

No. 21-788

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**In The  
Supreme Court of the United States**

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APARTMENT ASSOCIATION OF LOS ANGELES  
COUNTY, INC., DBA APARTMENT ASSOCIATION  
OF GREATER LOS ANGELES,

*Petitioner,*

v.

CITY OF LOS ANGELES, & ALLIANCE OF  
CALIFORNIANS FOR COMMUNITY EMPOWERMENT  
ACTIONS FOR A JUST ECONOMY,

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

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**BRIEF *AMICUS CURIAE* OF  
CALIFORNIA APARTMENT ASSOCIATION  
IN SUPPORT OF PETITIONER**

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**INTERESTS OF *AMICUS CURIAE*<sup>1</sup>**

The California Apartment Association (“CAA”) is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property owners and operators who are responsible for nearly two million rental housing units throughout California. CAA’s mission is to promote fairness and equality in the rental of residential housing, and to promote and aid in the availability of high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local fora. Many of its members are located in Los Angeles and are subject to the Moratorium Ordinance challenged herein. Moreover, the standard of review that the Ninth Circuit has adopted will have impacts for similar ordinances throughout the State of California.

**BACKGROUND & SUMMARY OF ARGUMENT**

Since the beginning of the COVID-19 pandemic in March of 2020, landlords in Los Angeles have been prohibited from evicting tenants for virtually any reason.

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<sup>1</sup> Pursuant to Rule 37.2(a), *amici* affirm that notice was provided to counsel for all parties of the intent of *amici* to file this brief at least 10 days before the deadline, and all parties provided written consent to its filing. Pursuant to this Court’s Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party. No person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

They may not evict tenants for any “no fault” reason (such as a property owner’s desire to move into his or her own rental property or a wish to exit the rental market altogether). They may not evict for certain lease violations related to unauthorized occupants and/or pets. They may not evict for nuisance. And, most crucially of course, they may not evict tenants for the non-payment of rent—the essential consideration for any lease agreement from a property owner’s perspective. Pet. App. 64-65; L.A.M.C. § 49.99.2(A)-(C).

Ostensibly, that non-payment must result from financial detriment to the tenant due to the COVID-19 pandemic, *id.*, but tenants are under no obligation to inform the landlord or document that inability in advance; they may simply raise it as an affirmative defense in an unlawful detainer action. And a property owner who seeks to evict without a purportedly “good faith” belief that the tenant does not qualify for the Ordinance’s protections faces significant monetary penalties—in the tens of thousands of dollars—even though tenants are under no obligation to inform landlords that they have suffered the negative COVID-19 financial effects that trigger those protections. *See* Pet. App. 67-68; L.A.M.C. §§ 49.99.7 & 49.99.8.

Also, ostensibly, tenants are not freed of their obligation to pay back rent *eventually*, but the deadline to do so remains far in the future: 2023 for any payments missed prior to October 1 of this year, Cal. Code Civ. Proc. § 1179.05(a)(2)(B)-(C), and some unknown future date for payments missed after that, Pet. App. 64; L.A.M.C. § 49.99.2(A). As one district court

has acknowledged, this right to collect back rent far down the line “is largely illusory, as tenants who have not paid their rent for many months because of economic distress—or, indeed, for any other reason—are unlikely to pay a money judgment against them.” *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 376 (D. Mass. 2020). But even if the payments might be received at some future date, the wait alone is a substantial hardship for many landlords. Even if the emergency were declared over today, the City of Los Angeles would have granted tenants the ability to live rent-free for *nearly three years*. In reality, it will surely be longer.

On the side of the ledger, landlords have not been relieved of the significant burdens they bear with respect to these rental properties. *They* are not freed of their many obligations under the lease agreements. They must continue to pay mortgages, insurance premiums, utility bills, and property taxes, and they must continue to bear the costs of maintaining the property in accordance with stringent state laws. These burdens are not slight, to say the least,<sup>2</sup> and the Los Angeles

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<sup>2</sup> Under California law, landlords have an implied duty to maintain the “habitability” of a rental unit. *See Green v. Superior Court*, 10 Cal. 3d 616 (1974). The Legislature has elaborated upon this duty in considerable detail; it includes the responsibility to maintain the structure of the unit—roof, walls, floors, ceilings, stairways, and railings—in good repair; to ensure that the plumbing—including hot and cold water—sewage, gas, heating, electric, and lighting, are in good working order; to ensure clean and sanitary buildings, grounds, and appurtenances, free from debris, filth, rubbish, garbage, rodents, and vermin; it requires the provision of adequate trash receptacles in good repair; it requires the provision of suitable deadbolts and other locks on doors and

City Council has paired its eviction moratorium with enhanced penalties for reducing housing services or failing to maintain the rental property; violation carries civil penalties and possible criminal liability.<sup>3</sup> Eviction moratoria—especially extreme moratoria like the one in Los Angeles—deprive owners of the rental income necessary to meet those expenses. Los Angeles is thereby placing property owners—a great many of whom are “mom-and-pop” property owners, who rely on rent as their only source of income and who may be

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windows; working smoke detectors; natural lighting in every room, etc. Cal. Civ. Code § 1941 *et seq.* The characterization of real estate as a “passive” investment is far from a literal description. Moreover, significant penalties can attach to the failure to comply with this obligation, up to and including criminal misdemeanor prosecution. *See* L.A.M.C. § 161.805(1) (following administrative hearing for violation of any provision within the authority of the L.A. Housing & Community Investment Department, the General Manager of such department may, among other remedies, “[o]rder that the violation be referred to the City Attorney’s office for prosecution”); L.A.M.C. § 161.401 (General Manager has authority to administer enforce the State Housing Law, State Housing Law Regulations, and L.A. Municipal Code provisions “relating to the maintenance, sanitation, ventilation, use, occupancy, and habitability of existing residential rental properties, buildings, units, and structures”); L.A.M.C. § 161.410(A) (General Manager’s “Arrest Authority” includes violations of L.A.M.C. § 9.8104); L.A.M.C. § 9.8104 (“Basic Maintenance and Repair of Existing Buildings and Premises”); L.A. Housing & Cmty. Investment Dept., “Referral to City Attorney’s Office” (Mar. 25, 2021), <https://hcidla2.lacity.org/rental-property-owners/referral-to-city-attorneys-office> (last visited Dec. 21, 2021) (“after a public hearing your property may be referred to the Office of the City Attorney for misdemeanor prosecution”).

<sup>3</sup> *See* Los Angeles Housing Dept., “Tenant Anti-Harassment Ordinance” (Oct. 14, 2021), *online at* <https://housing.lacity.org/residents/tenant-anti-harassment> (last visited Dec. 23, 2021).

facing their own pandemic-related economic troubles—at risk of bankruptcy or foreclosure, the liening of their properties, or the shutdown of utilities and other property-related services.<sup>4</sup>

Further compounding the issue, Los Angeles has also imposed a total rent freeze on rent-controlled units in the City, *see* L.A.M.C. § 151.32, amounting to approximately 65 percent of the total units,<sup>5</sup> so many landlords are unable to recoup losses from non-paying tenants by increasing rents on other units. That rent freeze is also due to remain in effect until one year after the local emergency is declared over, sometime in the future. L.A.M.C. § 151.32.

Nor is the promise of government-funded rental relief sufficient to address these harms. It is well-documented that those programs in California have been plagued by insufficient funds and bureaucratic delays, and many landlords are ineligible for such relief anyway, regardless of their financial circumstances.

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<sup>4</sup> Property owners are even prohibited from removing properties from the rental market and getting out of the rental business altogether. Pet. App. 66–67; L.A.M.C. § 49.99.4.

<sup>5</sup> *See* Los Angeles Housing Dept., “Report Dashboard for [Rent Stabilization Ordinance],” *online at* <https://housing.lacity.org/RSO> (last visited Dec. 23, 2021) (reporting that 653,389 units in the City are subject to rent control); U.S. Census Bureau, Quick Facts: Los Angeles city, Cal., <https://www.census.gov/quickfacts/losangelescitycalifornia> (last visited Dec. 21, 2021) (reporting that of nearly 1.4 million total households in the City total, only 36.8 percent are owner-occupied, meaning that close to 900,000 are occupied by non-owners).

In sum, the one-sided regime adopted by Los Angeles substantially destroys the value of a great many lease agreements from the landlords' perspective, and places landlords in the financial crosshairs in the process. It is hard to imagine a more radical and comprehensive impairment of the contractual arrangement between landlords and tenants in Los Angeles. It was in response to precisely such one-sided shifting of burdens, arising from the economic depression following the Revolutionary War, that the Contracts Clause was adopted. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 256-57 (1978) ("*Spannaus*") (Brennan, J., dissenting) (noting that, among the "ignoble" historical state practices that gave rise to the Contracts Clause were "'stay laws,' staying or postponing the payment of private debts").

Yet the Ninth Circuit blessed Los Angeles's eviction moratorium anyway. That court adopted a standard of review so deferential to policymakers that it is virtually impossible to envision any law that could be deemed an unconstitutional impairment of contracts, at least when the government itself is not a party thereto, and it is a standard that has been rightly rejected by the Second Circuit. *See Melendez v. City of N.Y.*, 2021 U.S. App. LEXIS 32327, at \*75 n.63 (2d Cir. Oct. 28, 2021) (declining to adopt the Ninth Circuit's refusal to apply the "careful review standard for substantial contract impairments identified in *Allied Structural Steel*"). The Ninth Circuit sanctioned an infringement on basic contractual rights that goes far, *far* beyond what this Court has ever previously

approved. Compare *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934) (“*Blaisdell*”) (upholding Minnesota’s mortgage moratorium law that allowed troubled homeowners to extend their mortgage payments through a court review process, where the homeowners still had to pay a *reasonable rental value* while the mortgage payments were extended) with *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935) (“*Worthen*”) (distinguishing *Blaisdell* and striking down Arkansas’ version of the mortgage moratorium laws as an unconstitutional impairment of contract in significant part because “[t]here [wa]s no enforceable obligation in the interval to pay instalments of the principal or even the accruing coupons.”).

Review by this Court is essential to clarify the proper standard of review and to ensure the continued vitality of the Contracts Clause as a constitutional provision with independent force.

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## ARGUMENT

### **I. The Los Angeles Moratorium Unquestionably Represents a Substantial Impairment of Lease Agreements That Threatens Massive Harm to Property Owners in Los Angeles, Especially the Mom-and-Pop Landlords That Make Up the Majority of Landlords.**

There is no doubt that the COVID-19 pandemic has been economically trying for thousands of tenants across the United States, and CAA has no wish to



downplay the fact that many tenants have been truly affected by the virus. But they are not alone. Across California and the nation many thousands of property owners face significant threats to their livelihoods and life savings, also as a result of COVID-19 and resulting government regulations. As this Court has recently recognized in striking down the Center for Disease Control’s eviction moratorium, in language equally applicable here, such moratoria put “millions of landlords across the country[] at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery. Despite [those governments’] determination that landlords should bear a significant financial cost of the pandemic, many landlords have modest means.” *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

To elaborate further, as recently reported in the *Washington Post*:

More than 8 million rental properties across the country are behind on payments by an average of \$5,600, according to census data. Nearly half of those rental properties are owned not by banks or big corporations but instead by what the government classifies as “small landlords”—people who manage their own rentals and depend on them for basic income, and who are now trapped between tenants who can’t pay and their own mounting bills for insurance, mortgages and property tax. According to government estimates, a third of small landlords are at risk of

bankruptcy or foreclosure as the pandemic continues into its second year.<sup>6</sup>

Under the LA Moratorium Ordinance, property owners are required to provide homes to needy tenants (and sometimes non-needy tenants, about which more below) for up to three years without any rent to cover the expenses of maintaining the properties that they are now required to provide for free. The situation created by the Ordinance—permitting no rental income but continuing all of the costs associated with the ownership of rental property—poses an extraordinary burden for landlords generally, and it effectively drains the rental agreements of all of their value from the perspective of the landlord. But it is especially burdensome for smaller landlords, who comprise the majority of rental housing providers in the country and in California specifically. As the nonpartisan Brookings Institution has observed, “without rental income, a significant number of noncorporate, ‘mom and pop’ landlords—who may be coping with their own unemployment or additional expenses related to the COVID-19 pandemic—will also struggle to pay their mortgages, utilities bills, property taxes, maintenance costs, and other property-related expenses.”<sup>7</sup>

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<sup>6</sup> See Saslow, “The Battle for 1042 Cutler Street,” WASH. POST (May 1, 2021), *online at* <https://www.washingtonpost.com/nation/2021/05/01/landlord-tenant-eviction-moratorium-pandemic/> (last visited Dec. 20, 2021).

<sup>7</sup> Broady, Edelberg & Moss, “An eviction moratorium without rental assistance hurts smaller landlords, too,” BROOKINGS INSTITUTION (Sept. 21, 2020), *online at* <https://www.brookings.edu/blog/up-front/2020/09/21/an-eviction-moratorium-without-rental->

According to Census Bureau data collected by the Urban Institute, more than 22 million rental units—approximately half of the country’s rental units—are found in small buildings with between one and four units.<sup>8</sup> The real estate market in Los Angeles, and California more broadly, trends even more towards such lower density small buildings than the nation as a whole due to the nature of the region’s housing stock.<sup>9</sup> Most of the units are owned by mom-and-pop landlords, many of whom invested in property to save for retirement. Among those owning residential investment property, roughly a third are from low- to moderate-income households; property income constitutes up to 20 percent of their total household income.<sup>10</sup> Even in normal circumstances, the owners of these smaller buildings spend at least half of their rental income on mortgage payments, property taxes, and insurance for their properties.<sup>11</sup>

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assistance-hurts-smaller-landlords-too/ (last visited Dec. 21, 2021) (“Brookings Institution Report”).

<sup>8</sup> See Housing Finance Policy Center, “Small Multifamily Units,” URBAN INSTITUTE (May 2020), p. 4, *online at* [https://www.urban.org/sites/default/files/2020/05/15/small\\_multifamily\\_units\\_0.pdf#page=4](https://www.urban.org/sites/default/files/2020/05/15/small_multifamily_units_0.pdf#page=4) (last visited Dec. 21, 2021).

<sup>9</sup> Reid & Heisler, “The Ongoing Housing Crisis: California Renters Still Struggle to Pay Rent Even as Counties Re-Open,” TERNER CENTER FOR HOUSING INNOVATION, U.C. BERKELEY (Oct. 2, 2020), <https://turnercenter.berkeley.edu/research-and-policy/ongoing-housing-crisis/> (last visited Dec. 21, 2021) (“Turner Center Report #1”).

<sup>10</sup> See Brookings Institution Report, *supra*, note 7.

<sup>11</sup> Schuetz, “Halting evictions during the coronavirus crisis isn’t as good as it sounds,” BROOKINGS INST. (Mar. 25, 2020),

Now those landlords, who may themselves be coping with their own unemployment or additional expenses related to the pandemic, are also dealing with a dramatic loss of rental income, facing the prospect of either trying to sell their property or going into debt to meet financial obligations including mortgage and insurance payments, property taxes, utilities, and maintenance costs. “Without rental income to offset these expenses, low- to moderate-income landlords may struggle to maintain the residences on which tenants depend. Consistent rental income is essential for individual investor landlords—especially those of modest means who rely on rental income as a substantial portion of their total household budget.”<sup>12</sup> Significant decreases in rental income threatens to lead to declines in property upkeep and foreclosures, which in turn can lead to more evictions and loss of affordable rental housing.

It is, of course, not surprising that the impact of these moratoria was felt by landlords right away. In a national survey in July 2020, more than half of small landlords reported that they had at least one tenant fail to pay rent in June of that year,<sup>13</sup> and more than

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<https://www.brookings.edu/blog/the-avenue/2020/03/25/halting-evictions-during-the-coronavirus-crisis-isnt-as-good-as-it-sounds/> (last visited Dec. 21, 2021).

<sup>12</sup> See Brookings Institution Report, *supra*, note 7.

<sup>13</sup> Turner Center for Housing Innovation, U.C. Berkeley, “How Are Smaller Landlords Weathering the COVID-19 Pandemic?” (July 2020), <https://nahrep.org/downloads/NAHREP-Turner-Center-Landlord-Survey-Factsheet.pdf> (last visited Dec. 21, 2021) (“Turner Center Report #2”).

half of landlords reported that rent collections were down from the first quarter to the second quarter, with 30 percent of respondents saying they were down more than 25 percent.<sup>14</sup> (In a four-unit building, if one person doesn't pay rent that's a loss of 25 percent of a landlord's rental income.) Nationwide, "[o]ne-in-three renters started September [2020] with outstanding back rent owed."<sup>15</sup> Moreover, only about a third of all renters "made an on-time rent payment in the first week of September" 2020.<sup>16</sup>

One in four small landlords said they had already borrowed to make ends meet in a July 2020 survey by the National Association of Hispanic Real Estate Professionals,<sup>17</sup> while another survey of small landlords found that 35 percent were dipping into savings to cover operating costs.<sup>18</sup> Furthermore, "[m]ore than half (58 percent) of small rental property owners lack access to credit to cover emergencies, such as lost rent payments, and they may lack sufficient assets to

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<sup>14</sup> *Id.*

<sup>15</sup> Popov, Warnock, & Salviati, "Despite Slight Improvement, Rent Payment Struggles Continue," APARTMENT LIST (Sept. 9, 2020), <https://www.apartmentlist.com/research/september-housing-payments> (last visited Dec. 22, 2021).

<sup>16</sup> *Id.*

<sup>17</sup> Nat'l Assoc. of Hispanic Real Estate Professionals, "NAHREP Landlord Survey" (July 2020), <https://nahrep.org/landlord-survey/> (last visited Dec. 21, 2021).

<sup>18</sup> Scott, "Landlords and Renters Struggling to Make Ends Meet During COVID-19 Uncertainty," AVAIL, INC. (Sept. 11, 2020), <https://www.avail.co/blog/landlords-and-renters-struggling-to-make-ends-meet-during-covid-19-uncertainty> (last visited Dec. 22, 2021).

pledge to a lender when rental income stops,” wrote American Bar Association President Patricia Lee Refo in a September 5 letter urging Congress.<sup>19</sup>

But even now, nearly two years into the pandemic, the impacts remain dire. According to a recent study published by the National Equity Atlas, based on Census Bureau data, 707,000 households in California were behind on their rent as of mid-October 2021, with a total estimated rent debt of \$2,649,700,000; nearly half of those households and nearly half that estimated rent debt was from the Los Angeles metro area.<sup>20</sup> A national survey of landlords conducted earlier this year indicated that “a sizeable share of landlords—of all sizes and in all cities studied—report declines in rent collection during the pandemic, although smaller-scale landlords reported more substantial losses,” causing “a significant amount of financial stress”<sup>21</sup> and resulting in “a significant share of landlords cutting back on property expenditures, including deferred maintenance

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<sup>19</sup> See Refo Letter to Congressional Leaders, “ABA Support for Emergency Rental Assistance to End the COVID-19 Eviction Crisis,” AM. BAR ASSOC. (Sept. 5, 2020), [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/eviction-crisis-letter-september.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/eviction-crisis-letter-september.pdf) (last visited Dec. 22, 2021).

<sup>20</sup> See PolicyLink/USC Equity Research Institute, National Equity Atlas, “Rent Debt Dashboard,” *online at* <https://nationalequityatlas.org/rent-debt> (last visited Dec. 21, 2021).

<sup>21</sup> Kneebone, *et al.*, “The Impact of the Pandemic on Landlords: Evidence from Two National Surveys,” HARVARD JOINT CENTER FOR HOUSING STUDIES (Sept. 2021), p. 6, *available online at* [https://www.jchs.harvard.edu/sites/default/files/research/files/harvard\\_jchs\\_impact\\_on\\_landlords\\_two\\_national\\_surveys\\_kneebone\\_et\\_al\\_2021.pdf](https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_impact_on_landlords_two_national_surveys_kneebone_et_al_2021.pdf) (last visited Dec. 21, 2021).

and missed payments for mortgage, taxes, and utilities.”<sup>22</sup>

And the promise of rent relief from the government—which the district court and the Ninth Circuit pointed to as purportedly mitigating the impacts of the Los Angeles rent moratorium—has proven to be wishful thinking on the part of many landlords. To begin with, Los Angeles’s initial program was underfunded, providing *partial* assistance<sup>23</sup> to a mere 50,000 households in a city with nearly one million renter households,<sup>24</sup> and providing so little funding that the application program was only open for five days in July 2020.<sup>25</sup> Los Angeles’s program was eventually absorbed into the statewide rent relief program, but that has proved a struggle as well:

California’s statewide program, the largest in the country, has been notoriously slow to make payouts throughout the pandemic. In recent months it faced logistical challenges

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<sup>22</sup> *Id.* at 18.

<sup>23</sup> The assistance was capped at \$2,000 per household. *See* City of Los Angeles, “Emergency Renters Assistance Subsidy Program,” <https://eccandc.org/emergency-renters-assistance-subsidy-program/> (last visited Dec. 21, 2020) (“City of Los Angeles ERAS Webpage”).

<sup>24</sup> *See* U.S. Census Bureau, Quick Facts: Los Angeles city, Cal., <https://www.census.gov/quickfacts/losangelescalitycalifornia> (last visited Dec. 21, 2021) (nearly 1.4 million households in total, of which only 36.8 percent are owner-occupied).

<sup>25</sup> *See* City of Los Angeles ERAS Webpage, *supra*, note 23 (“The application will be open for five (5) days, starting at 8 AM on July 13th, and closing at 11:59 PM on July 17, 2020”).

as it absorbed some municipalities' failing application systems, including a program run by the City of Los Angeles. The state agency in charge of the system has also been short-staffed, according to administrators, and spent resources retooling its website after civil rights groups filed a complaint in June over the site's failure to adequately serve non-English speakers.<sup>26</sup>

As a result, “[s]ince [California’s] program debuted in March it has received 434,000 applications, according to the new data. The 75,000 applications that have so far led to relief payments account for a total disbursement of \$898 million—less than one-fifth of the \$4.5 billion that applicants have requested.”<sup>27</sup> And in the Los Angeles metro area, only about 6 percent of renters have received rental assistance; 23 percent are still waiting, and 14 percent have been denied.<sup>28</sup> Moreover, the maximum relief available under the federal rent relief program that provides the funds for most of California’s program is capped at 18 months—barely

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<sup>26</sup> See Bach, “State’s Sluggishness Leaves Landlords ‘Holding the Bag,’” *THE REAL DEAL—LOS ANGELES REAL ESTATE NEWS* (Oct. 20, 2021), *online at* <https://therealdeal.com/la/2021/10/20/states-sluggishness-on-rent-relief-leaves-landlords-holding-the-bag/> (last visited Dec. 21, 2021).

<sup>27</sup> *Id.*

<sup>28</sup> See PolicyLink/USC Equity Research Institute, National Equity Atlas, “Rent Debt Dashboard,” *online at* <https://national equityatlas.org/rent-debt> (last visited Dec. 21, 2021).



half of what Los Angeles enables tenants to avoid without eviction.<sup>29</sup>

Moreover, though California has enacted state statutes requiring that landlords seek rent relief before pursuing evictions (in those places, unlike Los Angeles, where that is permitted), *see* Cal. Code Civ. Proc. § 1179.11(a)(1), not all tenants—and therefore landlords—are eligible. Such rent relief is only available to tenants who earn less than 80 percent of area median income, with priority given to households earning less than 50 percent of AMI. *See* Cal. Health & Saf. Code § 50897.1(a)-(b). That is true regardless of the financial circumstances of *the landlord*, meaning that a landlord of limited means bears the full brunt of the Los Angeles moratorium if the tenant’s income is sufficiently high.<sup>30</sup> That moratorium does not limit its protections to low-income tenants.

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<sup>29</sup> *See* 15 U.S.C. § 9058c(d)(1)(A)(ii); U.S. Dept. of Treasury, “Emergency Rental Assistance Program: FAQs,” Question 10 (updated May 7, 2021), *available online at* <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program/faqs> (last visited Dec. 23, 2021).

<sup>30</sup> This inability to obtain relief has been a problem for landlords right from the beginning. Most significantly, on March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act to provide emergency assistance to individuals, families, and businesses affected by the COVID-19 pandemic. Among other things, the CARES Act created the Paycheck Protection Program (PPP), a new loan program to assist small businesses that are being adversely impacted by the pandemic. However, due to regulatory guidance from the Small Business Administration, “passive businesses owned by landlords that

Inevitably, the coronavirus pandemic would have resulted in some level of disruption to these landlords in any event, but the LA Moratorium Ordinance vastly compounds the problem by depriving landlords of the ability to mitigate the damages they are incurring. The City of Los Angeles has sought to shift all the economic detriment of the pandemic to property owners by giving tenants all of the benefits of their rental agreements, while landlords retain all of the burdens. In so doing, the City is “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Pennell v. San Jose*, 485 U.S. 1, 9 (1988).

## **II. The Ninth Circuit’s Overly Deferential Standard of Review Effectively Nullifies the Contracts Clause and Conflicts with the Standard Recently Adopted by the Second Circuit.**

In general terms there is little dispute about the constitutional test applicable to the City’s moratorium ordinance. Under this Court’s case law, a court evaluating whether a government action works an unconstitutional impairment of contracts asks:

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do not actively use or occupy the assets acquired or improved with the loan proceeds” were excluded from the PPP loan program. *See* U.S. Small Bus. Admin., “Business Loan Program Temporary Changes; Paycheck Protection Program,” 85 Fed. Reg. 20811, 20812 (Apr. 15, 2020); 13 C.F.R. § 120.110(c); SBA Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, p. 85.

1. “[W]hether the state law has, in fact, operated as a substantial impairment of a contractual relationship”;
2. If a substantial impairment is found, whether there is “a significant and legitimate public purpose behind the regulation”;
3. And, finally, “[o]nce a legitimate public purpose has been identified, the next inquiry is whether the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.’”

*Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12 (1983) (“*Energy Reserves*”) (internal citations omitted).<sup>31</sup>

The devil, however, is in the details—in the application.

The district court held, and the Ninth Circuit assumed, that the moratorium works a substantial impairment of rental contracts. See *Apartment Ass’n of Los Angeles County v. City of Los Angeles*, 500 F. Supp. 3d 1088, 1094-96 (C.D. Cal. 2020) (“*AALC I*”); *Apartment Ass’n of Los Angeles County v. City of Los Angeles*,

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<sup>31</sup> The Second Circuit has noted, “the Supreme Court has sometimes indicated that Contracts Clause challenges should be reviewed in three steps and sometimes in two. [Citations.] No matter. The substance of the inquiry has remained the same. . . .” *Melendez*, 2021 U.S. App. LEXIS 32327, at \*73-75.

10 F.4th 905, 913 (9th Cir. Aug. 25, 2021) (“*AALC II*”). That this is the case can hardly be gainsaid, for the reasons discussed above. As the district court acknowledged, “the scope and nature of the COVID-19 pandemic, and of the public health measures necessary to combat it, have no precedent in the modern era, and that no amount of prior regulation could have led landlords to expect anything like the blanket Moratorium.” 500 F. Supp. 3d at 1096.

But having acknowledged the significance of the contractual impairment that L.A. landlords have been subjected to, the courts below failed to give proper weight to that fact. They treated it merely as a box to be checked, but under this Court’s precedents the first prong properly governs the level of scrutiny that must be applied to the other two. In the words of this Court in *Allied Structural Steel*, “[t]he severity of the impairment measures the height of the hurdle the state legislation must clear,” and “[s]evere impairment . . . will push the inquiry to a *careful examination* of the nature and purpose of the state legislation.” 438 U.S. at 245 (emphasis added). Thus, a severe impairment of contract rights, like that imposed by the Los Angeles moratorium, must be closely scrutinized to ensure that the Contracts Clause retains independent force.

The district court and the Ninth Circuit did not engage in the level of “careful examination” required of them. Instead, they both gave essentially unlimited deference to the City’s contention that the legislation was an appropriate means of pursuing a legitimate public purpose. *See* 10 F.4th at 914; 500 F. Supp. 3d at

1096. They thereby effectively wrote a blank check to government officials to alter contractual arrangements to benefit politically-favored groups<sup>32</sup>—exactly the circumstance the Contracts Clause was designed to prevent.

The Ninth Circuit justified this extreme deference by claiming that this Court’s most recent Contracts Clause cases—*Energy Reserves*, *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), and *Sveen v. Melin*, 138 S. Ct. 1815 (2018)—mark a “retreat” from its prior case law and from any but the most deferential level of review, and that they have “severely limited the Contracts Clause’s potency.” See *AALC II*, 10 F.4th at 908, 912-13, and 916. But as the Second Circuit recently noted in *Melendez*, see 2021 U.S. App. LEXIS 32327, at \*75 n.63, that misreads those subsequent precedents. *Energy Reserves* and *Sveen* were both decided on the basis that there was no substantial impairment of contractual rights in the first place, so they did not even reach the second and third prongs and cannot, therefore, not be regarded as resolving the issue of whether a substantial impairment warrants heightened scrutiny. See *Energy Reserves*, 459 U.S. at 413-16 (“ERG’s reasonable expectations have not been impaired by the Kansas Act”); *Sveen*, 138 S. Ct. at 1822 (“Here, we may stop after step one because Minnesota’s revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements”). And while *Keystone Bituminous Coal*

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<sup>32</sup> As noted above, see note 24, *supra*, barely one third of housing units in Los Angeles are owner-occupied—a fact surely not lost upon the elected officials in that City.

assumed a substantial impairment, that decision itself noted that in Contracts Clause cases it is “essential to determine the ‘severity of the impairment,’ *which in turn affects ‘the level of scrutiny to which the legislation will be affected.’*” 480 U.S. at 504 n.31 (emphasis added) (quoting *Energy Reserves*, 459 U.S. at 411). In other words, as the Second Circuit observed, in none of these cases “does the Supreme Court distinguish, much less reverse, its earlier cases so as to sound retreat.” *Melendez*, 2021 U.S. App. LEXIS 32327, at \*75 n.63.

In *Melendez*, the Second Circuit recently rejected the Ninth Circuit’s mode of analysis and adopted a more stringent level of review for a “severe” impairment of contracts like that at issue here; while acknowledging that something less than strict scrutiny was appropriate, that Court held that a more stringent level of review than the extremely deferential standard applied by the Ninth Circuit in this case is appropriate. *Id.* at \*75-77 & n.63, \*84-85. Such heightened scrutiny, it held, is necessary to ensure that “the Clause’s limits are not illusory or non-existent.” *Id.* at \*76. “It is a standard that depends on balancing to ensure that Contracts Clause limitations both ‘do not destroy the reserved power’ of the states ‘in its essential aspects,’ *and that the reserved power of the states does not ‘destroy the limitations’ of the Contracts Clause.*” *Id.* at \*77 (emphasis added). The Ninth Circuit’s approach to this case loses sight of the second half of this formulation entirely.

It is difficult to imagine a more extraordinary impairment of contractual relations than that imposed by

the extreme eviction moratorium that Los Angeles has adopted. If it can be upheld, with the barest minimum of scrutiny, then it is difficult to imagine almost *any* impairment of private contracts that would be barred by the Contracts Clause. That provision of the Constitution becomes meaningless paper barrier to be ignored by government officials at will. Contrary to the analysis of the Ninth Circuit below, the Second Circuit has rightly concluded that this Court's precedents do not support such a result.



## CONCLUSION

*Amicus curiae* California Apartment Association respectfully requests that the Court grant the petition for certiorari to address the proper standard of review in Contracts Clause cases and to resolve the split between the Second and Ninth Circuits on this point.

Respectfully submitted,

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