New Civil Liberties Alliance

July 22, 2021

**VIA ECF**

Patricia S. Dodszuweit
Clerk of the Court
U.S. Court of Appeals for the Third Circuit
601 Market Street
Philadelphia, PA 19106

*Re:* *Johnson, et al. v. Governor of New Jersey, et al.*
Case No. 21-1795

Dear Ms. Dodszuweit,

On the night of July 20, 2021, Appellees submitted an ostensible 28(j) letter regarding the New Jersey Appellate Division's decision in *Kravitz v. Murphy*. ECF 31 ("Bruck Letter"). Despite the Appellate Division's rejection of Governor Murphy's mootness arguments, Appellees' letter simply restates those same arguments. This responsive 28(j) letter explains that Appellees are still wrong about mootness.

Just as in this Court, Governor Murphy argued before the Appellate Division that actions challenging Executive Order 128 would become moot on July 4, 2021. *See* Op. at 3 n.1. The Appellate Division rightly rejected Governor Murphy's attempt to evade judicial review "[s]ubstantially for the reasons expressed by appellants in their June 17, 2021 letter brief, including the fact that 'the terms of EO 128 explicitly keep the order's effects in place for at least six months after the expiration of EO 128.'" *Id.*; (June 17 letter attached).

Appellees' now try to distinguish the state-court decision on Article III grounds, but the Appellate Division did not rely on its authority to decide a "technically moot" case of "sufficient importance." *But see* Bruck Letter, at 2. Rather, the state court rightly concluded that there is still a live controversy between the parties until at least December 4, 2021.

Moreover, as Appellants pointed out in opposition to the pending motion to dismiss, Appellants will maintain a concrete interest in this litigation even after December 4, given the collateral

consequences the district court's erroneous ruling will have on Appellants' right to recover damages in their breach-of-contract actions against their tenants who wrongly relied on EO 128. ECF No. 27, at 6-9.

The *Kravitz* decision only reinforces the need for this Court's immediate review, considering the Appellate Division's analysis of New Jersey's Contracts Clause relied primarily on the District of New Jersey's erroneous opinion below. *See* Op. 40-43. Appellants ask this Court to deny Appellees' motion to dismiss and decide this case on the merits as quickly as the Court's docket will allow.

Respectfully,

Jared McClain
Litigation Counsel

*Counsel to Appellants*

New Civil Liberties Alliance

June 17, 2021

**VIA eCourts**

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex, P.O. Box 006
Trenton, NJ 08625
Attn: Hon. Carmen Messano, P.J.A.D.

*Re:* Charles Kravitz, et al. v. Philip D. Murphy, et al.
Docket No. A-1584-20 (argued June 1, 2021)

Dear Judge Messano,

This letter, submitted pursuant to Rule 2:6-11(d), responds to the Respondents' June 7 letter suggesting that this case will become moot on July 4. Despite the passage of A5820, however, housing providers in New Jersey will not be able to celebrate their freedom from EO 128 this Independence Day.

*First*, by its terms, EO 128 *permanently* nullified the express terms of countless residential leases in New Jersey, including the Kravitzes' Glassboro Lease (plus the leases of any other tenants who invoke EO 128 between now and July 4). Once a tenant has invoked EO 128, the housing provider cannot require the tenant to replenish the security deposit under the lease that is in effect at the time. EO 128, ¶ 2.b. ("The tenant shall otherwise be without obligation to make any further security deposit relating to the current contract, lease, or license agreement."). The permanent change that EO 128 has imposed on residential leases did not end with the Public Health Emergency and will continue to impair the housing providers' rights beyond July 4—not only by impairing the right to require a new security deposit but also by impairing the type and amount of damages to which a housing provider is entitled for a tenant's violation of the lease.

*Second*, the terms of EO 128 explicitly keep the order's effects in place for at least six months *after* the expiration of EO 128. In addition to permanently altering the terms of any current lease, EO 128 continues to apply even if the contracting parties renew the lease—something many housing providers must do given how difficult the eviction moratorium makes it to end a tenancy. Under the terms of EO 128, once the contracting parties renew their lease, the housing provider cannot require a new security deposit until "six months following the end of the Public Health Emergency[.]" *Id.* This harm does not end until at least December 4, 2021, assuming that the Governor does not seek to adopt a similar EO in the meantime.

*Third*, as Appellants have explained, EO 128 has already permanently diminished the value of their leases. According to Respondents, the Governor of New Jersey can freely amend or nullify the express terms of residential leases without violating the Contracts Clause (let alone the separation of

powers) simply because the New Jersey legislature enacted the Rent Security Deposit Act back in the 1960s. In the Governor's view, this minimal regulation puts all housing providers on notice that the terms of their lease are never free from governmental impairment. Housing providers in New Jersey need this Court to rule on the merits so they can know during future lease negotiations whether they will be able to count on having security deposits available or not. The uncertainty they currently face due to their waning faith in the enforceability of private contracts is an ongoing harm.

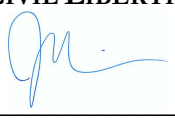
Requiring a security deposit—typically an amount worth 12.5% of a year-long lease's value—allows housing providers to mitigate the risk of leasing their private property to a stranger. Without the ability to rely on a security deposit, housing providers will have to mitigate that risk in other ways, including by raising their monthly rent or exiting the housing market entirely. If housing providers decide that leasing residential property in New Jersey is no longer worth the risk and choose to invest elsewhere, it will limit the housing supply. Both these alternatives will continue to harm housing providers and tenants alike. This perpetual harm of EO 128, and the Governor's claimed authority to issue that order, will remain without a declaration from this Court that his actions were unlawful.

Moreover, the uncertainty is compounded by the fact that Governor Murphy, through EO 244, ended only the Public Health Emergency, keeping in place the "State of Emergency declared in Executive Order No. 103 (2020) pursuant to [the Disaster Control Act.,] N.J.S.A. App.A.:9-33 et seq." EO 244, ¶ 1. As this Court knows, Governor Murphy did not articulate a defense of EO 128 based on the Public Health Emergency or Emergency Health Powers Act. The authority Governor Murphy claims to waive statutory law and express contractual provisions is based on the Disaster Control Act and the powers the Governor Murphy kept in place in EO 244. Appellants' ability to freely contract continues to be injured so long as Governor Murphy continues to claim that disputed authority.

*Finally*, this Court will retain jurisdiction to rule in this case even after the lingering effects of EO 128 expire. As the Supreme Court held in *Chase Manhattan Bank v. Josephson*, New Jersey courts are empowered "to consider and decide" weighty constitutional issues like those raised in this case "because of their public importance," even after the parties have settled their case. 135 N.J. 209, 214 (1994). Given the fundamental and structural constitutional issues that Appellants raised in this case, as well as the ongoing harm to Appellants and other housing providers throughout New Jersey, this Court should exercise its authority to rule on the merits even if EO 128 and its effects expire.

Respectfully,

**NEW CIVIL LIBERTIES ALLIANCE**



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