No. 21-788

IN THE
Supreme Court of the United States

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

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE

COMES NOW *Amicus Curiae* Foundation for Moral Law and respectfully moves this Court to grant permission to file the attached *amicus curiae* brief in support of Petitioner in the above-entitled matter.

Amicus has requested and received permission from Petitioner to file the attached brief. *Amicus* has been unable to contact Respondents because Respondents have not yet responded to Petitioner's Petition.

Amicus believes this brief, the primary author of which is a Professor of Constitutional Law for the Oak Brook College of Law & Public Policy, will be helpful to this Court in analyzing the historical circumstances that led to the adoption of the Contracts Clause, the intent of the Framers of the Contracts Clause, early interpretations of the Contracts Clause, a comparison of the original meaning of the Contracts Clause to *Home Building & Loan Assn. v. Blaisdell*, 290 US 398 (1934), and a comparison of the moderate Minnesota Mortgage Moratorium Act upheld in *Blaisdell* to the radical Los Angeles eviction moratorium that is the subject of this case.

Respectfully submitted,

John Eidsmoe

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation") (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation believes the right to enter into contracts and to enforce them in court is an essential freedom that the Founders valued highly and a fundamental cornerstone of the free enterprise system that is the key to American prosperity, and that the March 2020 COVID-19 eviction moratorium adopted by the City of Los Angeles violates that fundamental right and is therefore unconstitutional under the Contracts Clause of Article I, Section 10 of the United States Constitution.

SUMMARY OF ARGUMENT

If the City of Los Angeles had intended to bankrupt landlords and encourage tenants to occupy premises rent-free, they could hardly have devised a

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[1] Counsel for Petitioner has consented to the filing of this brief. Because Respondents have not filed a response to the Petition, *Amicus* has been unable to contact Respondents and request consent and has therefore filed a Motion for Permission to File. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

more effective way of doing so than the March 2020 COVID-19 eviction moratorium.

However, the moratorium stands in flagrant violation of the Impairment of Contracts Clause of Article I, Section 10 of the Constitution, even as interpreted by this Court in *Home Building & Loan Ass'n v. Blaisdell* 290 U.S. 398 (1934).

Even though *Blaisdell* was a departure from the plain meaning and original intent of the Contracts Clause, the Minnesota Mortgage Moratorium Act, upheld 5-4 in *Blaisdell,* was a narrowly-drawn measure to be applied on a case-by-case basis to help lenders and homeowners get through an emergency. While Minnesota used a scalpel, Los Angeles has used a chainsaw.

The Foundation urges this Court to grant certiorari in this case and either revisit the *Blaisdell* case or strike down the Los Angeles eviction moratorium as a violation of the Contracts Clause even as interpreted in *Blaisdell.*

ARGUMENT

I. The Court should grant certiorari because (1) the circuit courts and other lower courts have been divided on the interpretation of the Contracts Clause, and (2) this Court's interpretation of the Clause is vague and opens the door to unconstitutional restrictions on the right to enter and enforce a contract.

Because Counsel for Petitioner have thoroughly established the existence of a circuit split, the Foundation will not dwell extensively upon that issue except to note that the Ninth Circuit's decision in this case is in stark contrast to the Second Circuit's decision in *Melendez v. City of New York,* No. 20-4238-cv, 2021 WL 4997666 (October 28, 2021). We do urge the Court, however, to use this case as an opportunity to clear up conflicts not only in lower court rulings but also in its own jurisprudence.

II. The Framers intended a strict interpretation of the Contracts Clause.

While the Constitutional Convention was in session, the Continental Congress by a vote of 17-1 adopted the Northwest Ordinance on July 13, 1787 for the governance of new states which might in the future be admitted into the Union. One of the two principal drafters of the Ordinance was Rufus King of Massachusetts, a Convention delegate.

A central provision of the Northwest Ordinance (Article 2) was the following:

> [I]n the just provision of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously made.[2]

Note the absolute language of Article 2: "[N]o law ought ever to be made ... that shall, in any manner whatsoever, interfere with or affect private contracts or engagements... ."

On August 28, 1787, about six weeks after the Northwest Ordinance was adopted, its primary drafter and sponsor, Rufus King of Massachusetts, moved to add to the proposed Constitution a provision prohibiting state interference with the obligation of contracts. As Madison recorded,

> Mr. King moved to add, in the words used in the Ordinance of Cong[res]s establishing new states, a prohibition on the States to interfere in private contracts.[3]

Some discussion ensued in which James Madison and James Wilson supported King's proposal while

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[2] Northwest Ordinance of 1787, Article 2, https://avalon.law.yale.edu/18th_century/nworder.asp

[3] James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Ohio University Press 1966, 1985, p. 542).

Gouverneur Morris and George Mason thought states should have some authority to regulate the formation of contracts. Wilson noted that the Northwest Ordinance prohibited retrospective interference with contracts. Madison said the prohibition on ex post facto laws already covered that. John Rutledge moved to amend King's motion to prohibit "bills of attainder nor retrospective laws," and with that change King's motion passed.[4] On September 14 the language of Article I Section 10 was placed in its final form.[5]

Three further factors indicate the absolute nature of the Contracts Clause:

(1) Various provisions of Article I Section 10 prohibit states from doing certain things "without the consent of the Congress," such as laying duty of tonnage, keeping troops or ships of war, or entering into any agreement or compact with another state or with a foreign power. But the prohibition against impairing the obligation of contracts is absolute; states may not do this even with the consent of Congress.

(2) Other prohibitions of Article I Section 10 are conditional: states may not lay imposts or duties on imports or exports "except what may be absolutely necessary for executing its inspection laws," and states may not engage in war "unless actually invaded, or in such eminent danger as will not admit of delay." But no such exceptions or emergency conditions apply to the Contracts Clause; again, the clause is absolute.

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[4] Madison, p. 543.

[5] Madison, pp. 641-42.

(3) The Tenth Amendment provides that

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The power to impair the obligation of contracts is very clearly a power "prohibited by it [the Constitution] to the States." It is therefore not a power reserved to the States. Although in general the states may have a reserved police power to regulate for the health, safety, welfare, and morals of the people, this aspect of the states' police power is expressly prohibited to the states by the Contracts Clause.

From its inspiration by Article 2 of the Northwest Ordinance, its absolute wording, the lack of exceptions for emergency conditions or even for consent of Congress, the Framers clearly intended a strict interpretation of the Contracts Clause. They understood that a free enterprise economic system cannot function unless people are free to enter into contracts, and that contracts are virtually worthless if they cannot be enforced in court. As James Madison stated in *Federalist No. 44,* the Clause is necessary to "banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."[6]

[6] James Madison, *Federalist No. 44.*

III. Until *Blaisdell,* the courts gave the Contracts Clause a strict interpretation.

Prior to the adoption of Amendments 13-15, the Contracts Clause was the primary clause in the Constitution that restricted state power. In *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810), Chief Justice Marshall construed the Contracts Clause broadly to include both private and public contracts and to apply to both the right to enter a contract and the right to enforce the remedies provided in the contract for breach of that contract.

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819), held that a New York law discharging debtors from all debts after a bankruptcy proceeding impaired the obligation of contracts and was therefore unconstitutional. In *Ogden v. Saunders,* 25 U.S. (12 Wheat.) 213 (1827), the Court reaffirmed the views expressed by the Framers that the Contracts Clause prohibits the states from refusing to enforce pre-existing contracts but does not prohibit the states from limiting or regulating contracts prospectively. Likewise in *Bronson v. Kinzie,* 42 U.S. (1 How.) 311 (1843), the Court used the Contracts Clause to invalidate the retroactive application of an Illinois law that gave a mortgagor twelve months to redeem his property after default.

Other cases such as *Charles River Bridge v. Warren Bridge,* 36 U.S. (11 Pet.) 420 (1837), recognized some authority of the states to limit or terminate contracts in which the state or local government was a party but continue to recognize that the Contracts Clause prohibits the states from

impairing the obligation of contracts between private parties.

IV. *Home Building & Loan Ass'n v. Blaisdell* 290 U.S. 398 (1934), is a radical departure from Contracts Clause jurisprudence.

Having been Governor of New York, it is not surprising that Chief Justice Howard Evans Hughes would favor an expansive view of state power and a limited view of the Contracts Clause which limits state power. Nor is it surprising, then, that he would vote to uphold the Minnesota Mortgage Moratorium Act.

Adopted in 1933 because of the Depression, the Act authorized courts to limit foreclosures for nonpayment of mortgages, to postpone sales of foreclosed property. and to extend the time for redemption, The Act also directed the courts to ascertain the reasonable rental value of the mortgaged property and to require the mortgagor "to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, and mortgage...." Home Mortgage argued that, by prohibiting the lender from asserting his right to foreclose, the Act violated the Contracts Clause.

In his 5-4 decision upholding the Act, Chief Justice Hughes noted the nature of the emergency (the Depression), the temporary nature of the Act's remedy, the reasonableness of the remedy, the fact that the lenders would eventually be paid in full including additional interest, and the possibility that the Act might even work to the lenders' benefit because otherwise they might be stuck with a plethora

of foreclosed homes that during the Depression would be difficult to sell at anything approaching fair market value. For these reasons, the Chief Justice wrote, the Act is not an "impairment" of the obligation of contract because "no substantial right secured by the contract is thereby impaired," and under the standard of "reasonableness," the Clause has not been violated.

Although the Chief Justice's argument is forceful, it does not comport with the plain language or history of the Contracts Clause. He effectively amended the Contracts Clause to read that states may not "unreasonably" or "substantially" impair the obligation of contracts.

The Framers could have used such language in the Contracts Clause. Some might argue that they should have. Others might argue that the Contracts Clause could be amended by inserting such language.

But the plain fact is, the Framers used no such language. They simply said states may not pass "any Law impairing the Obligation of Contracts" -- no exceptions, no qualifications of reasonableness, no quantifications of substantiality. And the Contracts Clause has not been amended by the Article V means the Constitution designates. George Washington's admonition in his Farewell Address comes to mind:

> If, in the opinion of the people, the distribution or modification of the Constitutional powers be at any particular wrong, let it be corrected by an amendment in the way the Constitution designates. But let there be no change by

> usurpation; though this may in one instance be the instrument of good, it is the customary weapon by which free governments are destroyed.[7]

The Chief Justice also relied upon the states' police power to justify the Act. He acknowledged at 425, "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." However, he said at 426, "While emergency does not create power, emergency may furnish the occasion for the exercise of power," if it is "a living power already enjoyed." However, although the states have a police power, that power has been explicitly limited by the Contracts Clause. As noted earlier, the Tenth Amendment reserves to the states all power not delegated to the federal government by the Constitution or prohibited by it to the states. But this power has been expressly prohibited to the states by the Contracts Clause. The power to effectively rewrite contracts and enforce them only as rewritten by the state, is not a "living power already enjoyed." It is a power expressly prohibited.

Finally, in language that seems to presage the "Living Constitution" approach, the Chief Justice wrote at 432, "there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare," so "the question is no longer

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[7] George Washington, Farewell Address, 1797, *American Historical Documents* (New York: Barnes and Noble, Inc., 1960), p. 144.

merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends."

Writing for the four dissenting Justices, Justice Sutherland responded to the Chief Justice at 448-50:

> Few questions of greater moment than that just decided have been submitted for judicial inquiry during this generation. He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts. The effect of the Minnesota legislation, though serious enough in itself, is of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument. And those of us who are thus apprehensive of the effect of this decision would, in a matter so important, be neglectful of our duty should we fail to spread upon the permanent records of the court the reasons which move us to the opposite view.
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> A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations.

It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered in invitum by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now. This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court. The true rule was forcefully declared in *Ex parte Milligan*, 4 Wall. 2, 120, 121, 18 L. Ed. 281, in the face of circumstances of national peril and public unrest and disturbance far greater than any that exist to-day. In that great case this court said that the provisions of the Constitution there under consideration had been expressed by our ancestors in such plain English words that it would seem the ingenuity of man could not evade them, but that after the lapse of more than seventy years they were sought to be avoided. 'Those great and good men,' the Court said, 'foresaw that troublous times would arise, when

rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future.' And then, in words the power and truth of which have become increasingly evident with the lapse of time, there was laid down the rule without which the Constitution would cease to be the 'supreme law of the land,' binding equally upon governments and governed at all times and under all circumstances, and become a mere collection of political maxims to be adhered to or disregarded according to the prevailing sentiment or the legislative and judicial opinion in respect of the supposed necessities of the hour:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of

> its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.

Warning of the "gradual but ever-advancing encroachments upon the sanctity of private and public contracts" and of the "far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue," *Blaisdell* 448-50, Justice Sutherland seems to have anticipated the Los Angeles Eviction Moratorium.

VI. The Los Angeles Eviction Moratorium is a radical departure even from the *Blaisdell* rationale.

Los Angeles Ordinance No. 186585, enacted March 27, 2020, is far more radical than the Minnesota Mortgage Moratorium Act upheld in *Blaisdell*. Even though *Amicus* believes *Blaisdell* is a departure from the plain wording and original meaning of the Contracts Clause, the Ordinance goes far beyond anything the *Blaisdell* Court envisioned and is the kind of draconian measure Justice Sutherland warned would result from *Blaisdell*.

Consider the following differences:

(1) The Minnesota Mortgage Moratorium Act gave protection to mortgagors, borrowers who owned

homes and who in most cases had considerable equity in their homes. For most people, buying a home is the largest and most significant investment people make in their lifetimes. They want to keep their homes, they have built up equity in their homes that they don't want to lose, they have family memories and dreams infused into their homes, and they therefore have every incentive to bring their payments up to date as soon as possible so they can keep their homes and investments.

By contrast, the Eviction Moratorium affects renters who have no ownership in the property, no equity in the property, less attachment to the property, and probably less intention to keep possession of the property for a long period of time. Unlike the homeowner who doesn't want to lose his investment, the tenant under the Eviction Moratorium can simply not pay rent for however long the Mayor keeps the emergency in effect plus twelve additional months thereafter, and then walk away from the property, leaving the landlord with very low prospects of ever being able to collect back rent.

(2) The Mortgage Moratorium was narrowly-tailored and fact-specific. In each specific case, the trial judge must determine whether the homeowner is in fact unable to make the required mortgage payments. If in fact he is unable to make payments, the judge must then determine the fair rental value of the home and expenses of maintaining the home and require the homeowner to pay such rent and expenses as he can afford.

By contrast, the Eviction Moratorium prohibits landlords from evicting tenants based on nonpayment of rent due to COVID-19 related inability to pay but does not allow the landlord to require documentation of such inability to pay, thus in practice allowing tenants to avoid payment for any reason whatsoever. Furthermore, the Eviction Moratorium also prohibits evictions for any reason that is not the fault of the tenant, as well as for certain lease violations such as unauthorized occupants or pets even though these were prohibited by the lease, or even because the landlord had decided to remove the property from the rental market and sell the property or occupy the property himself. Furthermore, the landlord must continue to pay taxes, repairs, utilities, and keep the property habitable. All of this could be extremely expensive and time-consuming.

(3) Again, unlike the Mortgage Moratorium, the Eviction Moratorium creates a private right of action exclusively for tenants, allowing them to sue their landlords for violating the Eviction Moratorium, with civil penalties up to $10,000.00 per violation and an additional $5,000.00 if the tenant is a senior citizen or disabled. There is no comparable right of action for landlords for tenant violations.

Even using the "substantial impairment" test of *Blaisdell* and subsequent decisions, there is no question that the Eviction Moratorium works a substantial and severe impairment on landlords. Many landlords are not wealthy businesses; many are simple folks trying to make a living for themselves and their families, who have chosen rental property as a

means of providing for themselves, perhaps in their retirement. Many do not own their rental property free and clear but rather have to make mortgage payments on their rental property. Some are military personnel who bought homes while stationed in the area and have moved elsewhere by military orders and are now renting their Los Angeles homes because selling them has proved impossible or unfeasible. Losing rent for what could be several years with little prospect of recouping losses, coupled with having to pay taxes and repairs and maybe mortgages, is definitely non-trivial and a substantial and severe burden indeed. Even if an economic emergency exists and the Eviction Moratorium serves a legitimate objective and are temporary, the actions prescribed and proscribed by the Eviction Moratorium go far beyond what is justified by the emergency, what is appropriate to the emergency, and what is reasonable relief from contractual obligations.

CONCLUSION

Suppose an international economic crisis struck banks and mortgage institutions in the United States and across the world and was particularly hard on owners of rental property. To enable banks and landlords to survive this crisis, Minnesota might enact the Mortgage Acceleration Act and Los Angeles might enact the Rent Increase Act, authorizing lenders and landlords to require double mortgage payments or double rent. To ensure compliance, the new acts might create a private right of action authorizing mortgage institutions to sue for $10,000.00 damages for refusals to pay the doubled mortgage payments and authorizing landlords to sue for $10,000.00 damages

for tenants who refuse to pay double rent or try to move out in violation of the terms of their leases. The fact that a homeowner has a mortgage contract, or the fact that a tenant has a lease, that says he is to pay only a specified amount per month, shall be no defense to this action under the Acts.

This sounds outrageous, and it is outrageous. But is it not, as Justice Sutherland warned in his *Blaisdell* dissent, one of the "necessary implications" of a decision that opens "the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts" and "the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument"? *Id.* at 448-50.

Landlords, no less than tenants, deserve the protection of the Constitution. Because the status of the Contracts Clause has been unsettled since *Blaisdell* and its progeny, because the Second and Ninth Circuits are split in their interpretation of the Clause, and because the Los Angeles Eviction Act is a radical departure from the Contracts Clause and even from *Blaisdell,* this Court should grant certiorari and restore the Contracts Clause to its proper place in constitutional jurisprudence.

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