

Litigators of the Week: The Gibson Dunn Duo Who Scored an Extraordinary SCOTUS Win for New York Landlords

By Ross Todd
August 20, 2021

Randy Mastro and Akiva Shapiro of Gibson, Dunn & Crutcher have a knack for getting the attention of the U.S. Supreme Court.

Quickly.

Last year, we named Mastro and Shapiro Litigator of the Week runners-up after they secured an emergency injunction from the High Court for the Roman Catholic Diocese of Brooklyn finding New York Governor Andrew Cuomo's restrictions on in-person church attendance in purported COVID-19 hotspots violated the Free Exercise Clause of the First Amendment.

This week the pair got the court's attention again. Just three months after they filed suit on behalf of five New York landlords and a landlords' association, the pair secured another emergency injunction. Last week a six-judge majority of the court found that the state's eviction moratorium scheme — which didn't provide landlords a hearing to contest their tenants' unilateral claims of a COVID-related hardship — “violates the Court's longstanding teaching that ordinarily ‘no man can be a judge in his own case’ consistent with the Due Process Clause.”

Who were your clients and what was at stake?

Randy Mastro: Our clients are small New York property owners struggling to survive in this pandemic because they have been unable to reclaim their rental properties or collect any rent over the past 17 months as a result of this eviction moratorium. For example, our client, Brandie LaCasse, is an immuno-compromised Air Force veteran and single mom who is now effectively homeless because she rented out her property and moved in with her fiancée, but they've since broken up, and she can't get back possession of her own house, which remains occupied by non-paying tenants. And another client, Mudan Shi, is supporting three generations of her family but can no longer cover the expenses of owning her property, and can't move back into it, because her still-employed tenant hasn't paid rent since the pandemic. Their heartbreaking stories cried out for relief. We needed to win

for them. And for thousands of other small New York landlords suffering during this crisis.

Tell me the backstory. How did you end up handling this case?

Mastro: I am a former deputy mayor of New York City. That experience has resulted in many clients coming to me over the years for representation when they've wanted to challenge government actions. Or as I like to say, who better to know when government screws up than a former deputy mayor who likes to litigate? COVID has been no exception. When Governor Cuomo imposed fixed capacity restrictions on “houses of worship” in Brooklyn COVID “hot spots” last Fall that effectively closed churches and synagogues there, I got the call from Bishop DiMarzio, and suddenly, we were on a mission from God. So Akiva and I swung into action and, in six weeks from start to finish, obtained for the Roman Catholic Diocese of Brooklyn an emergency injunction from the Supreme Court lifting that cap and reopening churches in time for the holidays. That victory made national headlines and caused other private parties to contact us about COVID-related, government-imposed restrictions, including our clients, the Rent Stabilization Association and these individual small landlords, over New York's eviction moratorium. And from there, we proceeded to build the case against further extending the moratorium, which ultimately led to this past week's Supreme Court decision lifting it.

Who all was on your team and how did you divide the work?

Akiva Shapiro: We had a phenomenal team of associates who worked around the clock on the case and played critical roles throughout, from taking the testimony of one



(L-R) Randy Mastro and Akiva Shapiro of Gibson, Dunn & Crutcher.

Courtesy photos

of our clients at the preliminary injunction hearing (**Jessica Benvenisty**) to spearheading our Supreme Court briefing (**Will Moccia**). The rest of the team included **Alex Bruhn**, **Lauren Myers**, **Seton O'Brien**, **Lavi Ben Dor**, **Maxwell Peck**, and **Bina Nayee**. Each contributed to every aspect of the case, including strategy, research, drafting, and witness prep.

The district court and the Second Circuit both ruled against you in this case. What did you get out of those rulings that ultimately helped you get the Supreme Court's attention and secure this writ of injunction?

Mastro: You win cases on the facts and the law, especially when it comes to emergency relief, and we fully expected this case ultimately to end up in the Supreme Court on an emergency basis. So we built this case from day one as one that would present a compelling factual case for emergency relief, developing a detailed record at the district court level of the terrible suffering our clients were experiencing as small landlords under this eviction moratorium and of New York officials' overreach, going way beyond what federal authorities and other states were doing by literally closing the courthouse doors to property owners for 17 months, based solely on tenants' say-so, without any opportunity to challenge tenants' "hardship" claims. And we had to make our case quickly to get effective relief for our clients while this moratorium remained in effect. So we rushed into the district court on an emergency basis and got an immediate evidentiary hearing converted into a trial on the merits — over the government's objection — in which we established our clients were suffering irreparable harm and New York was coming back from COVID, having otherwise reopened in all other respects, including its courts. Indeed, our factual showing was so strong that the district court expressly found we'd established our client's irreparable harm — a necessary prerequisite for emergency relief that propelled us on appeal. So over three months, from start to finish, we went from trial to intermediate appeal to Supreme Court emergency review, having developed a detailed factual record, including our clients' irreparable harm.

Shapiro: We also leveraged the district court's legal conclusions in two key respects. First, the district court acknowledged in its opinion that we had made a strong showing that our clients were denied their due process right to a meaningful opportunity to be heard to the extent *Mathews v. Eldridge* applied. While the district court made a legal error in holding that *Mathews* wasn't the applicable standard, its *Mathews* analysis framed our later due process submissions. Second, the district court, like so many other courts during this pandemic, relied on the Supreme Court's 1905 decision

in *Jacobson v. Massachusetts*, holding, in the midst of the smallpox outbreak, that courts should defer to the government's public health and safety mandates in such a crisis. But too many courts ignored that *Jacobson* went on to say such deference was "subject to" the Constitution's protection of individual liberties. That distinction was central to our Supreme Court application.

How did your prior work in the case you handled for The Roman Catholic Diocese of Brooklyn inform your work here?

Mastro: We definitely built off of our success there in framing this case. In both instances, the Supreme Court had denied emergency relief to prior applicants challenging similar COVID restrictions by a 5-4 vote. And in both instances, we developed a factual record at the district court level that distinguished our applications from those earlier decisions. Specifically, our clients had compelling stories to tell of the irreparable harms they were suffering under these continuing government-imposed restrictions. Our state officials were going farther and harsher to address COVID concerns than other government authorities had before. And in general, New York was coming back from COVID at the time we brought each of these cases. It was the epicenter of the crisis back in the Spring of 2020, generally improving by the fall of 2020 when we brought the Roman Catholic Diocese case, and largely reopened by this spring when we brought this case. So we used all of that to make compelling arguments that these onerous restrictions had gone on too long and caused too much harm to continue.

Shapiro: Both cases also shared the same central theme, recognized by the Supreme Court's majority in the Roman Catholic Diocese case, that "even in a pandemic, the Constitution cannot be put away and forgotten." Yes, we're in a challenging time, but that doesn't mean that the Constitution goes on an extended hiatus. What a dangerous concept. In the Roman Catholic Diocese case, we highlighted how the lower courts had misread the Supreme Court's prior decisions, including the *Jacobson* decision I mentioned earlier, in giving carte blanche to the government during a pandemic, and urged the Court to intervene to provide critical guidance to the lower courts on this issue. And it did, holding that "even in a pandemic, the Constitution cannot be put away and forgotten." In *Chrysaifis*, we highlighted that the lower courts had failed to faithfully apply the Roman Catholic Diocese decision itself over the intervening months in refusing to apply its teaching outside the First Amendment religious liberties context. And we also built off of the Supreme Court's recent *Cedar Point* decision about the fundamental importance of protecting property

rights. So following on both of those landmark decisions, we framed this case as presenting compelling due process and First Amendment claims over the right to petition courts to protect property interests.

Walk me through the mental calculus of how you decide to go this route rather than petitioning the court through the more typical route via the merits docket.

Mastro: This is the second time in the past nine months that we've obtained emergency relief from the Supreme Court in a constitutional challenge to COVID-19 laws. Of course, it would have been easier to go the typical route, but given our client's predicaments, we had no choice but to seek an emergency writ. We were well aware of the heavy burden we'd face, including that you have to show an indisputably clear violation of constitutional rights and irreparable harm. But it was the only way to obtain meaningful relief for our clients, who were suffering terribly with each passing day.

Shapiro: Going into both cases, we had an overall case strategy mapped out that included the factual record we needed to establish and the legal claims we would raise that we hoped the Supreme Court would find compelling. We always knew these cases would be uphill battles — after all, others had tried and failed before us in mounting religious liberties challenges during the earliest months of COVID, and up until now, more than 100 private party applicants had tried and failed to convince the court to issue emergency injunctions to lift government COVID restrictions outside the religious liberties context. But we saw a path to victory from the very beginning. And we had no choice but to do everything we could to win for our clients in both cases, because they were truly suffering.

There's been considerable interest recently in the court's use of the so-called "shadow docket," including a House subcommittee hearing on the topic last February. As practitioners who've been actively involved in litigating cases on an emergency, expedited basis at the court, what do you say to court watchers who are concerned about the uptick in cases being handled without amicus participation, full merits briefing or oral argument?

Mastro: I don't consider these cases to be any part of any "shadow docket." These were high-profile cases, widely covered by the national press at every phase, and they drew amicus submissions along the way. By the time we got to the Supreme Court, we'd already had trials and intermediate appellate emergency review in both cases, so there were full and ample records here. Moreover, both cases resulted

in substantive written opinions from the Court, including majority opinions, concurrences and dissents, that powerfully explained the justices' reasoning. In short, these cases reflected the very best of our justice system.

Shapiro: Let's not forget that the emergency application process, at a fundamental level, serves to protect our liberties and freedoms. It is a critical piece of the Supreme Court's responsibilities because it provides a vehicle for immediate relief from the Highest Court in the land when there is an imminent or ongoing infringement of constitutional rights. In our cases, it did just that.

Practically speaking, what has this ruling meant for your clients? Have the courts opened back up to them?

Mastro: Now, there is finally light at the end of this tunnel. The courts have had to reopen for our clients, so both landlords and tenants will now get their day in court on a level playing field. New York's Chief Administrative Judge has already put out new guidance directing judges to schedule conferences in pending eviction matters. We have one client, for example, whose pre-Covid eviction warrant is ready to be executed as soon as that conference is held. That is real and substantial progress for small landlords who've literally had the courthouse door barred to them simply because their tenants declared "hardship" without ever having to back up their unsubstantiated claims.

What will you remember most about handling this matter?

Shapiro: Vindicating the rights of our small landlord tenants who suffered immeasurably during this pandemic yet were barred from having their day in court.

Mastro: How challenging it has been to convince courts not to defer to government authorities during this pandemic, no matter how much the government has overreached in its restrictions and infringed upon fundamental constitutional rights in the process. We have had unparalleled success in mounting these challenges during COVID, precisely because the Supreme Court has stepped into the breach. But the hallmark of our great democracy is how faithfully we apply the Constitution even in trying times such as these. As the Supreme Court said in *Hamdi v. Rumsfeld*, which we quoted in our recent briefing, it is "during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested." We have passed that test and the rule of law has prevailed, thanks to the Supreme Court, and we couldn't be more grateful.