

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

**66 APARTMENT ASSOCIATES, J.V., 636
APARTMENT ASSOCIATES, J.V., and
ELMSFORD APARTMENTS ASSOCIATES, LLC,**

Petitioners,

v.

**HON. LAWRENCE MARKS, Personally and as
Chief Administrative Judge of the Courts**

Respondent.

INDEX NO. 58098/2020

BRIEF OF AMICI CURIAE

**HOUSING COURT ANSWERS, MOUNT VERNON UNITED TENANTS, CITY-WIDE
TENANT UNION OF ROCHESTER, AND UNITED TENANTS OF ALBANY**

LEGAL SERVICES OF THE
HUDSON VALLEY
Marcie Kobak, Esq.
Christopher Schweitzer, of counsel
90 Maple Avenue
White Plains, NY 10601
mkobak@lshv.org

LEGAL SERVICES NYC
Edward Josephson, Director of Litigation
Roland Nimis, of counsel
40 Worth Street, Suite 606
New York, NY 10013
Tel: (646) 442-3600
ejosephson@lsnyc.org

THE LEGAL AID SOCIETY
Judith Goldiner, Esq., Attorney in Charge,
Civil Law Reform Unit
Ellen Davidson, of counsel
Amber Marshall, of counsel
199 Water Street
New York, NY 10038
Tel: 212-577-3339
ebdavidson@legal-aid.org

*Attorneys for Housing Court Answers, Mount
Vernon United Tenants, City-Wide Tenant
Union of Rochester, and United Tenants of
Albany*

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are non-profit organizations that represent low-income tenants throughout the state of New York who would be at imminent risk of eviction if the challenged administrative orders were found to be unconstitutional. *Amici* have a special interest and substantial expertise regarding evictions and low-income tenants in New York.

Housing Court Answers (“HCA”) was founded in 1981 to provide legal information to *pro se* litigants in New York City’s Housing Courts. HCA staffs tables at all of New York City’s Housing Courts, providing information, answers to questions and advice to unrepresented litigants. Additionally, HCA operates a Hotline to explain housing court procedures to *pro se* litigants and to provide information about rent arrears assistance.

Mount Vernon United Tenants (“MVUT”) is a community-based membership that has been providing tenants assistance in Westchester for over 30 years. MVUT runs a homeless prevention program that provides intensive case management to tenants at risk of homelessness. MVUT services include rent arrears assistance, landlord/tenant mediation and negotiation, assistance in filing Orders to Show Cause, and preparation of meritorious defenses in eviction proceedings.

City-Wide Tenant Union of Rochester (“CWTU”) is a three-year-old grassroots tenant union which seeks to build tenant power and expand the rights of all tenants. CWTU’s members include tenant associations, tenant unions, and individual members. CWTU members help tenants defend against eviction cases in Rochester City Court.

United Tenants of Albany (“UTA”) is a four decade old community based nonprofit organization that provides counseling and advice for Albany tenants in landlord tenant mediations and in eviction court proceedings. UTA responds to more than 5000 requests for information about

housing and evictions annually. Staff responds to questions on housing law, counsels tenants and assists tenants with mediations between landlords and tenants. Staff accompanies unrepresented tenants to court proceedings.

PRELIMINARY STATEMENT

Amid the worst pandemic in a century, Petitioners ask this court to strike down necessary and commonsense administrative orders designed to protect the lives and the due process rights of the housing court litigants. Although Petitioners frame their relief as a request to stay certain administrative orders, they in fact seek an unprecedented order from this Court directing the State's Housing Courts to open their doors to a flood of eviction cases that will far exceed their ability to process without reigniting the State's COVID-19 epidemic and reversing the gains of the past six months.

New York and New York City have been the epicenters of the world's COVID-19 pandemic. Since March 2020, over 430,000 residents have tested positive for COVID-19. Nearly 33,000 New Yorkers have died—a death rate of more than 7.5% of confirmed cases. In March 2020, Governor Cuomo declared a State disaster emergency in order to halt the transmission of the virus, which included, among other things, closing courts and declaring a moratorium on evictions. Today, despite the State's progress, many restrictions remain on in-person gatherings and commerce pursuant to the State disaster emergency. These measures have been necessary because the scientific consensus is clear: social distancing is the only effective tool to minimize the transmission of the virus and, accordingly, save lives.

In response to this unprecedented disruption to public life and to actions by the Governor and the Legislature, the Chief Administrative Judge has instituted several administrative orders, most recently and relevantly Administrative Order 160a/20, that balance the need to resume

operations with the need to protect the public health and due process. Contrary to Petitioners' protestations, AO 160a/20 does not alter any substantive rights or contravene the intent of the political branches. It simply prioritizes cases with attorneys on both sides and requires judges to consider the effects of any state or federal eviction protections passed since the courts modified operations in March.

Without AO 160a/20, thousands of tenants would descend upon housing courts throughout New York seeking orders to show cause to stop their imminent evictions. The courts are utterly unprepared to handle this number of in-person applications safely, if at all. Unleashing such a tsunami of *pro se* motions would risk triggering super-spreader events in neighborhoods with high concentrations of low-income tenants and Black and Latino tenants who are already more vulnerable to the virus. Tenants who could not or would not put themselves at risk by travelling to court and waiting on endless lines would then be at risk of imminent eviction. AO 160a/20 avoids the disaster of in-person proceedings by transitioning operations to virtual conferences, prioritizing pre-shutdown cases, and staying evictions to October 1 to allow the transition to virtual proceedings.

Given the necessity of diverting tenants from appearing in person, AO 160a/20 creates a system where *pro se* tenants can be assigned counsel in jurisdictions with right to counsel and connected to legal services or pro bono attorneys elsewhere and cases can proceed virtually. Virtual summary proceedings are only possible where litigants have the technological proficiency to meaningfully participate, but many tenants throughout New York lack access to videoconferencing technology. AO 160a/20 is therefore designed to ensure that *pro se* tenants are not virtually locked out of the courts. Assuring that cases are being handled by attorneys with

ability to engage in virtual conferences is necessary to ensure that the protections enacted by the political branches actually protect tenants and their communities.

For these reasons, further explained below, the Court should dismiss Petitioners' Article 78 proceeding and leave AO 160/20 in place in order to protect public health and litigants' due process rights in the midst of the State emergency.

STATEMENT OF FACTS

As of March 2020, 200,000 eviction cases were pending in the NYC Housing Courts, of which an estimated 165,000 involved tenants without counsel.¹ In over 14,000 of these cases, warrants of evictions had already been issued by the court.² The overcrowding in NYC Housing Court is legendary, with thousands of tenants packed into poorly ventilated courtrooms, hallways and elevators, typically spending hours in these conditions while waiting for their cases to be called and resolved.³ Tenants in eviction proceedings were drawn from the poorest districts of the City, populated by persons of color whose health was, even prior to the COVID-19 epidemic, far more precarious than that of residents in more affluent, whiter neighborhoods.⁴

¹ Directive DRP-213, August 12, 2020; teleconference with Administrative Judge Anthony Cannataro and the Queens County landlord and tenant bar, August 24, 2020.

² Kromrei, "End of eviction ban to unleash 14,000 warrants in NY," The Real Deal, August 4, 2020, <https://therealdeal.com/2020/08/04/end-of-eviction-ban-to-unleash-14000-warrants-in-ny/>.

³ Pereira and Fertig, "Reopening Housing Court Is 'Premature And Dangerous,' Brooklyn Lawmakers Say," Gothamist, July 2, 2020, <https://gothamist.com/news/reopening-housing-court-premature-and-dangerous-brooklyn-lawmakers-say>

⁴ See Jeffery C. Mays and Andy Newman, Virus is Twice as Deadly for Black and Latino People Than Whites in N.Y.C., THE NEW YORK TIMES (April 8, 2020), available at <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-race-deaths.html>.

Since the initial closure of the City's Housing Courts in March, judges have begun to process only two-attorney cases that were pending before the epidemic, with these cases handled remotely through videoconferences. Although approximately 4500 new eviction cases have been filed after June 22, none of these cases has been calendared.⁵ However, upon the expiration of the eviction moratorium in Governor Cuomo's Executive Order 202.28, the Court Administration was faced with the impending service of thousands of eviction notices by NYC Marshals, potentially leading to an influx of thousands of *pro se* tenants into its courthouses seeking Orders to Show Cause to stop their evictions. These tenants would have to stand in extremely long lines, and then endure lengthy waits in crowded hallways and courtrooms as judges examined and ruled upon their applications.

Courts in other parts of the State, while not facing the enormous absolute case numbers as New York City, still face an influx of eviction cases and litigants that will far exceed the courts' capacity to process them safely. In Westchester County ... Outside New York City, eviction matters are heard in 1,300 town and village courts, 61 city courts and ten district courts. Most of these courts are cramped, antiquated buildings. These courts typically hear extensive calendars of traffic, small claims and criminal cases scheduled for the same time as eviction matters. Maintaining social distancing to prevent the spread of COVID-19 would be impossible in such an environment.

In response to these looming threats to the health of litigants, court staff, and the public at large, OCA promulgated two commonsense directives designed to harmonize the flow of eviction

⁵ Teleconference with Judge Anthony Cannataro and the Queens County landlord and tenant bar, August 24, 2020.

cases with the courts' ability to process them while maintaining social distancing. Administrative Order 160a/20, applicable to the entire State, mandates that eviction cases be conferenced with a judge before proceeding. At the conferences, judges are instructed to inquire into the tenants' COVID-19 related defenses, and attempt to refer them to free counsel, who could then conduct the proceedings virtually. Within New York City, DRP-213 requires landlords to make motions on notice prior to executing on existing warrants. Again, judges hearing such motions will have the opportunity to match pro se tenants with free lawyers who can obviate the need for physical court appearances. Overall, these directives allocate scarce court resources to cases that are most urgent from the landlords' point of view – cases in which warrants have already been issued, and other cases that were pending prior to the epidemic.

ARGUMENT

I. The COVID-19 Pandemic Has Created a Health and Affordability Crisis Among New York Tenants

This case comes before the court during the ongoing coronavirus disease 2019 (COVID-19) pandemic. As of August 25, 2020, more than 23.6 million cases of COVID-19 have been reported in 188 countries and territories, resulting in more than 813,000 deaths.⁶ New York is the hardest hit state with 32,489 deaths and New York City alone accounts for 23,662 of those deaths.⁷ The actual death toll of COVID-19 is likely even higher. COVID-19 confirmed and probable

⁶ *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)*, <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6> (last visited August 25, 2020)

⁷ *New York Coronavirus Map and Case Count*, <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html#county> (last visited August 25, 2020)

deaths accounted for only 74% of the seasonally adjusted excess deaths through May 30, leaving 6,497 excess deaths in New York City not officially attributed to COVID-19.⁸

In addition to the heavy death toll, COVID-19 has resulted in an unprecedented loss of employment as non-essential businesses have shut down in-person operations to avoid spreading the disease and to comply with executive orders. Since the start of the COVID-19 pandemic through August 15, 3.49 million unemployment claims have been filed in New York State as compared to 341,000 that were submitted for the same period in 2019.⁹ New York City and the Hudson Valley have been hit especially hard, with unemployment claims increasing over 2019 levels by 1,061% and 929% respectively.¹⁰ The staggering unemployment insurance claim numbers do not capture the full extent of the financial hardship caused by COVID-19, because they exclude workers who have lost work but do not qualify for unemployment, including people without sufficient prior earnings or work history, undocumented immigrants, and those whose hours have been cut but who still work part-time.

COVID-19's health and economic toll has disproportionately affected low-income tenants. In New York City, neighborhoods with the highest concentrations of low-income residents and Black and Latino people have suffered the highest death rates.¹¹ In New York State, the age-adjusted death rate for Black people is estimated to be 4.30 times the rate of White people and the

⁸ Daniel M. Weinberger, et al., *Estimation of Excess Deaths Associated With the COVID-19 Pandemic in the United States, March to May 30, 2020*, JAMA Internal Medicine (July 1, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2767980>.

⁹ *Initial Claims Data - Week ending 8/15/2020*, New York State Department of Labor (August 20, 2020), <https://labor.ny.gov/stats/PDFs/Research-Notes-Initial-Claims-WE-8152020.pdf>.

¹⁰ *Id.*

¹¹ Michael Schwirtz and Lindsey Rogers Cook, *These N.Y.C. Neighborhoods Have the Highest Rates of Virus Deaths*, N.Y. Times, May 18, 2020, <https://www.nytimes.com/2020/05/18/nyregion/coronavirus-deaths-nyc.html>.

mortality rate of Latinos is 3.98 times that of Whites.¹² Low-income workers have also faced higher job losses during the pandemic. In the first month of the pandemic, employment for workers in the bottom quintile dropped 35% as compared to a 9% drop in employment for the highest quintile of earners.¹³ At the same time, low-income workers and people of color work disproportionately in frontline industries where they are considered essential and therefore at greater risk of being exposed to COVID-19.¹⁴

II. The Challenged Administrative Orders are Necessary to Prevent the Spread of the COVID-19 Pandemic

Without AO 160a/20, thousands of tenants would rush to housing courts throughout the state to stop imminent evictions and answer new petitions. The state eviction moratorium, economic collapse, and court closures in response to the pandemic have created an unprecedented backlog of potential eviction cases. There are about 14,500 active eviction warrants in New York City alone that were issued before the March 17 shutdown and there are thousands of more cases that would have been filed in the absence of the shutdown. If cases resumed without procedural modifications by the courts, *pro se* tenants would be forced to choose between going to courthouses that are incapable of preventing COVID-19 transmission or staying home and losing their homes.

Housing Court proceedings begin with service of a Notice of Petition and Petition upon the tenant. R.P.A.P.L. § 735. In New York City, holdover proceedings are noticed for a date certain; in nonpayment proceedings, tenants must appear at the clerk's office to answer, and are then

¹² Cary P. Gross, *et al.*, *Racial and Ethnic Disparities in Population Level Covid-19 Mortality*, *Journal of General Internal Medicine* (Aug 4, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7402388/>.

¹³ Tamaz Cajner, *et al.*, *The U.S. Labor Market During the Beginning of the Pandemic Recession*, Nat'l Bureau of Econ. Research, <https://www.nber.org/papers/w27159.pdf>.

¹⁴ Hye Jin Rho, *et al.*, *A Basic Demographic Profile of Workers in Frontline Industries*, Ctr. for Econ. and Policy Research (April 2020), <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf>.

assigned an initial court date. In the rest of the state, all petitions are noticed for a date certain. R.P.A.P.L. §§ 732, 743. In the event a judgment is eventually entered in the proceeding, the landlord engages a city marshal, a sheriff, or constable to apply for a warrant of eviction. R.P.A.P.L. § 749(1). The officer must serve a notice of eviction 14 days prior to execution of the warrant. R.P.A.P.L. § 749(2)(a). To stop the eviction, tenants must return to court to apply for an Order to Show Cause. Tenants must generally wait on long lines at the clerk's office, and then wait in a courtroom while the judge considers their applications. The tenant must then serve the Order to Show Cause upon the landlord's attorney personally or by mail, and then must return to court on the return date assigned by the judge.

In the ordinary course of business, the hallways of New York City housing courts have been compared to a subway car at rush hour.¹⁵ In the busier boroughs, about 2,000 people go to court each day and stay in the building for hours.¹⁶ Outside New York City, eviction matters are heard in 1,300 town and village courts, 61 city courts and ten district courts. Most of these courts are cramped, antiquated buildings. These courts typically hear extensive calendars of traffic, small claims and criminal cases scheduled for the same time as eviction matters. Maintaining social distancing to prevent the spread of COVID-19 would be impossible in such an environment. If the Chief Administrative Judge ignored the COVID-19 pandemic and allowed the rote application of the R.P.A.P.L., as Petitioners demand, housing courts throughout the state would be teeming with tenants answering petitions and filing Orders to Show Cause to stop evictions. Housing courts

¹⁵ Beth Fertig, *As Civil Courts Reopen, Tenant Advocates Fear Coronavirus Could Spread In A Busy Housing Court*, Gothamist, June 10, 2020, <https://gothamist.com/news/civil-courts-reopen-tenant-advocates-fear-coronavirus-could-spread>.

¹⁶ Shuai Hao, *In the Bronx, the City's Busiest Housing Court Struggles to Serve Tenants and Landlords*, October 20, 2018, <http://theink.nyc/bronx-citys-busiest-housing-court-struggles-serve-tenants-landlords/>.

throughout the state are not prepared for an influx of litigants nor can they be while COVID-19 remains in the community and incurable.

The obstacles to a safe in-person reopening present themselves before even reaching the court itself. First, tenants are more likely to use public transportation, and the lines serving housing court would begin to crowd if in-person eviction proceedings returned. Even prior to COVID-19, lines to enter Bronx Housing Court often wrapped around the block. The wait to enter will be extended as court security screens entrants with temperature checks and health surveys. Once inside, tenants will have to wait in the line to answer cases, wait in line to file Orders to Show Cause to stop evictions, and wait in line in the elevator bay to get to the upper floors where they will wait for their case to be heard in the crowded hallways and courtrooms. Tenants who choose to go to court will interact with others for several hours in crowded conditions. If marshals resumed service of eviction notices on *pro se* tenants, there would invariably be some tenants who were infected with COVID-19 who nevertheless would choose to go to court to save their homes. Without the conference system created by AO 160/20, there would be no other way to stop an eviction. Thus, a return to in-person operations would be even deadlier than similarly sized indoor gatherings with voluntary attendance, which remain prohibited throughout New York.

Moreover, the theoretical availability of virtual procedures cannot reduce the flow of tenants into the Housing Courts unless they are assigned counsel with access to and expertise in the necessary technology. *Pro se* tenants lacking internet access are unable to effectively utilize the Electronic Document Delivery System (“EDDS”) or participate in teleconferences and are therefore limited in their ability to defend themselves against eviction.¹⁷ As the shift to remote

¹⁷ EDDS is a program intended to mitigate the effects of the COVID-19 outbreak upon the courts and the public. It provides a means for attorneys and unrepresented litigants to make and respond

learning laid bare, an enormous “digital divide” exists across New York State, as thousands of residents lack requisite technology to participate in remote learning, including computers and wi-fi access. Those lacking a home or mobile broadband connection also face barriers to employment, banking, healthcare, social networks and government services.¹⁸ Unfortunately, as of March 2020, about 30 percent, or 2.2 million, of New York City residents lack broadband Internet access, including 350,000 who only access internet through cell phones or tablets.¹⁹ The comprehensive connectivity provided when one has both home and mobile access is increasingly becoming crucial to gaining full access to the range of services private and government entities offer to the public.²⁰

The costs of home broadband access present a formidable barrier for low income families.²¹ Low-income, immigrant-dense neighborhoods across the city most lack internet access: 50 percent in Chinatown and Lower East Side, 48 percent in Hunts Point, Longwood & Melrose, 46 percent in Borough Park, Kensington & Ocean Parkway, 44 percent in Morris Heights, Fordham South & Mount Hope, 43 percent in Belmont, Crotona Park East & East Tremont, and 43 percent in Jamaica, Hollis and St. Albans.²²

Thirty-six percent of New Yorkers outside of the labor force lack a broadband internet connection, versus 20 percent of employed New Yorkers. Seniors are much more likely to be

to motions in pending cases before the Civil and Housing Parts of the Civil Court of the City of New York. *See* <http://www.courts.state.ny.us/courts/NYC/SSI/directives/DRP/DRP208A.pdf>.

¹⁸ The New York City Internet Master Plan, New York City Mayor’s Office of the Chief Technology Officer (January 2020) https://tech.cityofnewyork.us/wp-content/uploads/2020/01/NYC_IMP_1.7.20_FINAL-2.pdf.

¹⁹ Scott Stringer, *Census and the City: Overcoming NYC’s Digital Divide in the 2020 Census*, Office of the New York City Comptroller (July 2019), at 5. https://comptroller.nyc.gov/wp-content/uploads/documents/Census_and_The_City_Overcoming_NYC_Digital_Divide_Census.pdf.

²⁰ NYC Internet Master Plan, *supra* note 13.

²¹ *Id.* at 13.

²² *Overcoming NYC’s Digital Divide*, *supra* note 14 at 5.

without a broadband internet connection compared to the general population.²³ Forty-two percent of New Yorkers 65 and above lacked broadband internet access, compared to 23 percent of 18 to 24-year-olds.²⁴ In March 2020, about 30 percent, or 2.2 million, of New York City residents lacked broadband access including 350,000 who only access internet through cell phones or tablets.²⁵ Internet access is even more scarce among indigent residents and seniors. Forty-four percent of New Yorkers in poverty lack broadband internet access, as opposed to 22 percent above the poverty line.²⁶

Data widely demonstrates racial disparities in accessing broadband internet access. Approximately 30 percent of Hispanic and Black New Yorkers lack broadband internet access, compared to 20 percent of White New Yorkers and 22 percent of Asian residents.²⁷ Further, recent studies indicate that 67% of Black and Hispanic New York City residents have Broadband internet access at their homes compared to 78% of White New York City residents and 15% of Black and Hispanic New York City residents have no internet access compared to 11% of White New York City residents.²⁸

Chief Judge DiFiore recently convened a partnership—the COVID-19 Recovery Task Force’s Housing Working Group—to recommend changes to Housing Court in light of the COVID-19 pandemic.²⁹ The Report pointed out that “[w]ithout substantial changes to court

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ American Community Survey, United States Census Bureau (2016), <https://www.census.gov/programs-surveys/acs/>.

²⁹ *Housing Working Group Report*, COVID-19 Recovery Task Force’s Housing Working Group, July 9, 2020 (“The COVID-19 Recovery Task Force, formed through a partnership of the New York State Court System and the New York State Bar Association at the request of Chief Judge

procedure, the increased number of cases will dramatically increase the number of people that travel to and appear at the courthouse, exacerbating the ongoing health risks of COVID-19 infection.”³⁰ The Report recommends, *inter alia*, that housing courts provide all individuals subject to eviction proceedings who satisfy certain low-income eligibility thresholds with free legal counsel, advertise the right to counsel at several distinct steps in the legal proceeding and advocate for a systemic shift for tenants to seek counsel before a petition is filed, and allocate additional judicial resources to support the surge in housing court cases.

Housing court judges are likewise alarmed about the premature reopening of housing courts. In her testimony in front of the New York Senate, Daniele Chinaa, a Manhattan Housing Court Judge and the President of the Housing Court Judges Association, warned that “[o]ur governmental objectives of preventing increased homelessness during a pandemic and the full resumption of court business, are at loggerheads and are not reconcilable. As a result, Housing Court Judges are being asked to make impossible determinations in an impossible environment.”³¹ Judge Chinaa further explained that the court system does not have a plan to enforce social distancing and mask compliance; has not implemented cleaning protocols; and has not finished redesigning courthouses so that outbreaks are prevented.³² Judge Chinaa’s testimony demonstrates that housing court judges lack clarity in how to proceed with eviction cases while protecting public health and due process. The challenged administrative orders attempt to provide that clarity and create consistency in courts across the state.

Janet DiFiore, is led by former Chief Judge Jonathan Lippman, Of Counsel at Latham & Watkins LLP.”).

³⁰ *Id.* at 3.

³¹ Testimony of Daniele Chinaa, President of the Housing Court Judges Association, https://www.nysenate.gov/sites/default/files/testimony_of_association_of_housing_court_judges_2.pdf.

³² *Id.*

Petitioners do not mention the seismic impact COVID-19 has had on New York, nor do they acknowledge the hazards that would accompany in-person proceedings. In the absence of COVID-19, the challenged administrative orders might be inappropriate. But once the threat of COVID-19 is appreciated, the decision to limit in-person operations is unimpeachable. Having decided to limit in-person operations, the Chief Administrative Judge needed to create new protocols for processing eviction cases that are appropriate for the moment. If the challenged administrative orders were struck down and the Chief Administrative Judge was prohibited from creating protocols in response to the pandemic, in-person operations would have to proceed and public health would be imperiled.

III. The Challenged Administrative Orders are Necessary to Ensure That Litigants have Equal Access to Justice in Housing Courts

Amici contend that there should be a complete moratorium on evictions during the COVID-19 pandemic. However, if evictions are allowed to proceed, it is imperative that the Chief Administrative Judge is allowed to implement procedures that ensure that tenants are able to participate in eviction cases brought against them. As explained above, in-person operations are infeasible. If proceedings go forward remotely, the court system must create protocols accordingly. Given the move to remote practice, the challenged orders are appropriately designed balance the needs of residential landlords to pursue evictions and the needs of tenants to assert defenses and resolve cases so that unnecessary evictions can be avoided.

AO 160a/20 does three things: 1) it continues the suspension of new proceedings and allows landlords to proceed on cases that were pending before the shutdown; 2) it instructs housing court judges to schedule pre-shutdown cases for conference and sets guidelines for those conferences; and 3) it stays evictions in conferenced cases to October 1. Each of these changes are necessary to administer justice in an orderly fashion.

First, prioritizing pre-pandemic cases is sensible because housing courts will not be able to process as many cases remotely as they could in normal times. Before the pandemic, New York City housing court judges were able to calendar more than 60 cases each day. Judges were able to manage heavy dockets primarily because much of the negotiation happens in court hallways and many cases are either adjourned or settled without the parties appearing before a judge. In addition, court attorneys continually conference cases with attorneys and *pro se* litigants to try to resolve disputes and clarify issues before involving the judge. Most New York City judges have two court attorneys, so three cases can be handled by the court at a time. In contrast, virtual court conferences are scheduled in advance on videoconferencing software and are generally handled by judges directly with attorneys for all parties. Currently, these proceedings are scheduled at 30-minute intervals throughout the day, meaning that each judge could only schedule 13 cases per day (9:30-5:00 with a one-hour lunch break). In order to hear as many cases as were processed before COVID-19, judges would need to schedule conferences every 6 minutes. Such a pace would be impracticable.

In the 1,300 justice courts in New York State, there is no central oversight of court facilities.³³ It is crucial that courts have the power to control the number of litigants entering these frequently tiny municipal buildings. Approximately 70% of the justices presiding in these courts are non-lawyers,³⁴ and prioritizing older cases creates time for justices to receive training on new state and federal laws.

With more cases to process per day than judges can process, the court system needs to prioritize cases. Logically, the Chief Administrative Judge prioritized cases that were pending

³³ *Memo in Support*, The New York Legal Services Coalition and The Fund for Modern Courts.

³⁴ *Id.*

before the shutdown. Litigants in these cases have by definition been waiting the longest to have their disputes resolved and the parties are more likely to be represented by counsel who can navigate the videoconferencing technology. For new cases, the court system will need to develop mechanisms for tenants to answer and be assigned counsel remotely. Given the widespread impact of COVID-19, many tenants facing nonpayment cases commenced after the shutdown will be protected from eviction by the Tenant Safe Harbor Act (TSHA). If these new cases were to proceed now, they would proceed haphazardly and cause further delay for pre-pandemic cases. Thus, AO 160a/20's suspension of new cases in favor of old cases is a sensible administrative change that is within the Chief Administrative Judge's purview.

The conference system created by the challenged administrative orders ensures that pre-pandemic cases are processed without sacrificing tenants' substantive or procedural rights. For pre-shutdown cases, AO 160a/20 instructs judges to set conferences and provides guidance on what judges should consider during conferences. Petitioners complain that these conferences impermissibly infringe on their rights and create new substantive rights for tenants. Instead, much of the guidance simply advises judges to be mindful of tenants' rights and to be sure that evictions are not authorized without a review of the case. The order instructs judges to: review the procedural history, confirm compliance with notice requirements, inquire into how COVID-19 has affected the parties, review available state and federal relief (including TSHA), refer litigants to legal services providers and housing counseling agencies, assess pending and anticipated motions, approve briefing schedules, and try to resolve outstanding issues. Even without guidance, a prudent housing court judge would implement all of these practices—most of them are already legally required. TSHA, for instance, prohibits any court from issuing a judgment of possession or warrant

of eviction against a protected tenant.³⁵ In New York City, many tenants are legally entitled to counsel in eviction proceedings.³⁶ And throughout the state, the federal CARES Act continues to prohibit evictions for nonpayment by landlords who benefit from mortgage forbearance.³⁷ Thus, AO 160/20 simply creates a checklist of considerations for judges to make sure that conferences are productive and fair.

Finally, AO 160/20's stay of evictions through September 30 is necessary to ensure that the court is not overwhelmed by Orders to Show Cause seeking stays of eviction. If AO 160/20 did not stay evictions and housing court judges began authorizing evictions immediately after conference, tenants would go to court *en masse* seeking relief. Many would seek relief in person at housing courts, which would create the public health risk that the conference system was designed to avoid. Beyond the immediate health risk, such a rush of orders to show cause would overwhelm the courts already slowed virtual operations. Instead of conferencing pre-shutdown cases, judges would need to schedule conferences for the rash of orders to show cause. Most tenants seeking relief would qualify for a stay under R.P.A.P.L. § 749 and § 753. Thus, allowing evictions now would be counterproductive to actually resolving eviction proceedings.

IV. The Challenged Administrative Orders Do Not Violate the Separation of Powers Doctrine Because They Do Not Constitute Policy-Making and Are Necessary to the Administration of Justice

“[T]he concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions.” *In re Maron*, 14 NY3d 230, 258 (2010). At issue

³⁵ S.8192B (Hoylman); A.10290B (Dinowitz), chapter 127 of the Laws of 2020.

³⁶ N.Y.C. Admin. Code § 26-1301, et seq.

³⁷ 15 USC § 9057; *see also* Notice H 20-07, U.S. Department of Housing and Urban Development, July 1, 2020, available at: <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-07hsgn.pdf.pdf>

here is the Court's ability to manage the administration of justice which is central to its function. Respondent issued its recent administrative orders to clarify the functioning of the courts after an unprecedented health crisis shut these courts down.

Petitioners argue that Respondent's administrative orders violate separation of powers because they intrude on policy making. However, petitioners fail to acknowledge that the judiciary is a coequal branch of government with its own responsibilities. "The courts are not the puppets of the Legislature. They are an independent branch of government, as necessary and powerful in their sphere as either of the other great divisions" (*Lang v Pataki*, 674 NYS2d 903, 913 [Sup Ct, New York County 1998] quoting *Riglander v Star Company*, 90 NYS 772, 775 [1st Dept 1904]).

Courts are vested with the inherent power "to do all things reasonably necessary for the administration of justice within the scope of their jurisdiction" (*Lang* 674 NYS2d at 913 citing *Gabrelian v Gabrelian*, 489 N.Y.S.2d 914 [2d Dept.1985], *appeal dismissed*, 66 N.Y.2d 741[1985]). As Petitioners themselves acknowledge, "it is the Respondent's duty to insure [sic] that justice is available to all who seek it" (plaintiff's memorandum of law at 13). As such, the judiciary possesses "all powers reasonably required to enable it to perform efficiently its judicial functions, to protect its dignity, independence, integrity and to make its lawful actions effective" (*Carlton Assoc. v Bayne*, 740 NYS2d 785, 788 [Sup Ct, Kings County 2002]).

The discretion to stay proceedings is a fundamental element of inherent judicial power (*Lang*, 674 NYS2d at 913 citing *Landis v North American Company*, 299 U.S. 248, 254 [1936]). "How this can be best done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance" (*Landis* 299 U.S. at 254).

It is true that this power is not without limit: "...the courts' discretion to adjust their procedures in areas involving the 'inherent nature of the judicial function' may not be exercised

‘in a manner that conflicts with existing legislative command’” (*Lang v Pataki*, 271 AD2d 375, 376 [1st Dept 2000], *appeal dismissed* 95 NY2d 886 [2000]).

However, contrary to Petitioners’ contention, Respondent is not constrained from acting simply because the legislature and executive have acted within the same field. Respondent’s administrative orders do not conflict with any existing legislative command and are firmly within the judiciary’s authority to govern its own operations and its responsibility to protect the due process rights of all litigants during these extraordinary times.

Across their filings, Petitioners ignore the widespread impact that COVID-19 has on the entire Unified Court System. Petitioners simply cite to administrative orders 127/20, 131/20, 143/20, 160/20 and conclude that eviction and foreclosure proceedings have been singled out by Respondent to impose a policy that “attempt[s] to deprive landlords of their right to relief, or otherwise hamstringing the law so as to legislate a remedy for a perceived social need” (plaintiff’s memorandum of law at 14).

This policy-by-implication argument fails in light of the herculean efforts by the courts to administer justice safely during the pandemic. Evictions and foreclosures are merely the subject of the administrative orders Plaintiff chose to cite in this proceeding. However, Chief Judge Janet DiFiore and Respondent have issued at least thirty-five statewide administrative orders in response to COVID-19.³⁸ These thirty-five administrative orders govern the functioning of all courts and all actions in the Unified Court System. In addition to the statewide orders, each judicial district has

³⁸ *Latest STATEWIDE Administrative Orders*, Coronavirus and the New York State Courts, New York State Unified Court System, available at: <http://nycourts.gov/latest-AO.shtml> [last access Aug. 25, 2020].

issued separate administrative orders, directives, and/or advisory notices outlining local procedures to temporarily govern cases during the pandemic.³⁹

Chief Judge DiFiore has provided weekly updates on the court's efforts to expand operations since the initial closure in March. Throughout these updates, she repeatedly emphasized that:

[her] number one priority will always be the health and safety of our court family and of the lawyers, the litigants, our agency partners, and the countless members of the public who file into our courthouses on a daily basis. And our careful weighing and balancing of all the many factors and public health concerns that guide us to smart, responsible decisions are informed always by science, by the data and by the best available public health guidance, including that of our own epidemiologist.⁴⁰

The early months of the pandemic demonstrated that in-person court operations must be handled carefully. By the end of April 2020, three judges had died from COVID-19 and almost 170 court workers were infected.⁴¹ Policies to expand virtual filings and operations and limiting in-person proceedings are necessary to protect the health and safety of all persons involved in court proceedings. However, in creating such policies, the courts must reckon with substantial due process concerns, particularly for *pro se* litigants. As Respondent himself acknowledges, the lack of access to computers and broadband is a problem for eviction proceedings.⁴² With respect to

³⁹ *Latest LOCAL Administrative Orders*, Coronavirus and the New York State Courts, New York State Unified Court System, available at: <https://www.nycourts.gov/latest-local-AO.shtml> [last access Aug. 25, 2020].

⁴⁰ Transcript of Chief Judge DiFore Message, August 3, 2020, available at: <https://www.nycla.org/pdf/August3-CJ-Message.pdf> [last access Aug. 24, 2020].

⁴¹ Andrew Denney, *3 New York judges died from coronavirus, almost 170 court workers infected*, The New York Post, available at: <https://nypost.com/2020/04/28/coronavirus-in-ny-3-judges-die-almost-170-court-workers-infected/> [last accessed Aug. 24, 2020].

⁴² Testimony of Respondent during the New York State Senate Joint Public Hearing To Examine the Re-Opening and Operation of New York Courts During the COVID-19 Pandemic, August 21, 2020, available at: <https://www.nysenate.gov/calendar/public-hearings/august-21-2020/joint-public-hearing-examine-re-opening-and-operation-new>.

eviction proceedings, in New York City alone, the courts must also handle a backlog of 200,000 cases.⁴³

These fundamental issues are still being worked out by Respondent and the courts. Chief Judge DiFiore has convened multiple working groups to recommend best practices for operations during the pandemic, including for housing proceedings. In her most recent update, Chief Judge DiFiore acknowledges the courts are still “pursuing a number of strategies to limit courthouse traffic in the future...[and] are working around the clock to expand access to our virtual courts”⁴⁴ The message is clear. Nothing is finalized and the courts are still trying to identify the best way forward.

As of the date of this writing, few courts in New York State are functioning with any similarity to pre-pandemic operations. Landlords are not the only litigants waiting for their day in court. The fundamental right of criminal defendants to a speedy trial is still suspended. In civil actions where litigants are awaiting trial on damages, defendants have interest accruing and plaintiffs cannot get judgments for desperately needed funds. Similar examples can be found in every forum in the State.

The administrative orders at issue in this proceeding represent a careful balancing of interests between the safety of litigants and court personnel, taking into account the scarcity of resources to retrofit courtrooms to prevent the transmission of COVID-19, due process concerns, and the courts’ substantial backlogs. The orders thus implicate the inherent nature of the judicial

⁴³ Rebecca Baird-Remba, *Can NYC Reopen Its Housing Courts Safely?*, Commercial Observer, August 3, 2020, available at: <https://commercialobserver.com/2020/08/can-nyc-reopen-its-housing-courts-safely/> [last access Aug 24, 2020].

⁴⁴ Transcript of Chief Judge DiFore Message, August 24, 2020, available at: <https://www.nycourts.gov/whatsnew/pdf/August24-CJ-Message.pdf> [last access Aug. 24, 2020].

function and are not based on policy determinations that are in the exclusive realm of the political branches.

Petitioners cite to *Bourquin v Cuomo* for the general proposition that “the constitutional principle of separation of powers, implied by the separate grants of power to each of the coordinate branches of government, requires that the Legislature make critical policy decisions” (plaintiff’s memorandum of law at 14; 85 NY2d 781, 784 [1995]). This is not in dispute.

However, *Bourquin* is instructive in the instant proceeding for more than this general proposition. In *Bourquin*, plaintiffs brought a challenge based on the separation of powers doctrine to an executive order directing the Public Service Commission to certify the Citizens’ Utility Board to represent the interests of residential utility customers throughout the state. The Court upheld the executive order, finding that there was no substantive policy content in the executive order, such as directing the board to press for lower utility rates or seek greater disclosure of the financial status of utility companies (*Bourquin*, 85 NY2d at 787).

The *Bourquin* Court noted that “[d]espite this functional separation the court has always understood that the duties and powers of the legislative and executive branches cannot be neatly divided into isolated pockets” (*Bourquin* at 784). Indeed, the Court “[r]ecogniz[ed] the necessity of ‘some overlap between the separate branches’ of government...” (*Bourquin* at 785). As such, New York jurisprudence represents a “long-standing and steadfast refusal to construe the separation of powers doctrine in a vacuum, instead viewing the doctrine from a commonsense perspective” (*Bourquin* at 785). Indeed, “[t]he exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers” (*Bourquin* at 785, internal citation omitted).

The administrative orders at issue here are essential to the courts' function. Facing an unprecedented state-wide emergency that closed every court in this state to in-person proceedings, Respondent has created procedures to address the cases that were put on pause and the cases that have been filed since the courts reopened. Similar to *Bourquin*, the administrative orders have no substantive policy content. They do not direct individual judges to dismiss claims against respondents in summary eviction proceedings. They do not create a new standard to obtain relief. There are no new procedures, except those to necessary for the orderly functioning of the courts themselves in the midst of a global pandemic.

Petitioners are wrong to suggest that the courts regulate their own procedure in eviction matters because the legislature enacted a law concerning the type of substantive relief available in certain types of cases. The Tenant Safe Harbor Act is both more limited in scope and broader than the Administrative Orders which concern every eviction case in this state. TSHA is more limited in that it applies to tenants with COVID-19 related financial hardships who are sued for nonpayment of rent. TSHA is also broader than any of the AO's as the money owed in rent for this time period for tenants covered by TSHA can never be the subject of a possessory judgment. Unlike the AO's at issue in this case, TSHA does not regulate how, when and where those cases or any other case may proceed. Petitioner is wrong to draw any conclusion from this legislation about the legislature's intent as to how eviction cases move forward. (plaintiff's memorandum of law at 2).

Petitioners' reliance on the principle of *expressio unius est exclusio alterius* (the inclusion of one thing means the exclusion of the other) is clearly misplaced. This linguistic canon is much narrower than Petitioners suggest, particularly in New York jurisprudence. The basic presumption of the phrase is that the legislature in enacting a particular measure, considered and rejected every

related possibility (Linda D. Jellum, *Mastering Statutory Interpretation* 111 [2008]). This canon “presumes something about legislative drafting that simply does not reflect reality” and is increasingly considered unreliable (Jellum at 112).

For this reason, New York courts are cautious when applying this canon and interpret it to mean “where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded” (*People v Page*, 35 NY3d 199, 206-07 [2020]). TSHA is a law concerning substantive relief in certain types of eviction cases. The law is clearly unrelated to the procedures described in the AOs. A hostile legislative intent cannot be drawn from this enactment. “Legislative inaction, because of its inherent ambiguity, ‘affords the most dubious foundation for drawing positive inferences’” (*Bourquin* at 787-88, internal citations omitted).

Similarly, the executive orders rescinding restrictions on summary eviction proceedings may only indicate an intent to revoke prohibitions based on executive policy (Executive Order [Cuomo] Nos. 202.48 and 202.49 [9 NYCRR 8.202.48-49]), but in no way suggest an intent that the courts conduct their business in a manner that endangers their staff and litigants.

No legislative or executive actions have directed the Courts to affirmatively handle or prioritize any type of proceeding. As such, there is no conflict with existing legislative command, and the administrative orders fall squarely within the courts’ authority to adjust procedures involving the inherent nature of the judicial function (*Lang*, 271 AD2d at 376).

CONCLUSION

The protections created in AO 160/20 are necessary for the courts and for tenants and are entirely appropriate given the changes to the laws, economy, and public health of New York in the wake of COVID-19. The Petitioners are demanding that the Chief Administrative Judge ignore the

pandemic and allow chaos to prevail in the State's housing courts. This court should reject Petitioner's crabbed view of the role of court administration and allow the Chief Administrative Judge to implement commonsense and temporary protections for housing court litigants.

Amici respectfully submit that Petitioners' prayer for temporary and preliminary injunctive relief should be denied and that this case should be dismissed.

Respectfully submitted,

LEGAL SERVICES OF THE
HUDSON VALLEY
Marcie Kobak, Esq.
Christopher Schweitzer, of counsel
90 Maple Avenue
White Plains, NY 10601
mkobak@lshv.org

LEGAL SERVICES NYC
Edward Josephson, Director of Litigation
Roland Nimis, of counsel
40 Worth Street, Suite 606
New York, NY 10013
Tel: (646) 442-3600
ejosephson@lsnyc.org

THE LEGAL AID SOCIETY
Judith Goldiner, Esq., Attorney in Charge,
Civil Law Reform Unit
Ellen Davidson, of counsel
Amber Marshall, of counsel
199 Water Street
New York, NY 10038
Tel: 212-577-3339
ebdavidson@legal-aid.org