Supreme Court, U.S.
FILED
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No. 21-809

In The

Supreme Court of the United States

Alexander Gallo,

Petitioner

v.

District of Columbia

Respondent

On Petition for Writ of Certiorari
To the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

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QUESTIONS PRESENTED

In 2020, several states and municipalities imposed uncompensated "eviction ban" moratoria. This petition concerns the District of Columbia's municipal ban- held unconstitutional by the District's Superior Court. The questions presented are:

1. **Whether a Legislature's Closing of Landlord-Tenant Court Violates Access to the Court**

2. **Whether Fundamental Rights of Property are Fundamental Rights Warranting Strict Scrutiny**

3. **Whether the Withdrawal of Possessory Remedy Against a Lessee in Breach of Contract Violates the Contract Clause**

4. **Whether *Knick v. Township of Scott*, 588 U.S. ___ (2019) Abolished Declaratory or Injunctive Relief for a Continuous Taking**

5. **Whether Suspension of a Homeowner's Right to Possess or Exclude is a Taking of Property**

RELATED PROCEEDINGS

District of Columbia Court of Appeals:

District of Columbia v. Towers, et al. 21-CV-37. Judgment entered October 7, 2021.

Order granting stay pending appeal entered May 13, 2020, published at 250 A.3d 1048 (D.C. 2021).

District of Columbia Superior Court:

Gallo Holdings LLC – Series 2, et al. v. Andre Hopkins. No. 2020-LTB-008032. Declaratory Judgment Order entered December 16, 2020

Alexander Gallo v. District of Columbia. No 2021-CA-004322

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The merits opinion of the District of Columbia Court of Appeals is scheduled for publication and appears in the Appendix at 1a. Its prior Order granting a stay pending appeal is published at *District of Columbia v. Towers et al, 250 A.3d 1048, 1056 (D.C. 2021).*

The Superior Court's Order declaring the "filing moratorium" unconstitutional is unpublished but is contained in the Appendix at 13a.

JURISDICTION

The District of Columbia Court of Appeals issued its opinion on October 7, 2021. This petition is timely filed within 90 days. Jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS

Petition Clause (1st Amendment): "Congress shall make no law respecting... the right of the people... to petition the Government for a redress of grievances"

Due Process Clause (5th Amendment): "No person shall ... be deprived of property, without due process of law"

Contract Clause (Article I, Section 10, Clause 1): "No State shall...pass any...Law impairing the Obligation of Contracts"

Takings Clause (5th Amendment): "Nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

In the District of Columbia, resort to judicial process is the sole legal path to possess property or enforce a lease. In May 2020, the District of Columbia passed a statute[1] prohibiting any person for any reason from filing a complaint for possession (the "filing ban"), despite their having valid claims.

Petitioner Alexander Gallo owns several condominium units in the District. In one, a squatter has been residing at the District's invitation for nearly two years- not paying one penny while Petitioner is Legislatively precluded from filing suit to remove him. Petitioner's lease contracts with other tenants were declared similarly unenforceable and breached without consequence. Petitioner's pecuniary damages on one condo alone are now crossing **$30,000**.

No compensation was or is provided or promised by the District for the occupancy imposed or rights taken. No offsetting protection (such as Government covering expenses) was provided. Remedy was simply withdrawn with homeowners left to pay the bills. Adding insult to injury, the District continually subjected homeowners with outlay obligations such as HOA dues, utilities, property tax, cost of capital and maintenance, with foreclosure and civil fines to be imposed for any failure to continue serving non-paying occupants.

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[1] The statute also prohibited any civil or small claims action for debt (rent due), prohibited enforcement of any prior judgment for money or possession via garnishment, attachment, or eviction, and required creditors to offer "payment plans" allowing delinquency through the year 2023 with no penalty.

The District thus- by fiat- suspended the right to possess, to exclude, to receive income from, and to protect quiet enjoyment of property. It withdrew access to the courts, appropriated contracts and converted private homes to public housing. The Superior Court found this to be unconstitutional. The Court of Appeals reversed.

Procedural History of the Case

There were several hundred complaints for possession (typically for nonpayment) awaiting hearing in the Landlord-Tenant Branch of the Superior Court in May 2020. The case below[2] was one of them. Upon enactment of the filing ban, the court directed plaintiffs to show cause as to why their cases should not be dismissed pursuant to the moratorium.

In response, homeowners facially challenged the moratorium on several grounds:

- There is a constitutional right of Access to the Courts which protects possessory actions
- The Contracts Clause prohibits suspension of actions for possession
- The Takings Clause prohibits Government-imposed occupancy absent compensation

The court consolidated several cases for a hearing on these issues. The District intervened to defend the moratorium. It briefed all grounds and denied any duty to compensate. The trial court then issued declaratory judgment holding "The United States Constitution protects the right of property

[2] possession action against foreclosed homeowner

owners to go to court" and instructed the clerk to reopen the court. *Appendix at 13a, 62a.*

The District appealed and received administrative stay in January 2021, swiftly shutting court once more. In granting stay pending appeal, the Court of Appeals found that the right of Access to the Courts may be "fundamental" but that it is also "ancillary to the underlying claim," and then found no actionable right to exist. It concluded that regardless of whether Access to the Courts is implicated, the moratorium could satisfy intermediate scrutiny anyway, as it implicates no "fundamental" right.

On October 7, 2021 the Court of Appeals issued a merits opinion reversing the Superior Court (*Appendix at 1a*) holding there is "no constitutional right to eviction on a specific timetable, much less a fundamental one." *Towers* at 2. Citing this Court's language in *Sosna v. Iowa, 419 U.S. 393 (1975)*- as many courts have recently done- it found no deprivation, "only delay." The Court of Appeals also held "the filing moratorium involves no abrogation of contracts." *Towers* at 11.

Proponents of theft are pleased- proclaiming the ruling cements the Government's "right" to halt judicial process and stick private parties with the bills "should the need arise again." *LegalAidDC Tweet, 10/7/2021.* On cue, three weeks later, the "need" arose again.

A claim for damages under 42 USC 1983 has been filed against the District for the substantial damages accruing.

REASONS FOR GRANTING THE PETITION

1. The decision below from a state court conflicts with relevant decisions of this Court. Rule 10(c)
2. The decision below from a state court of last resort conflicts with decisions from other state courts of last resort. Rule 10(b)

I. The Decision Below Conflicts with This Court's Precedents Protecting a Fundamental Right of "Access to the Courts"

The decision below reverses the trial court's finding of a violation of Access to the Courts. To do so, it holds that indefinite "delay" of access is permissible. This conflicts with clear precedents of this Court, which held that "temporary total deprivation" violates due process and that "temporary or partial impairments... merit due process protection." *Connecticut v. Doehr,* 501 U.S. 1 (1991). "the essence of the access claim is that official action is *presently* denying an opportunity to litigate" *Christopher v. Harbury, 536 U.S. 403 (2002).*

The trial court's finding rested on several of this Court's precedents. The trial court noted that the doctrine is "fundamental" in and of itself, citing *Tennessee v. Lane,* 541 U.S. 509 (2004) ("fundamental right of access to the courts"- infringements on which are "subject to more searching judicial review"). This Court held the right fundamental on at least three other occasions: *Chambers v. Baltimore & Ohio R. Co.,* 207 U.S. 142 (1907) ("[t]he right to sue and defend in the courts is the alternative of force" and "lies at the

foundation of orderly government"). *Bounds v. Smith*, 430 U.S. 817 (1977) ("The fundamental constitutional right of access to the courts"; *Borough of Duryea v. Guarnieri,* 564 U.S. 379 (2011) (right to file suit is "fundamental to liberty").

Some cases had underlying actions themselves deemed fundamental, for example *Wolff v. McDonnell,* 418 U.S. 539 (1974) ("opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights"), but *Chambers, Tennessee* and *Duryea* do not limit the right to protect only some subset of "fundamental" lawsuits. Simply, *Tennessee* did not hold that a state's landlord-tenant court would be exempt from having to install an elevator because proceedings therein may not be "fundamental."

The decision below holds that Access to the Courts is not violated because there is no "right" to evict at any given time. This conflicts with this Court's holding that the District's eviction statute protects a time-sensitive right. "Like the modern cause of action embodied in 16-1501, novel disseisin was a summary procedure designed to mete out *prompt justice* in possessory disputes." *Pernell v. Southall Realty,* 416 U.S. 363 (1974). "the *right* to recover possession of real property governed by 16-1501 was a *right ascertained and protected by courts* at common law" and that the concept of unlawful detainer "can be traced directly to the statute of Henry VI."

This Court has held that "to repeal such a statute so as to affect rights actually obtained thereunder is a deprivation of property without due process of law." *Ettor v. Tacoma,* 228 U.S. 148 (1913). "a cause of action is a species of property protected by

the...Due Process Clause." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982).

The trial court noted that enforcement of contract rights requires access to court. "the only way that landlords can seek to vindicate their constitutionally protected property rights is through an action for possession, because D.C. law deprives the landlords of the self-help remedy that they had under common law. See Mendes v. Johnson, 389 A.2d 781, 787 (D.C. 1978)." This includes rights arising "out of contract." *Appendix at 32a-33a.* The trial court cited to this Court's holding in *Lindsey v. Normet,* 405 U.S. 56 (1972). ("the Constitution expressly protects against confiscation of private property or the income therefrom.") In *Lindsey,* this Court recognized "unless a judicially supervised mechanism *is provided* for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent."

The holding below- that the rights of *possession* or *exclusion* are mere legislative graces to be flicked off like a light switch- conflicts with other precedents of this Court.

Recently, this Court reaffirmed "preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Alabama Association of Realtors v. HHS,* 594 U. S. __ (2021), *at 7.* An owner has "the right to possess..." *Pakdel v. San Francisco,* 594 U. S. ____ (2021). "the elements of all title are possession, the right of possession... the right of property, which carries with it the right of possession" *Ward v.*

Cochran, 150 U.S. 597 (1893). "What is that right...? It is the right to the possession...a right to recover that which has been taken." *United States v. Lee,* 106 U.S. 196 (1882).

Blackstone noted a fundamental "right of every Englishman is that of applying to the courts of justice for redress of injuries." *Commentaries on the Laws of England, Volume 1 (p. 102).* Edward Coke wrote that an injured party "without exception... may take his remedy by the court of law, and have justice... fully without any denial, and *speedily without delay.*" *Institutes of the Laws of England 55 (1797).*

The Petition Clause

The trial court found Access to the Courts underpinned by both the Due Process Clause and the Petition Clause. "The Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes" including "debt actions" *Borough of Duryea v. Guarnieri,* 564 U.S. 379, 387 (2011); "filing a complaint in court is a form of petitioning activity" *McDonald v. Smith,* 472 U.S. 479, 484 (1985).

The decision below finds no protection afforded by the Petition Clause. "see also *Ortwein v. Schwab, 410 U.S. 656, 660 n.5 (1973)* ('Appellants also claim a violation of their First Amendment right to petition for redress. Our discussion of the Due Process Clause, however, demonstrates that appellants' rights under the First Amendment have been fully satisfied.')" *Towers,* footnote 18 (*Appendix at 7a*). Yet *Ortwein*'s footnote stated there are *rights* under the Petition Clause.

The possession process notably culminates in a petition to the Executive- the writ of restitution. Hundreds of years ago, the complaint for possession was styled as a petition to the King, and just as today, the Sovereign must remove a person from land.[3]

This Court has perhaps never precisely held that lawsuits are protected by the Petition Clause. "For the reasons set forth by Justice Scalia, I seriously doubt that lawsuits are 'petitions' within the original meaning of the Petition Clause of the First Amendment." *Borough of Duryea v Guarnieri,__, Thomas, J. concurring.* "The Court has never actually held that a lawsuit is a constitutionally protected 'Petition'... I acknowledge, however, that scholars have made detailed historical arguments to the contrary." *Ibid, Scalia, J. concurring.*

Scholars make a strong case as to the Petition Clause's distinct protections. See Andrews, C.R. *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right,* 60 Ohio St. L. J. 557, 604–605, n. 159 (1999). Petitions "present individual grievances for government resolution," distinguishable from due process protections. "The government has a different obligation under the Petition Clause." (p. 645). The Clause at a minimum protects the "right to file." (p. 594, 633, 646, 680)

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[3] The Assize of Clarendon "any freeholder, who had been recently dispossessed of his land, to obtain a writ from the king which would put the matter before a sworn inquest of his neighbors [who] could give a verdict on this issue *instantly*" G.O. Sayles, The Medieval Foundations of England at 339 (1967)

Some federal circuits have held the Petition Clause distinctly protects a right to file. "[t]he right to petition exists in the presence of an underlying cause of action and is not violated by a statute that provides a complete defense to a cause of action or curtails a category of causes of action." *City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 397 (2d Cir. 2008).*[4] A Plaintiff "has no First Amendment right to petition the courts for redress of such a nonexistent claim." *Doherty v. Merck & Co., 892 F.3d 493, 499 (1st Cir. 2018).* By property's very nature, someone has the *right* to possess at any given time. The right cannot be "suspended"- only taken and given.

II. Federal Circuits are Divided on Scrutiny Due. Strict Scrutiny Should be Due for a Fundamental Right

The decision below holds that even if the right to possess or exclude exists, it is not a "fundamental" right and therefore court may be closed anyway (eviction not an "interest of fundamental constitutional importance." *Appendix at 8a*). Yet history is clear that at the time of the founding, rights such as possession were considered "fundamental:"

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[4] This case was cited by *Baptiste* in finding no Access to the Courts violation in Massachusetts' filing ban. "Plaintiffs do not claim that they have a constitutional right to evict. Rather, they claim a statutory and contractual right to evict that the Moratorium interferes with in violation of the Contracts Clause and Takings Clause." This Petition claims a *constitutional* right to possess.

"inherent and indefeasible rights, among which are those...acquiring possessing and protecting property" *Constitution of Pennsylvania § 1. Inherent rights of mankind (1776-Present)*; "natural, inherent, and unalienable rights, amongst which are...acquiring, possessing and protecting property" *Constitution of Vermont, Article 1 [...their natural rights] (1777-Present)*; "natural, essential, and unalienable rights; among which... that of acquiring, possessing, and protecting property" *Constitution of Massachusetts [Declaration of Rights] (1780-Present)*; "natural, essential, and inherent rights among which are...acquiring, possessing, and protecting property" *Constitution of New Hampshire, Article 2 [Natural Rights] (1784-Present)*; "certain inherent rights... namely... acquiring and possessing property" *Virginia Declaration of Rights (1776) (Constitution of Virginia).*

This Court[5] held the right of possession to be fundamental. "The constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right *not ex gratia from the legislature*, but ex debito *from the constitution*" *Vanhorne's Lessee v. Dorrance,* 2 U.S. 304 (1795). This fundamentality was reaffirmed. "The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland, 27 U.S. 627, 657 (1829).* Lower courts agreed that Access to the Courts protected a fundamental right of possession. "What these fundamental principles are... the right to acquire and possess property of every kind... to

[5] In an opinion authored by a participant to the 1787 Constitutional Convention

institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal" *Corfield v. Coryell,* 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3230).

Yet over time, the fundamentality of the right appears to have vanished. "it does not follow that there is a fundamental right to evict... In fact, the Constitution establishes no such fundamental right." *Rubinovitz v Rogato,* 60 F.3d 906 (1st Cir. 1995). *Rubinovitz* became the basis for Massachusetts homeowners being forced to provide free housing in 2020, but *Rubinovitz* was a dispute over whether a tenant could be evicted for... having a cat.

"As explained earlier, however, the right to evict is not itself a constitutional right, let alone a fundamental constitutional right. It is at most a property right protected by the Due Process Clause. See Rubinovitz" *Baptiste v. Kennealy, 490 F. Supp. 3d 353 (D. Mass. 2020).* And bada bing: "As a result, for the reasons discussed concerning the Contracts Clause and in the Due Process analysis, even if the right to access to the courts is deemed to be a fundamental right, plaintiffs are not reasonably likely to prove that there was not a *rational basis* for the Moratorium in April 2020."

The 2nd Circuit precludes Due Process protection entirely. "The Second Circuit has expressly forbidden this sort of duplication." *Elmsford Apartment Associates, LLC v. Andrew Cuomo (S.D.N.Y. June 29, 2020),* stating that the Takings Clause and Contract Clause form the outer limit of rights of property. New Jersey- same fate. "[T]he Due Process Clause cannot 'do the work of the Takings Clause'" "Plaintiffs have not identified a property

interest independent of the interests addressed by their Contracts Claims. This is fatal to their due process claims." *Johnson v. Murphy, 1:20-cv-06750-NLH (D.N.J. Mar. 22, 2021).* Connecticut- same fate (*Auracle Homes, LLC v. Lamont,* 478 F. Supp. 3d 199 (D. Conn. 2020)).

In Philadelphia (3rd Circuit), back to rational basis. "because Due Process Clause claims are assessed using a less exacting standard than Contracts Clause claims, for the reasons stated in the Contracts Clause section, these provisions of the EHPA are not arbitrary or irrational." *Hapco v. City of Philadelphia,* 482 F.Supp.3d 337 (2020).

This all this conflicts with this Court's precedents: "the dichotomy between personal liberties and property rights is a false one." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). "We have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another. *United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993). This Court has found Due Process violation where "injurious invasion of property rights is practically sanctioned and the owner stripped of all real remedy" *Truax v. Corrigan,* 257 U.S. 312 (1921)

Possession is so fundamental that it implicates the 4th Amendment as well. "A seizure of property occurs where there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen,* 466 U.S. 109 (1984), including where Government is merely complicit in someone deprived of possession of a home without due process. *Soldal v. Cook County,* 506 U.S. 56 (1992).

"The Constitutional guarantee of due process of law has "a substantive component, which forbids the government to infringe certain `fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores,* 507 U.S. 292, 302 (1993). The 9th Circuit sitting en banc found property rights categorically ineligible for such treatment (see *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc)) while the 11th Circuit sitting en banc found non-fundamental only property rights "created only by state law (as is the case with tort law and employment law)" (see *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc)). This Court has held the possession right "not ex gratia from the legislature" *Vanhorne's Lessee v. Dorrance, 2 U.S. 304 (1795).* Strict scrutiny should be due nationwide.

III. The Decision Below Conflicts with This Court's Centuries of Precedent Holding the Contracts Clause Prohibits Such a Moratorium

The Contract Clause applies locally. *DC Code § 1–203.02. Legislative power.* And this Court has made clear "The Contract Clause...fetter[s] the freedom of a State to deny access to its courts." *Angel v. Bullington,* 330 U.S. 183 (1947). Yet the decision below finds no access violation because "the filing moratorium involves no abrogation of contracts." *Appendix at 10a.*

This conflicts with centuries of precedent. This Court found no "difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void and one which *took*

away all remedy to enforce them or encumbered it with conditions that rendered it useless or impracticable to pursue it." "he had a right to *sue for and recover the land itself...* it is his *absolute and undoubted right...to go into the court* of chancery and obtain its order" *Bronson v. Kinzie,* 42 U.S. 311 (1843). It conflicts with this Court's holding that "the Legislature may not withdraw all remedies" and may not "materially delay or embarrass the enforcement of rights" *Oshkosh Waterworks Co. v. Oshkosh,* 187 U.S. 437 (1903).

Without enforcement, a "contract, as such, in the view of the law, *ceases to be*, and falls into the class of those `imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest." *Edwards v. Kearzey,* 96 U.S. 595 (1877). "he who pays too late, pays less. Any authorization of the postponement of payment... is in conflict with the constitutional inhibition." *State of Louisiana v. City of New Orleans,* 102 U.S. 203 (1880). "the act carves out for the mortgagor or the owner of the mortgaged property an estate of *several months* more than was obtainable by him under the former law, with full right of possession, and without paying rent or accounting for profits in the meantime." *Barnitz v. Beverly,* 163 U.S. 118 (1896). "machinery is provided to secure to the landlord a reasonable rent"[6] with a tenant retaining possession "so long as he *pa[id] the rent* and perform[ed] the other terms and conditions of the lease." *Block v. Hirsh,* 256 U.S. 135 (1921). "in an action for rent or rental value, the landlord secures

[6] Notably, the temporary statute upheld in *Block* was reimposed as a permanent statute and has been the law now for decades. The notion of time-limited "emergency" power was explicitly disavowed in *Blaisdell* ("Emergency does not create power")

judgment by default, he shall, in addition to a money judgment, *be put in possession if payment be not promptly made.*" *Marcus Brown Holding Co., Inc. v. Feldman,* 256 U.S. 170 (1921)

These seven cases all held the same thing: *possession* is actionable upon non-payment. *Blaisdell* did not change anything. Despite its dicta, it affirmed the principle. "Decisions of this Court in which statutes extending the period of redemption from foreclosure sales were held unconstitutional do not control where the statute in question *safeguards the interests of the mortgagee* ... by conditions imposed on the extension." *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398 (1934). In so holding, it permitted- by a court weighing the individual equities- a temporary stay of only the contract's most drastic remedy- foreclosure- *provided* the obligor made reasonable payments to satisfy the obligation. "It will be observed that in the Bronson case . . . there was no provision, as in the instant case, to secure to the mortgagee the *rental value of the property* during the extended period." *Blaisdell* upheld- not overturned- *Bronson* and similar cases.

Shortly after *Blaisdell,* this Court reiterated that *precisely* the situation imposed here and now- "undisturbed possession for the debtor and without a dollar for the creditor" with "no enforceable obligation in the meantime" and debtors having "every incentive to refuse to pay a dollar"- is unconstitutional. *W.B. Worthen v Kavanaugh,* 295 U.S. 56 (1935). It unanimously reiterated contracts "are impaired within the meaning of the Constitution when the right *to enforce them by legal process* is taken away or materially lessened." *Lynch v United States,* 292 U.S. 571 (1934). It held again "We were unable then, as we

are now, to concur in the view that an emergency can ever justify, or, what is really the same thing, can ever furnish an occasion for justifying, a nullification of the constitutional restriction upon state power in respect of the impairment of contractual obligations." *W. B. Worthen Co. et al. v. Thomas,* 292 U.S. 426 (1934). And again: "possession of the property remain in the bankrupt, 'under control of the court,' subject only to the *payment of an annual rental* to be fixed by the court." *Louisville Joint Stock Land Bank vs. Radford,* 295 U. S. 555 (1935).

That makes twelve cases of this Court (pre and post *Blaisdell*) holding possession actionable upon non-payment. *Worthen* was again cited by this Court in *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978) as the "appropriate test"[7] in this case.

An Enduring Circuit Split

This Court recently stated the Clause remains alive by stating the real test under the Clause may be whether a law "stacks up well against laws that this Court upheld against Contracts Clause challenges as far back as the early 1800s." *Sveen v. Melin,* 584 U.S. ___ (2018). Yet appeals courts in 2021 remain split on whether the Clause was judicially interred. The 2nd Circuit recently found the Clause *might* have "continued vitality" against a law canceling the rent-drawing a chastising dissent from "lengthy and

[7] "The severity of the impairment measures the height of the hurdle the state legislation must clear" & "'Not *Blaisdell's* case, but *Worthen's* supplies the applicable rule' here."

unnecessary review of superseded case law"[8] such as every case cited here. The 9th Circuit simply declared the Clause an impotent vestige of an "earlier era"[9] and dismissed. A split has existed for decades. [10]

We know what was resolved in 1787: shutting courts to halt remedy is unconstitutional. The Vermont Council of Censors noted that by 1786 its Legislature had sought exactly such "uncontrolled dominion." The "Legislature's *preventing suits being brought* upon all private contracts, is an unheard of transaction." This included "depriving the owners of such property, of the *right of action against the trespassers*"- a violation so flagrant "it may truly be said to be unprecedented and unparalleled; and will, unless revised and materially altered, be an indelible blot in the annals of our history, afford our enemies the most solid argument they have yet offered against the reasonableness of our existence as a sovereign State, and be the greatest inducement to our friends to desert us, as having too little wisdom, or too much cunning, to hold the reins of an independent government."[11]

Luther Martin- Attorney General of Maryland and delegate to the Constitutional Convention- walked out precisely because the convention had moved to deny a State's authority to do this. Writing

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[8] *Melendez v. City of New York*, No. 20-4238-cv (2nd Cir. Oct. 28, 2021)

[9] *Apartment Ass'n of L. A. Cnty. v. City of Los Angeles*, No. 20-56251 (9th Cir. Aug. 25, 2021)

[10] See Cataldo, Michael. "Revival or Revolution: U.S. Trust's Role in the Contracts Clause Circuit Split" *St. John's Law Review*. Number 4, Volume 87, Article 9. (Fall 2013)

[11] Records of the Council of Censors of the State of Vermont, at 68 (1785-1786). Paul S. Gillies and D. Gregory Sanford. 1991

to the Maryland House of Delegates, he warned that the Constitution would prohibit States- in times of "great public calamities and distress" from interfering with contracts by "*totally or partially stopping the courts of justice, or authorizing the debtor to pay by instalments*"- actions he felt should remain permissible. New York also unsuccessfully requested amendments to retain State power to do this. *1 Debates In The Several State Conventions on the Adoption of the Federal Constitution 376 & 330 ("Luther Martin's Letter").*

IV. The Decision Below Conflicts with Decisions from other State Courts of Last Resort Holding Such Moratoriums Unconstitutional

Missouri's Supreme Court rejected such a moratorium. It found "The right of access to the courts is said to trace back to Magna Carta." "delay, by abridging the right to file suit...necessarily destroyed the remedies" *State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. 1979).* Illinois' found "litigant's right to seek immediate redress in the courts was violated." *People ex rel. Christiansen v Connell, 2 Ill.2d 332, 118 N.E.2d 262 (1954).* Kentucky's found a statute which "provides for an unusual and unnatural delay is unconstitutional." *Commonwealth v. Werner, 280 S.W.2d 214 (Ky. Ct. App. 1955).* Minnesota's found such a moratorium "beneath the dignity of a free government." *Davis v. Pierse, 7 Minn. 13 (1862).* As did Wisconsin's (violating "fundamental principles" *Durkee v. City of Janesville, 28 Wis. 464, 467 (1871)*), New Mexico's ("unconstitutionally deprives them of

their due process right of access to the courts without delay" *Jiron v. Mahlab, 659 P.2d 311 (N.M. 1983)*), and Texas' ("Legislature is without the power to deny the citizen the right to resort to the courts" *Middleton v. Tex. Power & Light Co., 185 S.W. 556, 560 (Tex. 1916)*

The Supreme Court of Michigan, interpreting *Blaisdell*, upheld a moratorium only "under conditions of payment of rent, rental value, income and profits to the discharge of charges against the property." *Russell v. Battle Creek Lumber Co.*, 252 N.W. 561 (Mich. 1934)

Oklahoma's highest court voided a moratorium which "fails to provide for the protection of the mortgagee by requiring the payment of taxes, interest, or fair market rental by the mortgagor during the continuance. The Act further fails to grant the trial court the power to prevent waste or otherwise protect the mortgagee during the period of delay...In *Blaisdell*, the Supreme Court found the contracts clause would not be construed to 'permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.'" *Federal Land Bank of Wichita v. Story*, 1988 OK 52 (1988).

As did Kansas': "the Act does not provide sufficient protection for the mortgagee, and lacks the "reasonable conditions" contained in the debtor relief legislation upheld in *Blaisdell*" and were such because Blaisdell required an occupant who "retains possession during the extended redemption period, pay a reasonable rental." *Federal Land Bank of Wichita v. Bott,* 240 Kan. 624 (1987).

As did Iowa's: "the means used to achieve this noble end cannot withstand scrutiny under

constitutional doctrine prohibiting...the impairment of contracts by the State." "The legislation at issue before us clearly falls somewhere between the benign, narrowly focused relief found constitutional in Blaisdell...and the "oppressive and unnecessarily destruct[ive]" conditions rejected in Worthen and Bott." *Federal Land Bank of Omaha v. Arnold,* 426 N.W.2d 153 (1988).

As did New York's: Legislators "have made an expedient selection of the temporary noteholders to bear an extraordinary burden. The invidious consequence may not be justified by fugitive recourse to the police power of the state or to any other constitutional power to displace inconvenient but intentionally protective constitutional limitations." "...a constitution would serve little of its purpose if all that it promised, like the elegantly phrased constitutions of some totalitarian or dictatorial nations, was an ideal to be worshiped when not needed and debased when crucial." "Moreover, in *denying access to the courts*, there is in effect a denial of all remedy. It is elementary that denial of a remedy is a denial of the right (see, e.g., Worthen Co. v Kavanaugh, 295 US 56, 62; cf. Home Bldg. & Loan Assn. v Blaisdell, 290 US 398, 430-434)." *Flushing Nat. Bank v. MAC,* 40 N.Y.2d 731 (1976).

North Dakota's Supreme Court easily identified the fatal flaw of such a moratorium: it does "not even offer adequate compensation for the right taken, or any compensation at all." *State ex Rel. Cleveringa v. Klein,* 249 N.W. 118 (N.D. 1933).

V. The Takings Clause Prohibits an Uncompensated Moratorium. Declaratory and Injunctive Relief Should Be Available

In holding "the filing moratorium involves no abrogation of contracts," the decision below suggests no compensation is due. On this theory, New York homeowners were already denied compensation. ("does not constitute a physical taking" because "tenants will continue to accrue arrearages" *Elmsford*)

Suspending enforcement requires compensation. "The States remain free to exercise their powers of eminent domain to abrogate such contractual rights, upon payment of just compensation." *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977), *footnote 27.* "An appropriation under eminent domain with compensation of a contract *neither challenges its validity nor impairs the obligation.* It is a *taking, not an impairment,* of its obligation. Every contract, whether between the state and an individual or between individuals only, is subject to the law of eminent domain, for there enters into every engagement the unwritten condition that it is subject to appropriation for public use." *Cincinnati v. Louisville & Nashville R. Co.,* 223 U.S. 390 (1912). "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property." *Lynch v. United States,* 292 U.S. 571 (1934).

This Court's precedents on temporary takings are clear. "The essential question is not... whether the government action comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is

whether the government has physically taken property for itself or someone else." *Cedar Point Nursery v Hadid,* 594 U.S. __ (2021). Where the Government "provide[s]...any leasehold estate" a taking occurs. *Ibid, Breyer, J, dissenting, at 4.* These are simple rearticulations of older principles. "Where the government, in emergencies, takes private property into its use, a contract to reimburse the owner is implied." *United States v. Russell,* 80 U.S. 623 (1871). "the right to occupy, for a day, a month, a year, or a series of years...has a value" *United States v. General Motors Corp.,* 323 U.S. 373 (1945). The compensation due is the "rental which could have been obtained." *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949).

If a temporary physical taking is a per se taking, and a taking of personal property is a per se taking (see *Horne v. Dept. of Agriculture,* 576 U.S. 350 (2015)), then a temporary appropriation of leases and causes of action should be a per se taking.

Yet the trial court below declared itself unable under *Knick* from halting the harm of forced occupancy. The trial court below held "the remedy would be to order the District to pay just compensation – not to enjoin any continued taking. See Knick v. Township of Scott" (*Appendix at 59a*). It then held it had no jurisdiction to order compensation.

In Philadelphia: "the Supreme Court...recently explained that... 'injunctive relief will be foreclosed.'" *Hapco.* "declaratory relief sought by Plaintiff... would be the functional equivalent of injunctive relief ...the Supreme Court's decision in Knick forecloses such relief." *Cnty. of Butler v. Wolf, 2020 WL 2769105.* In Massachusetts, "functional equivalent" of an

injunction. "'no basis to enjoin...' Knick"' *Baptiste.* In Baltimore, "proper remedy for a Takings violation is not injunctive relief... see Knick" *Willowbrook Apartment Assocs. v. Mayor & City Council of Balt,* Civil Case No.: SAG-20-1818 (D. Md. Jul. 6, 2020). In San Diego, "injunctive relief is generally barred...Knick" *Southern California Rental Housing Association v. County of San Diego,* 3:21cv912-L-DEB (S.D. Cal. Jul. 26, 2021)

Knick has become an excuse for nationwide injunction-immune theft. Declaratory relief in the context[12] of the Takings Clause is not necessarily injunctive. Declaratory relief is an available statutory remedy in any "proceeding for redress." 42 U.S. Code § 1983. Declaratory relief need not "enjoin" a challenged enactment- it merely establishes liability. See for example, "the constitutional injunction that compensation be made." *Horne, opinion of Breyer, J.* "Actions for declaratory judgments are neither legal nor equitable." *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271 (1988). Declaratory judgments are a "milder alternative than the injunction" *Steffel v. Thompson,* 415 U.S. 452 (1974). Such judgments in these "eviction ban" situations would have alleviated anguish and prevented foreclosures.

This Court has long permitted injunctive relief as well. See *Babbitt v. Youpee,* 519 U.S. 234, (1997); *Hodel v. Irving,* 481 U.S. 704 (1987); *Eastern Enters.*

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[12] See *Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985)* ("declaratory judgment is, *in a context such as this* ... the practical equivalent of specific relief *such as* an injunction . . . since it must be presumed that federal officers will adhere to the law as declared by the court") (Scalia, J.)

v. Apfel, 524 U.S. 498 (1998) ("the declaratory judgment and injunction sought ... constitute an appropriate remedy under the circumstances"). There is a long history of raising the Takings Clause in private disputes where the remedy would be to compensate or *proceed*[13]- not force someone to drain their savings suffering a taking while then draining even more suing the Government for reimbursement.

A middle-class homeowner has no ability to file repeated lawsuits for damages as they multiply. "This 'sue me' approach to the Takings Clause is untenable." *Knick v. Township of Scott*, 588 U.S. ___ (2019), *Thomas, J. concurring*. The trial court below should have been able to invite the District to pay into the court registry to obtain a stay or enjoin the taking.

Finally, while the decision below proclaims "resumption is at hand" (*Appendix at 11a*), the Legislature has since decided: not so fast. On November 2, 2021, it passed a new statute[14] ordering the Superior Court not to issue possession judgments in cases of non-payment, continuing its imposition of uncompensated occupancy of private homes. The suspension of judicial remedy continues indefinitely-without compensation.

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[13] For example: *Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913)* (whether dredging "is a taking of private property which may be enjoined unless provision for compensation has been made"); *Manigault v. Springs, 199 U.S. 473 (1905)* ("enjoin...until compensation is paid"); *Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1870)* ("compel the specific performance of a contract"); *Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)* (voiding moratorium; taking of "substantive rights in specific property" found).

[14] B24-0468 - Tenant Safe Harbor Emergency Amendment Act of 2021

CONCLUSION

Urgency of Granting Certiorari

In New York, an immigrant's life savings is sucked dry. "No joke. I have no money" he says, as the city's leading tenant activist blames him for his fate. "How can this happen in the U.S.?" says another-forced to house a tenant $80,000 in arrears. "I just want the Government to *open the court.*"[15] Elderly homeowners are, according to CBS news, "drain[ed] in the last years of their life" under the statute.[16] When media confronted New York's Governor with "what are landlords supposed to do?" – deflection.

A Connecticut homeowner describes having $60,000 stolen by a serial squatter who rode out a State moratorium and disappeared, with the emotional toll devastating. "This is criminal."[17]

A landlord in Chicago Heights shows the $50,000 in bills the Government levies while allowing his tenants to occupy rent-free: "how long do I have before I lose my house?"[18] The Governor of Illinois, whose office had successfully closed courts by declaring "Plaintiffs' Constitutional Rights Must Yield,"[19] responded: "We're continuing to look at how we will help restore our landlords and their rights."

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[15] https://reason.com/video/2021/02/23/the-victims-of-the-eviction-moratorium/

[16] https://www.youtube.com/watch?v=Eem-Fix-63U

[17] https://www.youtube.com/watch?v=z5vf5_rnMtQ

[18] https://www.youtube.com/watch?v=1R7FynStTJg

[19] *JL Properties Grp. B LLC v. Pritzker*. Governor's Memorandum in Opposition. July 5, 2020. "their rights have not been diminished or abolished but rather have been suspended only temporarily" & the "Constitution... is merely an expression of a philosophy and not a mandate"

How kind. A news anchor observed the State had left him with "all of the bills and all of the burdens of this housing crisis."[20]

In California, a retiree loses $70,000 on a fire-sale after 11 months of no legal ability to enforce his lease in court. "67 years old, senior citizen, disabled, and I depend on this property for income."[21] A Los Angeles homeowner states "We've paid probably $60,000 in attorney fees, settlements and the mortgage" while a squatter occupies their home. The squatter's social worker tells the owner she can provide shelter information if the owner has nowhere to live.[22] The news anchor states "can you imagine the irony of this? It's crazy!"

Down the road, another couple (one a veteran with PTSD) purchased their home in late 2019. Two years later, they "have not slept a night" in it. "We've had to couch surf, we've had to live with different families...I'm paying the mortgage, I'm paying all the bills, for someone to live for free...it does mess with you, that you have no right over your home because the city has taken your house hostage and they won't give it back to you."[23]

Here in Washington, DC, same story: "As the new 'owner,' am I still responsible for the real estate taxes? And if so, how is that just if I am not benefiting from the property? Who is protecting me about the months of rent that I am incurring due to the district's

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[20] One could easily add the words "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40 (1960)

[21] https://www.youtube.com/watch?v=wv7AKN09vhM

[22] https://www.youtube.com/watch?v=qByc_CFFKjE

[23] https://www.youtube.com/watch?v=TeccDrS91N4

policy prohibiting me from taking possession of my property? So I am responsible to pay both mortgage and rent and this gentleman gets to stay in property to which I am paying taxes, for free? How is this scenario justifiable? Why is the burden left to me? What if I can't afford to pay both rent and mortgage? How is this constitutional? Can anyone from the DC government explain to me how this is legal to place the burden on my shoulders? Why is my hardship not a consideration? Is this not trespassing?" Homeowner to DC Council, October 2020 (Superior Court docket)

"In Washington, D.C., affordable housing landlord Arthur Nalls tried for months to hang on after the pandemic began, paying off the mortgages on his two rental buildings with savings, then his credit cards and finally his retirement fund. About a third of his 47 tenants stopped paying, the 66-year-old said. 'My gas bills didn't get a deduction, my utilities didn't get a deduction, my property taxes were still due and I still had to make repairs.' In January and June, Nalls sold his two properties to investors. 'You can probably tell by the tone of voice,' he said, 'I'm extremely bitter about the whole thing.'"[24]

This is what courts dismiss as "only delay" (*Appendix at 9a, 10a*) citing this Court's language in *Sosna*. See also *Elmsford* ("mere delay"), *Hapco* ("short delay"), *Baptiste* ("'only delay.' Sosna"). Yet *Sosna* is easily distinguishable: the delay in that case was chosen by the Plaintiff herself who was suffering no active harm.

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[24] "Selling out: America's local landlords. Moving in: Big investors" *Reuters*, July 29 2021.

Conclusion

A century ago, this Court accepted a case arising from the District's landlord-tenant court (whether moratorium an "unconstitutional restriction of the owner's dominion and right of contract or a taking of his property" *Block v. Hirsch, 256 U.S. 135 (1921)*). It should do so again and affirm Access to the Courts. It should reaffirm that possession and exclusion are fundamental. It should reaffirm its twelve precedents holding that the Contract Clause protects enforcement of obligations. It should reaffirm that possessory or contract rights may not be "suspended" without compensation.

The violations are obvious. In the hearing on the bill imposing this moratorium, one legislator wondered "what I've been trying to understand...are we 'wedging' a new element into a pre-existing contract? ...Can you help us understand the legal theory as to how we can do that?" The Chairperson responded: "The Attorney General issued an opinion...that it is possible for a Government to step in and, to use the phrase from the Constitution, impair contracts." [25]

Respectfully submitted,

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[25] DC Council, Twenty-Ninth Legislative Meeting. May 5, 2020. At 1 hour, 27 minutes.