTIFFS AND THE CLASS ARE ENTITLED TO A PRELIMINARY INJUNCTION.

A preliminary injunction may be granted "in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual." CPLR § 6301. A preliminary injunction is appropriate where the moving party can demonstrate "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in [its] favor." *Handler v. 1050 Tenants Corp.*, 295 A.D.2d 238, 239 (1st Dep't 2002) (*quoting Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988)). Plaintiffs and the proposed Class can establish all three elements.

A. Plaintiffs Are Likely To Be Successful on the Merits of this Action.

To establish a likelihood of success on the merits of an action, "a prima facie showing of a reasonable probability of success is sufficient." *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 431 (1st Dep't 2016); *see also Bingham v. Struve*, 184 A.D.2d 85, 88 (1st Dep't 1992) ("*likelihood* of success . . . must not be equated with the showing of a *certainty* of success on the merits"). Here, Plaintiffs are likely to be successful on the merits of their action.

Under New York law, Defendants have an affirmative obligation to provide a shelter allowance for New York City families with children that is "adequate to enable the father, mother or other relative to bring up the child properly, having regard for the physical, mental and

moral well-being of such child." N.Y. Soc. Servs. L. § 350(1)(a); *see also* N.Y. Soc. Servs. L. § 131(1) ("It shall be the duty of social services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves, in accordance with the requirements of this article and other provisions of this chapter."). In the landmark case of *Jiggetts v. Grinker*, the New York Court of Appeals confirmed that the Social Services Law "manifest[s] the Legislature's determination that family units should be kept together in a home-type setting and impos[es] a duty on the [State] to establish shelter allowances adequate for that purpose." 75 N.Y.2d 411, 417 (1990).

Defendants' enforcement of the Lawsuit Requirement during the COVID-19 pandemic violates their duty to provide an adequate shelter allowance. As the pandemic continues to rage on, thousands of New York City families need FHEPS subsidies to avoid becoming homeless. Defendants' insistence on enforcing the Lawsuit Requirement has made those subsidies entirely inaccessible to new applicants. Because EEFPA prohibits the commencement of any eviction proceedings, it is legally impossible for families who need FHEPS to qualify for it. By the time eviction proceedings resume, many families will have become ineligible for FHEPS because their rent arrears will have accumulated far beyond the $9,000 limit for FHEPS eligibility. Thus, Defendants' refusal to waive the Lawsuit Requirement will ensure that many families who need FHEPS will not be able to access it at all.

At the same time, Defendants will force those families who remain eligible for FHEPS into an impossible choice: they can either appear in Housing Court to defend themselves in an eviction proceeding, thereby risking infection or death by COVID-19; or protect their health and safety by not appearing in Housing Court, thereby risking a default judgment of eviction, which will likely result in an eviction before they receive approval for FHEPS benefits. Housing

subsidies that families cannot access at all, or without risking infection with a deadly virus or a default judgment of eviction, are inadequate.

In addition, Defendants' enforcement of the Lawsuit Requirement during the pandemic violates their duty to provide a shelter supplement that shows "regard for the physical, mental and moral well-being of [a] child." N.Y. Soc. Servs. L. § 350(1)(a). Once the eviction moratoriums expire, the Lawsuit Requirement will require that individuals appear in Housing Court in order to access FHEPS. Because of school closures and remote and blended learning schedules, many parents do not have childcare options during the day and would have to take their children with them to Housing Court, thereby exposing those children to the risk of contracting COVID-19. Even if children do not travel with their parents to Housing Court, parents who contract COVID-19 in Housing Court will bring it home to their children. Those parents who do not go to Housing Court risk eviction, with obvious deleterious impacts on the physical, mental, and moral well-being of their children. *See N.Y.C. Hous. Auth. v. Hart*, 147 Misc. 2d 56, 59, 554 N.Y.S.2d 979, 982 (Civ. Ct. 1990) ("An eviction for non-payment of rent will not only have a profound impact on the health and welfare of these children but it contravenes the established policy of this state of providing support for needy families and ensuring that they and their children are maintained in their home.").

Finally, Defendants' enforcement of the Lawsuit Requirement during the COVID-19 pandemic violates Plaintiff's due process rights. Plaintiffs have a right to FHEPS benefits that is protected by the Due Process Clauses of the Constitutions of the United States and the State of New York. *See* 18 N.Y.C.R.R. § 352.3 ("Each social services district must provide a monthly allowance for rent in the amount actually paid, for cases with a verified rental obligation."); Administrative Directive 03 ADM 7, N.Y. State Off. of Temp. and Disability Assistance, Aug. 4,

2003, https://otda.ny.gov/policy/directives/2003/ADM/03_ADM-07.pdf (setting forth statewide requirements for shelter allowance program); Policy Directive #17-26-ELI, N.Y.C. Hum. Res. Admin., Dec. 14, 2017, http://onlineresources.wnylc.net/nychra/docs/new_pd_17-26-eli.pdf (setting forth directives for administration of FHEPS program). Defendants' refusal to waive the Lawsuit Requirement denies Plaintiffs an opportunity to be heard regarding their right to FHEPS benefits because it is currently impossible for Plaintiffs to satisfy the Lawsuit Requirement. Once the current eviction moratoriums expire, Defendants' refusal to waive the Lawsuit Requirement will constructively deny Plaintiffs an opportunity to be heard regarding their rights to FHEPS benefits—assuming they are still eligible—because their due process rights will be contingent on Plaintiffs risking their health and safety to appear in Housing Court.

Where, as here, "denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced." *Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 145 (1st Dep't 1990). As set forth below, the irreparable harm that Plaintiffs and the Class face due to the COVID-19 pandemic is imminent. A final judgment requiring Defendants to waive the Lawsuit Requirement would come too late to avoid that harm—indeed, there may not be a final judgment in this case until after the pandemic has subsided.

New York law requires Defendants to make FHEPS benefits available to vulnerable New York City families, and it does not permit Defendants to condition those benefits on a family risking infection or eviction. Accordingly, Defendants' refusal to waive the Lawsuit Requirement during the COVID-19 pandemic violates the law, and Plaintiffs can demonstrate a likelihood of success on the merits.

B. Absent a Preliminary Injunction, Plaintiffs and the Class Will Suffer Irreparable Harm.

Without a preliminary injunction against enforcement of the Lawsuit Requirement, Plaintiffs will suffer irreparable harm. Unless Defendants are enjoined from denying eligible families FHEPS assistance while this action is pending, Plaintiffs will continue to accrue arrears, forcing them to far exceed the $9,000 limit for the FHEPS program and potentially face homelessness due to their inability to access rent subsidies. Even if Plaintiffs remain under that $9,000 threshold until a final judgment in this action, they will be forced to choose between traveling to Housing Court and thereby exposing themselves and their families to the risk of COVID-19 infection, or losing their homes.

There is no question that the risk of health complications or death as the result of exposure to a deadly virus, as well as the public health risk of contributing to the spread of that virus in the community, constitutes irreparable harm. *See, e.g.*, *Arias v. Decker*, 459 F. Supp. 3d 561, 569-71 (S.D.N.Y. 2020) (finding irreparable harm where petitioners faced a risk of contracting COVID-19 in immigration detention facilities); *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 214 (E.D.N.Y. 2000) (finding irreparable harm where lack of "meaningful access" to public assistance benefits resulted in "imminent risk to [plaintiffs'] health, safety, and lives"), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003); *Mixon v. Grinker*, 157 Misc.2d 68, 71 (Sup. Ct. N.Y. Cnty. 1993) (finding possible exposure to infectious diseases in homeless shelter posed risk of "irreparable danger to [plaintiff's] health").

Exposure to COVID-19, particularly in the vulnerable populations that Plaintiffs and similarly situated families represent, presents such a risk. Plaintiffs both have underlying medical conditions that put them at increased risk of "severe illness" should they contract COVID-19. *See* Affidavit of Maoli Soriano ¶ 7; Affidavit of Shealean Smith ¶ 7; *COVID-19:*

People with Certain Medical Conditions, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited Feb. 8, 2021). "[B]ecause the risk of harm to plaintiffs is a grave threat to their health and possibly their lives, they have . . . no adequate remedy at law." *Mays v. Dart*, 453 F. Supp. 3d 1074, 1098 (N.D. Ill. 2020).

Here, that risk is neither speculative nor remote. COVID-19 is a highly contagious disease that spreads most effectively in enclosed, crowded indoor spaces like the courtrooms and hallways in Housing Court. (Compl. ¶ 11.) The citywide positivity rate is currently nearly 9%, and 45 zip codes—including the zip codes where the Queens and Bronx Housing Court facilities are located—have positivity rates over 10%. *COVID-19: Data*, N.Y.C. Dep't of Health, https://www1.nyc.gov/site/doh/covid/covid-19-data.page (last visited Feb. 8, 2021). Strains of COVID-19 that are 70% more transmissible and 30% more lethal were recently detected in New York City, and officials expect those strains to become the dominant source of COVID-19 infection in the United States within the next few weeks. (Compl. ¶ 33.)

Once Housing Court is open for business, "uncertainty remains regarding the health and safety of litigants, attorneys, judges, jurors, court staff, and the public upon their returns to courtrooms." J. Public Hearing Before the S. Standing Comms. on Judiciary, Codes, and Hous., Constr. and Cmty. Dev., Aug. 21, 2020, https://www.nysenate.gov/calendar/public-hearings/august-21-2020/joint-public-hearing-examine-re-opening-and-operation-new ("Joint Hearing"). More than 156,000 petitions were filed and answered in Housing Court in 2019, and each case generally has multiple court dates. N.Y.C. Hous. Ct.: Court Statistics 2019, https://www.nycourts.gov/courts/nyc/housing/statistics.html (last visited Feb. 8, 2021). Courtrooms are small and tend to fill to capacity. The crowded hallways outside of those

courtrooms serve as overflow space where litigants wait for their case to be heard, while negotiations occur in every corner. Tenants who appear in Housing Court often appear with children, spouses, friends, home health aides, or witnesses. (Compl. ¶ 58.) Thus, it is unclear whether and to what extent there can be adequate social distancing in Housing Court.

During a public hearing to examine the re-opening and operation of New York's courts during the COVID-19 pandemic, Housing Court Judge Daniele Chinea testified on the condition of the courts, noting inadequate notice of HVAC interruptions, the lack of effective use and availability of personal protective equipment, and the lack of enforcement of social distancing and mask compliance. Joint Hearing. The use of recycled air in Housing Court in Brooklyn and the Bronx, and potentially outdated ventilation systems in all courthouses, only compounds the risks presented by Housing Court's overcrowding. Even if litigants wear masks and are able to socially distance, the CDC has recognized that being within six feet of an infected person for a total of 15 minutes or more carries a serious risk of contracting COVID-19. *Community-Related Exposure*, Ctrs. for Disease Control and Prevention, updated Oct. 21, 2020, https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html.

Tenants forced to appear in Housing Court are particularly vulnerable to COVID-19. Black and Hispanic individuals and families are nearly twice as likely to be threatened with eviction, with eviction filing rates being highest in low-income Black and Hispanic neighborhoods. (Compl. ¶ 61.) Those same neighborhoods have also suffered the highest rates of infection and death from COVID-19. (*Id*.) In addition, low-income individuals who must appear in Housing Court most often travel there by public transportation, further increasing their exposure risk to COVID-19. (*Id*. ¶ 62.)

The availability of remote proceedings does not adequately mitigate those risks. In order to participate in virtual Housing Court proceedings, tenants need reliable access to broadband Internet and an Internet-enabled device, which many low-income families sued for eviction in New York City do not have. Indeed, 2.2 million New York City residents, or approximately 30% of the City's population, lack access to broadband Internet. Scott Stringer, *Census and the City: Overcoming NYC's Digital Divide in the 2020 Census*, Off. of the N.Y.C. Comptroller, July 2019, https://comptroller.nyc.gov/wp content/uploads/documents/Census_and_The_City_ Overcoming_NYC_Digital_Divide_Census.pdf. For low-income New Yorkers, that number is even higher: 44% of residents who live below the poverty line do not have broadband Internet access. *Id*. Even families that have access to adequate Internet and devices may be unable to use them to attend virtual proceedings because children in the families need to use them for remote schooling. As a result, many low-income tenants, representing the most vulnerable populations in the City, will have no choice but to appear in Housing Court in person.

Plaintiffs are not the only ones to have recognized the grave personal and public health risk that results from enforcing the Lawsuit Requirement during the COVID-19 pandemic. In June 2020, in recognition of those risks and their irreparable consequences for both low-income New York City families and the public health at large, NYC DSS requested that Defendants waive the Lawsuit Requirement. (Tabatabai Affirm., Ex. 8.) Defendants refused. (Tabatabai Affirm., Ex. 9.) In July 2020, the New York State Court Officers Association sued the OCA and Chief Judge Janet DiFiore, alleging that state courts were not safe for in-person proceedings because of a lack of property safety measures, which resulted in court officers contracting COVID-19 and, in some cases, dying from it. Craig Clough, *NY Court Cops Sue Over*

Inadequate COVID-19 Protections, Law360, July 1, 2020, https://www.law360.com/articles/1288654/ny-court-cops-sue-over-inadequate-covid-19-protections.

If individuals do not appear in Housing Court in order to avoid the risk of contracting COVID-19, they risk an equally irreparable injury: the loss of their home through the entry of a default judgment of eviction. New York courts routinely hold that "[t]he threat of eviction and the realistic prospect of homelessness constitute a threat of irreparable injury, and satisfies the first prong of the test for preliminary injunctive relief." *McNeill v. N.Y.C. Hous. Auth.*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989); *see also NRI Grp. LLC v. Crawford*, 36 N.Y.S.3d 48, 53 (Sup. Ct. 2016) ("Courts have recognized that the realistic possibility of homelessness constitutes irreparable injury."); *Wright v. Lewis*, 873 N.Y.S.2d 516, 528 (Sup. Ct. 2008) ("If [Plaintiffs] are evicted they will suffer irreparable harm."); *Brownley v. Doar*, 811 N.Y.S.2d 894, 903 (Sup. Ct. 2006) ("If this court does not grant a preliminary injunction, plaintiffs will suffer irreparable harm in the truest sense—they and their young children will face eviction from their homes.").

Becoming homeless during the pandemic carries the additional irreparable harm of placing Plaintiffs and similarly situated families at a higher risk of contracting COVID-19 due to overcrowding and other unsafe conditions in homeless shelters. *See Federal Register Notice: Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, Ctrs. for Disease Control and Prevention, Sept. 2, 2020, https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html. The mortality rate for COVID-19 is approximately 80% higher for homeless New Yorkers than for the general population. *Age-Adjusted Mortality Rate for Sheltered Homeless New Yorkers*, Coal. for the Homeless, https://www.coalitionforthehomeless.org/age-adjusted-mortality-rate-for-sheltered-homeless-new-yorkers/ (last visited Feb. 8, 2021).

Accordingly, Plaintiffs have established the risk of irreparable harm in the absence of a preliminary injunction.

C. The Equities Weigh in Favor of a Preliminary Injunction.

Lastly, in considering whether the balance of the equities tips in favor of the party seeking a preliminary injunction, a court must determine, among other things, whether "the irreparable injury to be sustained [by the plaintiff] is more burdensome than the harm caused to [the defendant] through imposition of the injunction." *Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.*, 69 A.D.3d 212, 223 (4th Dep't 2009). In balancing the equities, the court must examine "the enormous public interests involved." *Id.* (quoting *Seitzman v. Hudson Riv. Assocs*., 126 A.D.2d 211, 214 (1st Dep't 1987)).

Here, the irreparable injury that Plaintiffs would sustain absent a preliminary injunction is significantly more burdensome than any harm that Defendants would suffer if the Court were to order a preliminary injunction. Without a preliminary injunction, Plaintiffs and similarly situated families face grave risks of homelessness, infection, or death. By contrast, any hardship on Defendants would be minimal and solely monetary in nature. *See Brownley*, 811 N.Y.S.2d at 903-04 (finding the balance of the equities favored plaintiffs who faced the risk of eviction and homelessness "over the State that [would] suffer only monetary loss should the injunction prove improvident"); *Thrower v. Perales*, 523 N.Y.S.2d 933, 937 (Sup. Ct. 1987) (finding plaintiffs' "physical and emotional suffering ... [] far more compelling than the possibility of some administrative inconvenience or monetary loss to the government").

In addition, there is a "significant public interest" in ensuring "public health and safety," which would be best served by limiting the number of people who must travel to and appear in Housing Court. *See Basank v. Decker*, No. 20 Civ. 2518 (AT), 2020 WL 1953847, at *13

(S.D.N.Y. Apr. 23, 2020) (quoting *Grand River Enter. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005)).

Accordingly, the balance of the equities strongly weighs in favor of a preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court (1) certify the proposed Class; and (2) enter a preliminary injunction preventing Defendants from enforcing the Lawsuit Requirement to deny FHEPS assistance to Plaintiffs and the Class.

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court, I hereby certify that the foregoing memorandum of law contains 6,969 words, exclusive of the caption, table of contents, table of authorities, and signature block, and therefore complies with the word count limit under Rule 202.8-b.

/s/ Fara Tabatabai
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