No. 21-788

In the Supreme Court of the United States

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 AND STRATEGIC ACTIONS FOR A JUST ECONOMY,

Respondents.

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

CONSOLIDATED REPLY BRIEF OF PETITIONER

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Respondents[1] waste much ink distracting the Court with issues that are not relevant to this petition. This petition presents only the narrow question of the appropriate standard of review when addressing Contracts Clause claims in the private contractual setting. If Petitioner prevails, the matter will be remanded to the Ninth Circuit to apply a variable standard of review, as articulated *and applied* in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

Respondents now suggest that the petition does not raise a "difficult and unprecedented question[]" and accuse Petitioner of asking the Court to "depart from well-established and uniformly-applied Contracts Clause precedent." Intervenors Opp. 1; *see also* City Opp. 21. Not so. The Court has not abrogated the variable standard of review it announced and applied in *Allied Structural Steel*. Yet the Ninth Circuit applied pure rational basis review without calibrating its analysis to the degree of impairment, which the district court found to be substantial. This is not a "straightforward" application of this Court's Contracts Clause jurisprudence; rather, it is the Ninth Circuit's proclamation that the Contracts Clause is a dead letter in the private contract setting. *See* Oral Arg. 5:42–47

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[1] This consolidated reply brief is filed in response to the two oppositions filed by Respondent City of Los Angeles and Intervenor-Respondents Alliance of Californians for Community Empowerment Action and Strategic Actions for a Just Economy (collectively, "Respondents").

(Judge Bybee: "Counsel, you would have won this case going away if you were arguing in the nineteenth century.").

Respondents also suggest that there is no conflict among the circuits because the Second Circuit "did not apply a different legal standard, but simply applied the same well-established law to different facts on a different procedural posture." Intervenors Opp. 2. Respondents even assert that "Petitioner's claimed split between the Ninth and Second Circuits is nonexistent." *Id.*; *see also* City Opp. 21. In light of the question presented by this petition, however, Respondents' fig leaf of an argument quickly wilts. The different procedural posture and facts of the two decisions are not germane—rather, it is the standard of review that the two courts applied that matters. The Ninth Circuit applied pure rational basis without accounting for the severity of the impact. The Second Circuit, consistent with *Allied Structural Steel*, applied a variable standard of review after the law there was held to constitute a substantial impairment. With due respect to Respondents, a variable standard of review cannot possibly be considered "consistent" with the pure rational basis review applied by the district court and Ninth Circuit here.

Finally, it is because the Ninth Circuit went straight to the merits without addressing the equities that makes this case an excellent candidate for this Court to grant certiorari. Questions concerning irreparable harm and the balancing of the equities

were not addressed by the Ninth Circuit, leaving only the merits to be addressed with this Court.[2]

The petition should be granted.

ARGUMENT

I. There is a Clear Circuit Split as to the Question Presented by the Petition.

A. The Plain Text of the Second and Ninth Circuit Opinions is Irreconcilable.

The question presented by this petition is both simple and important. It asks, essentially, whether this Court meant what it said in *Allied Structural Steel*: must courts apply a variable scrutiny depending on the severity of the contractual impairment?[3]

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[2] Although irreparable harm and "the equities" are not the subject of this petition, as this Court recently emphasized in *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485, 2489 (2021), landlords throughout the nation were "at risk of irreparable harm" due to the CDC's nationwide eviction ban, which "deprive[d] them of rent payments with no guarantee of eventual recovery." Those same landlords necessarily include Petitioner's members, who were not only subject to the national CDC eviction ban, but also the City's much more egregious eviction ban.

[3] Contrary to the City's claims (*see* City Opp. 3, 28–29), Petitioner did in fact raise this issue in its briefing both before the district court and Ninth Circuit, as well as at oral argument. *See, e.g.*, Oral Arg. 3:53–5:03 (Counsel for Petitioner: "The Contracts Clause has a standalone, defined test . . . . The severity of the impairment, as the Supreme Court has indicated in two of the more recent cases, dictates the level of review.").

The Second Circuit, in a lengthy discussion exploring this Court's precedent, definitively answered in the affirmative, and now holds that a variable level of scrutiny applies in Contracts Clause challenges to laws impairing private contracts. *Melendez v. City of New York*, 16 F.4th 992, 1035 (2d Cir. 2021). The Ninth Circuit below, however, applied an especially milquetoast form of review, refusing to "second guess" the City's legislative enactment—despite the district court finding (and the Ninth Circuit's assuming) that the City's eviction moratorium substantially impaired existing contracts. Pet. App. 19, 21. This stark divergence in opinion alone is enough to grant the petition for certiorari.

As explained more fully in the petition for certiorari, the Second Circuit in *Melendez* was tasked with determining what level of scrutiny applies to Contracts Clause challenges under *Allied Structural Steel*. There, plaintiffs argued that *Allied Structural Steel* requires strict scrutiny, while the city defendant claimed—as the City has repeatedly insisted here—that "the 'customary deference'" accorded "to legislative judgments dictates only rational-basis review." *Melendez*, 16 F.4th at 1035.

Faced with a wide chasm in opinion between the parties, the Second Circuit took the opportunity to "clarify" that *Allied Structural Steel* does not prescribe a "particular standard of review," but instead understood this Court's precedent to instruct that "the weight any purpose and means showing must bear to avoid unconstitutionality can vary with the degree of contract impairment." *Id.* The *Melendez* court

specifically dubbed it a "variable standard," and believed that "until the Supreme Court instructs otherwise," it "must endeavor to faithfully apply it in conducting the 'careful examination' of a substantial contract impairment that is required '[d]espite the customary deference courts give to state laws directed to social and economic problems.'" *Id.* (quoting *Allied Structural Steel*, 438 U.S. at 244–45); *see also id.* at n. 65 (addressing dissenting colleague to further discuss variability of the standard).

The Ninth Circuit opinion below, however, is dripping with deference despite a finding of substantial impairment by the district court. In stating the test, the court noted that it "need not decide" whether there is a substantial impairment in the first place "because, even assuming it is, . . . the moratorium's provisions constitute an 'appropriate and reasonable way to advance a significant and legitimate public purpose.'" Pet. App. 19. Right off the bat, the Ninth Circuit failed to heed *Allied Structural Steel*'s strictures by jumping straight to a reasonableness analysis. In doing so, the court wholly failed to tailor its analysis to the substantial nature of the impairment. Strike one.

The Ninth Circuit then doubled down on deference by holding that AAGLA's challenge "m[et] its end . . . because the district court properly deferred to local officials in the reasonableness analysis under modern Contracts Clause precedent." *Id.* (citing *Energy Reserves Grp. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983)). Strike two.

The Ninth Circuit then proceeded to cite two self-serving "findings" made by the City in its own

moratorium relating to fears of housing displacement, and, in conjunction with a citation to the City's briefing effectively parroting these concerns, found that "each of the provisions of the eviction moratorium that AAGLA challenges may be viewed as reasonable attempts to address that valid public purpose." Pet. App. 20–21. If the Ninth Circuit left any doubt as to how little it scrutinized the moratorium, the opinion mentions *twice* that the court was "refus[ing] to second-guess" the City's own determinations of reasonableness. Pet. App. 20, 21. This was necessary, the Ninth Circuit explained, "given the deferential standard that precedent constrains [it] to apply." Pet. App. 21. Strike three.

Interestingly, the Second and Ninth Circuits both believed themselves to be "faithfully" applying this Court's precedent. *Compare Melendez*, 16 F.4th at 1035 ("until the Supreme Court instructs otherwise, we must endeavor to faithfully apply it [*i.e.*, variable scrutiny]"), *with* Pet. App. 28 ("We are tasked only with evaluating the constitutionality of the eviction moratorium under the forgiving standard of modern Contracts Clause analysis. A faithful application of that standard requires us to conclude that the district court did not err[.]"). By a plain reading of this Court's precedent, the Second Circuit gets it right.

B. The Circuit Split Will Lead to a Divergence in Application of *Allied Structural Steel*.

If the plain text of *Melendez* and the opinion below do not evince tension sufficient to grant certiorari, consider this:

If a district court in the Second Circuit is presented with a Contracts Clause challenge to a law that is alleged to impair private contracts, then, under *Melendez*, it must calibrate its scrutiny to the substantiality of impairment. Assume for a moment that the hypothetical court finds the law to substantially impair contracts. Under *Melendez*, the court must proceed to review that law carefully to assess whether it is truly an appropriate and reasonable means of effecting its purported purposes. This is entirely expected, and necessary, under *Allied Structural Steel.*

If, however, an identical litigant challenges an identical law in a district court in the Ninth Circuit, then, under the opinion below, the district court will understand that it must "refuse to second-guess" the defendant's own determinations of reasonableness, irrespective of the severity of the impact. In other words, the municipality would get what amounts to a free pass in one circuit, but in another, its legislative enactments would be scrutinized and tested.

But why speak in hypotheticals? This happened yesterday. On March 23, 2022, the Northern District of California granted in part a defendant city's motion to dismiss where plaintiffs pressed a Contracts Clause challenge against a municipal law capping commissions by third-party delivery services for restaurants. *DoorDash, Inc. v. City & Cty. of San Francisco*, 21-cv-05502-EMC, Dkt. 60, at 1 (N.D. Cal. Mar. 23, 2022). There, the district court found it plausible that the law substantially impairs existing contracts. *Id.* at 16. And

also there, like here, the parties disputed whether rational basis—or something more—applied. *Id.*

The *DoorDash* court noted that "[a]t one end of the spectrum, courts and commentators have likened this analysis to rational basis review." *Id.* at 16–17 (citing *Melendez*, 16 F.4th at 1052 (Carney, J., concurring in result and dissenting in part)). "At the other end of the spectrum, the deference due to [the] legislature 'is not so entirely deferential as to constitute rational basis review.'" *Id.* at 17 (quoting *Melendez*, 16 F.4th at 1052 (Carney, J.)).

Confronting its own circuit's precedent, the Northern District noted that "the Ninth Circuit has recently affirmed a district court decision on a Contract Clause claim where the district court had applied rational basis review." *Id.* (citing this case).[4] The court expressly rejected the plaintiffs' argument that it should follow the majority in *Melendez* where "the Second Circuit applied an exacting scrutiny under *Allied Structural Steel*[.]" *Id.* at 23 n.3. Instead, the *DoorDash* court followed "the binding approach by the Ninth Circuit in *Apartment Association*." *Id.*

Relying on the opinion challenged by this petition, the *DoorDash* court granted defendant city's motion to

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[4] Curiously, the *DoorDash* court believed that "[a]lthough the Ninth Circuit did not specify whether it too was applying rational basis review, it relied on . . . *Energy Reserves Group* and *Keystone* [*Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)]," which "'severely limited the Contracts Clause's potency.'" *Id.* at 17 (quoting the opinion challenged here). No matter. It is clear that the Ninth Circuit applied rational basis in spirit if not in name.

dismiss without leave to amend: "Because the Ordinance has a legitimate public purpose and the Court cannot 'second-guess' the City's determination that the Commission Cap constitutes 'the most appropriate way' of advancing its purpose, Plaintiffs' Contract Clause claims are implausible." *Id.* at 29 (quoting the opinion challenged here).

This difference in application of *Allied Structural Steel* is precisely the reason to grant certiorari. *See* Rule 10(a).

C. A Single Footnote in *Melendez* Does Not Save Respondents.

Respondents desperately cling to a single footnote in *Melendez*—footnote 70—to claim that the Second Circuit is not split with the Ninth Circuit on the question presented by this petition. City Opp. 22, 24; Intervenors Opp. 2, 14. Footnote 70 is not the cure-all that Respondents believe it to be.

In footnote 70, the *Melendez* court states that "[t]he Ninth Circuit's recent rejection of a Contracts Clause claim in [the opinion below] is not to the contrary." 16 F.4th at 1040 n.70. What Respondents fail to mention, however, is that footnote 70 lies deep within *Melendez*'s discussion of reasonableness of the challenged measure there—*not* in its discussion of the appropriate standard of review. Indeed, footnote 70 is in no way relevant to the question presented by this petition, which the *Melendez* court squarely answered contrary to the opinion below. *Melendez* clearly does not "appl[y] the same analysis as the Ninth Circuit" as Respondents suggest. Intervenors Opp 14.

Moreover, if Respondents are right that footnote 70 proves that there is no disagreement among the circuits as to the standard of review, then what to make of a different footnote—footnote 3 in *DoorDash*? "The Court rejects Plaintiffs' contention that the Court should follow the analysis in *Melendez*. There, the Second Circuit applied an exacting analysis under *Allied Structural Steel*[.] . . . The Court will follow the binding approach by the Ninth Circuit in *Apartment Association*." *DoorDash*, Dkt. 60 at 23 n.3 (proceeding to apply rational basis review).

Finally, as a practical matter, it blinks reality to think that the *Melendez* court (and its studious law clerks) invested the time and effort to diligently review the history and trajectory of the Contracts Clause (totaling over a dozen pages in the Federal Reporter), including significant discussion regarding the "variable standard" of scrutiny that it ultimately applied, to merely negate all its hard work via a single footnote reference to another circuit's opinion—and to do it in its discussion regarding the New York law's reasonableness.

Whatever force footnote 70 might have, it does not apply to the question presented by this petition.

II. The Petition is an Excellent Candidate to Address Needed Clarification on the Appropriate Standard of Review.

Interlocutory review is "no barrier" to granting this petition on an issue of monumental public importance. Respondents cite a number of cases for the unremarkable proposition that petitions to review

interlocutory decrees should be granted only in the extraordinary case. Intervenors Opp. 25–26. This is codified in Rule 11 of this Court, which counsels practitioners that petitions relating to interlocutory decrees demonstrate an "imperative public importance" to justify an "immediate determination" by the Court. As discussed in the petition itself, landlords and landlord associations throughout the country have challenged various COVID-19-related legislation under the Contracts Clause. Pet. 24–25. The fact that the Second Circuit and Ninth Circuit came to different interpretations on the standard of review for Contracts Clause claims demonstrates the need for clarity on the appropriate standard. While the Ninth Circuit and Second Circuit are the first to issue opinions on such claims, other circuits will no doubt be called upon to address similar challenges wending through the federal courts—in circumstances both related and unrelated to those present here.

While Petitioner recognizes this prudential rule in the "ordinary" case, this COVID-19-related litigation filed on behalf of thousands of Petitioner's landlord members (and which will affect thousands if not millions more in other jurisdictions with eviction bans) is indeed extraordinary. Petitioner requests the Court to reaffirm and clarify the variable standard of review espoused in *Allied Structural Steel* and remand the case back to the Ninth Circuit to apply the appropriate standard and evaluate the severity of the impact of the City's moratorium on pre-existing leases. Without such clarity, the Ninth Circuit decision will stand, and

landlords will continue to suffer for potentially many more years.[5]

The fact that this petition arises in connection with the denial of a preliminary injunction should not pose any additional barrier for granting certiorari. This Court has granted numerous petitions in cases with similar postures. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (certiorari granted to review grant of preliminary injunction); *Mazurek v. Armstrong*, 117 S. Ct. 1865 (1997) (certiorari granted in context of district court denial of motion for preliminary injunction).

In the most recent case cited by Respondents for this rule—*Abbott v. Veasey*, 137 S. Ct. 612 (2017), the Chief Justice made clear that although the Court denied the petition for certiorari, the fact that the order in question was interlocutory was "no barrier" to granting the petition, but noted that petitioners could raise the same issues after final judgment. The same is not true here. The district court and Ninth Circuit have already weighed in on their interpretation of the

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[5] *E.g.*, at oral argument before the Ninth Circuit, counsel for the City argued that the City could permissibly continue imposing its moratorium for many more years. Oral Arg. 21:52–22:07. It is unclear what authority counsel relied on for this proposition, as it is nowhere to be found in case law or statutory law. To give credit where it is due, counsel did concede that 20 years is likely too long. Oral Arg. 22:00–04. If, however, rational basis is applied irrespective of the severity of the impact, then the Contracts Clause should not pose any obstacle to such a draconian measure. And if rational basis is the rule in all circumstances, it is likely irrelevant that the City did not "go so far" as to relieve tenants of their rental obligations entirely.

appropriate level of review. This case presents largely legal issues and one would not expect either the Ninth Circuit or district court to rule differently on this pure legal issue after trial on the merits.

Immediate clarification on the standard of review is needed in this case (and many others) in order for district and circuit courts to uniformly apply this Court's test for Contracts Clause challenges.

CONCLUSION

Petitioner's members, numbering in the tens of thousands, eagerly await some relief from their compulsory provision of an indefinite rent holiday for the City's tenant constituents. With respect to the City, landlords cannot withstand another year—let alone 20 years—of tenants taking advantage of the City's eviction moratorium to withhold payment of rent. The eviction moratorium was purportedly designed to prevent eviction for tenants suffering lost wages or layoffs. If, however, a tenant cannot afford to pay $2,000 for April 2020 rent, what evidence is there that the tenant will be able to pay $24,000 in back rent in April 2021, or $48,000 in back rent in April 2022, or $72,000 in back rent in April 2023? The ability to replace nonpaying tenants with paying tenants through eviction is the only real security landlords possess for those in default. The City's eviction moratorium obliterates that security.

There is no better example of the "tyranny of the majority" than those policy-makers who have decided to wage economic warfare against housing providers whose only offense is to furnish housing to a population

long suffering from a severe housing shortage. *See* Pet. App. 58 ("It is, but for the shooting, a war in every real sense. Hundreds of thousands of tenants pitted against tens of thousands of landlords—that is the tragedy that brings us here.").

But this petition leaves these harder questions for another day. Petitioner only requests that this Court grant certiorari to mend the split between the circuits, reaffirm and clarify its test as enunciated in *Allied Structural Steel*, and allow Petitioner's members to receive that to which they are entitled: a serious and meaningful review of a law that was found to impair private contracts in a substantial way.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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