No. 21-809

In The

Supreme Court of the United States

Alexander Gallo,

Petitioner

v.

District of Columbia,

Respondent

On Petition for Certiorari to the District of Columbia Court of Appeals

Petitioner's Petition for Rehearing

Alexander Gallo
950 25th St NW #329N
Washington, DC 20037
aogallo@gwmail.gwu.edu
516-770-1624

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Petition for Rehearing

This Court denied certiorari on January 14, 2022. The questions raised included whether the Superior Court had the authority to void the uncompensated moratorium under the Takings Clause and whether the moratorium violates the Contracts Clause.

On March 7, 2022, the Superior Court resolved Questions 4 and 3, thereby dismissing the instant case and dozens more. It held (a) the Takings Clause permits no injunctive remedy because this Court abolished such remedy in *Knick* and (b) the uncompensated suspension of obligations does not violate the Contracts Clause. It resolved the Contracts Clause issue not via any substantive analysis of this Court's precedent but rather by a stated need to follow the "dicta" of the appeals decision challenged here.

This Court is requested to vacate its denial of certiorari, affirm declaratory and injunctive remedy exist under the Takings Clause, and vacate the decision below with instructions to resolve the Contracts Clause in accordance with all of this Court's precedent.

The Takings Clause Must Be (and is) More Than a Reimbursement Vehicle

The Superior Court held- after being moved several times to enjoin *unless compensation is paid*- that *Knick* categorically abolished such relief. "...the property owner may seek just compensation in a lawsuit..." *Appendix* at 11. However, *Knick* contained a concurrence. "The Fifth Amendment does not merely provide a damages remedy to a property owner willing to 'shoulder the burden of securing compensation'

after the government takes property without paying for it." *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), Thomas, J., concurring.

The petition highlighted how homeowners are being forced to do precisely this in several cities. Portland has since joined the list ("takings claim also fails because they only seek declaratory and injunctive relief' *Farhoud v. Brown*, 3:20-cv-2226-JR (D. Or. Feb. 3, 2022).

Justice Thomas' concurrence affirms history. "If the law requires a party to give up property to a third person without adequate compensation, the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker." *Morrisdale Coal Co. v. United States*, 259 U.S. 188 (1922). See also *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82 (1913) ("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"); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (enjoining uncompensated moratorium on evictions). Compensation is due for trespass "before his occupancy is disturbed." *Cherokee Nation v. Southern Kansas R. Co*, 135 U.S. 641 (1890) An "appropriation by the State to public use, and without compensation, of the private property of the citizen" is "enjoined by the Fourteenth Amendment" *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897) ("No court... would hesitate to adjudge void"). Government may not seize "a right to the possession until reasonable, certain and adequate provision is made for obtaining just compensation." *Albert Hanson Lumber Co v. U.S.*, 261 U.S. 581 (1923). "Under the Constitution... the United States are not entitled to possession of the land until...*actually paid*." *Bauman*

v. Ross, 167 U.S. 548 (1897) (emphasis added). "injunction should be denied, conditional however upon prompt payment... to oblige the landowner to bring repeated actions at law for loss of rental would be so onerous as to deny adequate relief' *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334 (1933).

State supreme courts have long agreed: enjoin if "serious in amount and irreparable in character" *Town of Greenville v. State Highway Commission*, 196 N.C. 226 (1928), "enjoined from any acts...having for their object the taking possession of the same without making compensation" *Ill. Cities Water Co. v. Mt. Vernon,* 11 Ill. 2d 547 (Ill. 1957). Enjoin when Government takes "faster than the property owner can litigate" *Wandermere Corp. v. State*, 79 Wn. 2d 688 (Wash. 1971) (en banc). When Government is "about to take possession without condemnation, injunction is a proper remedy" *Wilshire v. Seattle*, 280 P. 65 (Wash. 1929). "where a taking is attempted under the power of eminent domain without any provision being made for compensation an injunction will lie" *Beals v. City of Los Angeles.* 23 Cal.2d 381 (Cal. 1943). "Injunction is the proper remedy to prevent the taking...for a public use without just compensation by one who is invested with the power of eminent domain." *Meagher v. Appalachian Electric Power Co.*, 195 Va. 138 (1953). Enjoin for "nuisance or trespass" and where inverse condemnation is not an "adequate remedy." *Curran v. Department of Highways*, 258 Mont. 105 (Mont. 1993).

See also *Eminent Domain-Rights and Remedies of an Uncompensated Landowner*, 1962 Wash. U.L.Q. 210, which collects countless more affirmations of injunction, including the "qualified injunction"

articulated by this Court unanimously in *Manigault* and *Harrisonville.*

Did *Knick* abrogate all of this and reduce the Takings Clause to a lethargic reimbursement vehicle-precisely in the way this Court in *Harrisonville* said would "deny adequate relief"? The issue is of nationwide importance and urgence.

The Contracts Clause

The decision below reimposed a moratorium alleged to violate the Contracts Clause while sidestepping the issue. Now, "Whether by a binding holding or persuasive dictum"- it compels the Superior Court to find no violation. *Appendix at 5-10.* While this Court may be reticent to resolve grounds left unaddressed below, it should, at a minimum, vacate the decision below with instruction to properly consider the issue.

"The Contract Clause...fetter[s] the freedom of a State to deny access to its courts." *Angel v. Bullington,* 330 U.S. 183 (1947). The Contracts Clause protects the right "to bring suit and obtain a judgment, to take out and prosecute an execution" *McCracken v. Hayward,* 43 U.S. 608 (1844). It protects suits for possession and prohibits any statute "dispensing with the performance" of a contract. *Green v. Biddle,* 21 U.S. 1 (1823). It protects the obligation of payment: "the legal right to continue in possession until November 1, 1922, by the *payment, or securing the payment,* of a reasonable rental, to be determined by the courts." *Levy Leasing Co., Inc. v. Siegel,* 258 U.S. 242 (1922). "if the money is not paid at the appointed

day, to go into the court of chancery and obtain its order." *Bronson v. Kinzie et al.*, 42 U.S. 311 (1843).

"The right to maintain the suit is undisputed" and the occupant "must pay the rental value of the premises as ascertained in judicial proceedings" *Home Bldg. L. Assn. v. Blaisdell,* 290 U.S. 398 (1934). After *Blaisdell,* this Court unanimously rejected what occurred here: "undisturbed possession for the debtor and without a dollar for the creditor" with "no enforceable obligation in the meantime" *W.B. Worthen v Kavanaugh,* 295 U.S. 56 (1935). Even the most forgiving of this Court's precedents rejected a payment holiday ("obligated the mortgagor to pay taxes, insurance, and interest" and partial principal during the continuance. *East New York Savings Bank v. Hahn,* 326 U.S. 230 (1945)).

The "Test" Needs Urgent Clarification- and Correction

Lower courts are split on which doctrine controls. This Court recently wondered whether "we should abandon our two-step Contracts Clause test to whatever extent it departs from the Clause's original meaning and earliest applications" *Sveen v. Melin,* 584 U. S. __ (2018), footnote 3. The solution is far simpler- and can be implemented here immediately.

Consider *Energy Reserves,* in which the modern "test" was allegedly articulated along with a policy of deference. The case upheld a State's regulation of utility rates. Yet while dated 1983, the case is a throwback to 1920 ("power to regulate the carrier's rates" *Producers Transp. Co. v. R.R. Comm,* 251 U.S. 228 (1920)). And this Court in 1920 simply repeated what was said in 1876 ("legislature steps in and

prescribes a maximum of charge" *Chicago, Etc. R.R. Co. v. Iowa*, 94 U.S. 155 (1876)). A concurrence in *Energy Reserves* even attempted- thoughtfully- to cabin its dicta to "the context... of public utilities."

Deference is also advertised as a "modern" aspect of Contracts Clause jurisprudence. But again- peel back the *Energy Reserves* onion and history shines. *Energy Reserves* found no substantial impairment- as its concurrence notes, this was "dispositive." Its deference doctrine traces verbatim to *United States Trust* which traces back to earlier cases. *Blaisdell* states: "And Chief Justice Waite, quoting this language in Antoni v. Greenhow, 107 U.S. 769, 775, added: 'In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge.'" *Blaisdell* at 431, collecting cases in which *insubstantial* modifications to remedy are permitted provided they are "reasonable" and "provided no substantial right secured by the contract is thereby impaired." In *Antoni*, this Court found no violation because "the remedy ... is not rendered less efficient" and "changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left." *Antoni v. Greenhow*, 107 U.S. 769 (1883). Further back we may still travel, as the deference due in *Antoni* was simply a rearticulation of *Jackson v. Lamphire*, 28 U.S. 280 (1830), in which a law establishing chains of title was subject to the "sound discretion of the legislature" given that "the state has not by this act impaired the force of the grant" *Jackson* at 290. *Antoni* also rested on *Terry v. Anderson*, 95 U.S. 628 (1877), which upheld creation of a statute of limitations: "it is well settled that the legislature may

change them at its discretion, provided adequate means of enforcing the right remain. In all such cases, the question is one of reasonableness... Of that the legislature is primarily the judge."

Energy Reserves is, essentially, a holding from 1876 with deference doctrine passed down from 1830. Yet judges nationwide continue to buy in to the theory that the Contracts Clause was entombed by *Blaisdell* and *Energy Reserves*. See *Apartment Association of Los Angeles v. City of Los Angeles*, 10 F.4th 905 (9th Cir. 2021) (cert. denied) ("Energy Reserves provided for considerable deference...we 'specifically recognized the shift in the law created by Energy Reserves ,' when the Supreme Court 'retreated from its prior case law' and 'indicated a renewed willingness to defer'" & "the outmoded approach in the pre- Blaisdell cases does not resemble the Supreme Court's modern Contracts Clause doctrine"); See also *Melendez v. City of New York*, 16 F.4th 992 (2d Cir. 2021), Carney, dissenting ("modern standard is... rational basis review" and "lengthy and unnecessary review of superseded case law")

"Retreated?" "Superseded?" No: "these cases continue to control." *Melendez*, footnote 50 (referencing *Bronson* and *Green*). The Florida Supreme Court agrees: "the 'new test' unveiled in Blaisdell was really no more than an attempt to restate what the Court had actually been doing all along." *Pomponio v. Claridge of Pompano Condominium*, 378 So. 2d 774 (Fla. 1979) (f. 14).

Only this Court can reject the notion that its holdings have been superseded. This Court should instruct lower courts that- as it has already hinted in passing- analysis of "reasonableness" should be a

determination of whether a "statute stacks up well against laws that this Court upheld against Contracts Clause challenges as far back as the early 1800s." *Sveen*, at 8. Alternately stated, whether an Act "possess[es] the attributes of those state laws that have survived challenge under the Contract Clause" *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). History does not begin in 1983 and throughout history, this Court appears to have never actually *upheld*[1] a substantial impairment without compensation. *Blaisdell-* now used to excuse substantial impairment nationwide- was crystal clear in its holding: "not so as to impair substantial rights" under the contract (*Blaisdell* at 398). *Blaisdell* even suggested that substantial impairment is outcome dispositive- see footnote 13, collecting such cases.

This Court's decades of silence and errant dicta have allowed reasoned holdings- those considering facts nearly identical to these- to be supplanted by ruinous propaganda. Just two months ago, the district court in Portland found its moratorium to be identical to the one this Court unanimously rejected in *W.B. Worthen-* but held it "reasonable" under the 9th Circuit's "modern" analysis. The substantial impairment continues without compensation.[2]

This Court should vacate and remand with instruction to consider the issue using this corrected test and in light of *W.B. Worthen, Bronson, Green* and the plethora of other cases in which this Court has for centuries rejected the notion of a wanton payment holiday.

---

[1] *Keystone Bituminous*, for example, permitted an impairment of merely "less than 2%" (480 U.S. at 471)

[2] https://www.youtube.com/watch?v=4G4cYKYivpU

Unexplained Doctrinal Shifts in the Modern "Test"

Case	"Test" Used	Observed Shift?
Pre-*Blaisdell*	Whether "substantial" remedy remains *Caveat:* activities can be made illegal, and prices regulated	Baseline: *Fletcher* (1810) ("a substantial breach"), *Dartmouth* (1819) ("substantially to change"), *Bronson* (1843) ("the substantial right"), *Von Hoffman* (1866) ("provided no substantial right"), *Antoni* (1882) ("impair substantial rights"), *Hendrickson* (1917) ("provided no substantial right")
Blaisdell (1934)	"legislation is to be tested... upon whether the end is legitimate and the means reasonable and appropriate" & "but not so as to impair substantial rights secured by the contract"	No shift: The current test's words (2nd and 3rd prongs) are articulated but merely as a requirement for *insubstantial* impairments. "Reasonableness" is assessed by 5 articulated factors
Honeyman (1939)	No new test- follows *Blaisdell*	No shift: Remedies may change if "payment in full" is secured

Case	"Test" Used	Observed Shift?
Faitoute (1942)	No new test	No shift: Reaffirmation of Clause's purpose to "preserve... substantial rights"
East New York (1945)	No new test- follows *Blaisdell*	No shift: Permits no delay of interest and cost- the bank's income is not reduced
El Paso (1965)	No new test- follows *Blaisdell*	No shift: "modification of the remedy as long as there is no substantial impairment"
United States Trust (1977)	"impairment may be constitutional if it is reasonable and necessary to serve an important public purpose" *Caveat:* Deference due to Legislature for "economic and social legislation" (per *East New York*) *Caveat*: State's "own contract" is on some "different basis"	**Major unexplained (inadvertent?) shifts**: • "Substantial" (the word) disappears. Test shifts to seemingly permit substantial impairment. But, paradoxically, Clause to be applied with "respect for... prior decisions" • Detaches "reasonableness" from Blaisdell's 5 factors • "Deference" concept from *East New York* is detached from its limit to *insubstantial* impairments

Case	"Test" Used	Observed Shift?
		• "Private contracts" put on a "different basis" without explanation. Dissent: "...contemplates stricter judicial review under the Contract Clause when the government's own obligations are in issue, but points to no case in support of this multi-headed view of the scope of the Clause" • Dissent: new doctrine is a "spontaneous formulation virtually assured of frustrating the understanding of court and litigant alike" whereas "*W.B. Worthen*... is the prime exposition of the modern view"
Allied Structural Steel (1978)	Current test appears: Legislation must be "reasonable and appropriate" *upon* finding of substantial impairment	• "Substantial" (the word) returns, but merely as the 1st prong; current test forms • Blaisdell's "reasonable and appropriate" standard now applies to *substantial* impairments

Case	"Test" Used	Observed Shift?
	Caveat: "particular scrutiny" for contracts for which "State itself... a party"	• Deference standard is re-limited to *insubstantial* impairment: law must be "reasonable and appropriate" "Despite the customary deference"
Energy Reserves (1983)	No shift: 3-prong test *Caveat:* Deference returns	Deference is again unmoored from its *insubstantial* limit and now combined with the State-party caveat. It merges into "Unless the State is a contracting party...'courts properly defer'" as to reasonableness
Keystone Bituminous (1987)	Current test	Case concerns *insubstantial* impairment but deference remains unmoored: "entitled to deference, because the Commonwealth is not a party"
Sveen (2018)	Current test	No mention of "deference"; no mention of "State as party" scrutiny. Footnote 3 and the dissent recognize the problem.

A Corrected Contracts Clause "Test"

It is impossible for lower courts to apply "the test" from modern cases because "the test" morphs case-to-case without explanation and its words are unmoored from their original context. "The test" harmonized to history is articulated here:

1. Restore *Blaisdell*'s articulation of the "test" as a comprehensive description of the doctrine applied since the Founding: An insubstantial impairment must be "reasonable and appropriate."
2. Restore *Blaisdell*'s well-traced doctrine of legislative deference: Courts customarily- but not totally- defer to legislative balancing of what is "reasonable and appropriate" if the impairment is insubstantial or technical.
3. Eliminate the distinction for "private" contracts- created in 1977 with no basis.
4. Assess according to the two types of statutes generally implicating the Clause:
    a. Where laws attempt to adjust payment terms or schedules between debtors and creditors, apply *Blaisdell*'s test and consider related holdings such as *W.B. Worthen.* (eg, the "payment" cases). The test has always been whether a creditor can "make himself whole" *Honeyman v. Jacobs*, 306 U.S. 539 (1939). To go any further, a State must compensate.
    b. Where valid police power regulations incidentally abrogate contracts by making certain *activities* or *structures* illegal, the contract is permissibly rendered void and therefore entails no obligation. (eg, the

> "nuisance" and "franchise" cases). The test has always been that if such rights to operate are subject to restriction, one "cannot remove them from the power of the state by making a contract about them" *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). However, where such regulations go too far or take property, "To set such a limit would need compensation" *Id.* See also *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650 (1885): "police power... never surrendered...the public health, the public morals, or the public safety" but "rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation"

Voilà. This corrected "test" is a coherent doctrine into which all of this Court's precedents fit. It puts the words of the "modern" test back on their overlapping- not sequential- historical footing. It permits States free reign to act to protect the welfare of the people while protecting the substantial rights of contracting parties- the original intent of the Clause.

Respectfully submitted,

Alexander Gallo
950 25th St NW #329N
Washington, DC 20037
aogallo@gwmail.gwu.edu
516-770-1624

RULE 44.2 CERTIFICATION

As required by Supreme Court Rule 44.2, I certify that the Petition for Rehearing is limited to "intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented," and that the Petition is presented in good faith and not for delay. I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted on May 3, 2022.

s/ Alexander Gallo
Alexander Gallo
950 25th St NW #329N
Washington, DC 20037
aogallo@gwmail.gwu.edu
516-770-1624

APPENDIX

APPENDIX
TABLE OF CONTENTS

Superior Court of the District of Columbia
Civil Division

ORDER OF DISMISSAL

The Court dismisses the remaining cases that were filed during a statutory moratorium on the filing of eviction cases during a public health emergency and that do not fall within one of the limited exceptions to the moratorium.

About 90% of the plaintiffs in the eviction cases that were filed during the moratorium and that were pending three months ago did not object to dismissal, and the Court has dismissed those cases. Fifty-eight remaining plaintiffs object to dismissal. A recurring argument against dismissal is that the plaintiff would ultimately win if the case goes forward. However, the filing moratorium applies to all cases, and the Court may not refuse to enforce the moratorium based on a property owners' assurance that the defendant has no valid defense. These plaintiffs argue that the filing moratorium is unnecessary and overbroad, but the legislative branch has primary responsibility to decide whether the moratorium is good public policy. The Court is obligated to enforce the moratorium unless it violates a constitutional protection of property owners, and the plaintiffs have not demonstrated that it does.

I. Background

a. The statutory moratoriums on eviction filings and evictions

In March 11, 2020, the Mayor of the District of Columbia declared a public health emergency due to the COVID-19 pandemic. *District of Columbia v.*

Towers, 260 A.3d 690, 692 (D.C. 2021) ("*Towers II*"). The Mayor subsequently extended the emergency to July 25, 2021. See id. At 693.

On May 13, 2020, the Mayor signed emergency legislation prohibiting landlords from filing actions for possession of real property pursuant to DC Code 16-1501 during the public health emergency and for sixty days thereafter. *Towers II*, 260 A.3d at 692. This filing moratorium applied retroactively as of March 11, 2020. Id. Subsequent legislation first extended the filing moratorium, and then phased it out in stages, with the last stage ending on December 31, 2021. Id. At 693. "By January 1, 2022, all property owners [were] able to file suit for possession, with many able to file for possession before then based on non-payment of rent, property damage, or public safety concerns." Id. At 695.

Legislation prohibiting evictions themselves during the public health emergency was first enacted even earlier in the public health emergency. A package of measures enacted on March 17, 2020 including a moratorium on evictions "during a period of time for which the Mayor has declared a public health emergency." *Towers II*, 260 A.3d at 692. The eviction moratorium was included in subsequent emergency and temporary acts and remained in effect until July 25, 2021, when the public health emergency ended. Id. At 693.

b. Procedural background

In the summer of 2020, the Court issued orders in all cases filed during the filing moratorium requiring plaintiffs to show cause why the case should not be dismissed due to the moratorium. "The Presiding Judge of the Civil Division directed the trial

court to adjudicate all questions of law relating to the filing moratorium common to any eviction case filed on or after March 11, 2020, in the Landlord and Tenant Branch." *District of Columbia v. Towers*, 250 A.3d 1048, 1052 (D.C. 2021) ("*Towers I*"). On December 16, 2020, the Court concluded that the filing moratorium unconstitutionally burdened the right of access to the courts.

In *Towers I*, the Court of Appeals stayed this Court's declaratory ruling pending a final ruling by the Court of Appeals.

In *Towers II*, 260 A.3d at 691, the Court of Appeals reversed this Court's ruling, holding that "the temporary filing moratorium does not burden the right of access to the courts." Towers II addressed only one constitutional issue: "The filing moratorium could perhaps be challenged on other grounds, but because the Superior Court's judgement rested solely on its holding that the filing moratorium violates the right of access to the courts, our focus on appeal is similarly limited." Id.

On November 10, 2021, the Presiding Judge of the Civil Division established a procedure to resolve any remaining challenges to the filing moratorium in light of *Towers II*. See Second General Order Concerning Landlord and Tenant Cases Filed On or After March 11, 2020. Except in cases subject to a statutory exception to the filing moratorium, the Court issued another set of orders requiring plaintiffs to show cause why these cases should not be dismissed. These show cause orders provided that if the plaintiff did not respond within 28 days, the Court would dismiss the case without prejudice and without further order.

The Court issued this second set of show cause orders in 590 cases. Before the Court started issuing these orders in December 2021, plaintiffs had already dismissed a large majority of roughly 2,000 cases filed during the filing moratorium, pursuant to a settlement agreement or otherwise. Plaintiffs responded to the second set of show cause orders in 58 cases- about 10% of the cases in which the orders were issued. The Court dismissed without prejudice the 522 cases in which plaintiffs did not file a response. As a result, 58 cases filed during the filing moratorium remain.

After it received 58 responses by plaintiffs to the second set of show cause orders, the Court did not provide for another round of briefing by defendants and their advocates or by the District of Columbia because legal services providers and the District briefed the same common questions of law when plaintiffs raised them in their first set of show cause orders. The District as an intervenor and eight legal services organizations as amici curiae filed comprehensive briefs in the *Towers* litigation on November 6, 2020.

Except for the few cases subject to one of the limited exceptions to the filing moratorium, the Court effectively stayed cases filed during the filing moratorium until it resolves the legal issues common to all of these cases. During this stay, the Court has not conducted any substantive proceedings concerning the merits of these cases

II. Discussion

The plaintiffs in the 58 remaining cases raise four questions of law concerning the constitutionality or scope of the eviction filing moratorium that are

common to multiple cases. The two cases in the caption of this order are representative cases raising these issues.

As the Court stated at the outset, the arguments by multiple defendants against the filing moratorium on policy grounds should have been directed to the legislative branch of government, and they are not for the judicial branch to resolve. Various plaintiffs made other, scattershot arguments in cursory fashion, but "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." Johnson v. District of Columbia, 225 A.3d 1269, 1276 n.5 (D.C. 2020) (cleaned up). "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." Id. (cleaned up). Most of the respondents to the second set of show cause orders (33 of 58) were filed by self-represented litigants, and courts must exercise special care to ensure that self-represented litigants are not left to fend entirely for themselves. See *Berkley v. D.C. Transit, Inc.* 950 A.2d 749, 756 (D.C. 2008). However, a self-represented litigant "cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance." Macleod v. Georgetown University Medical Center, 736 A.2d 977, 979 (D.C. 1999).

A. D.C. Code §1-203.02

The filing moratorium does not violate D.C. Code §1-203.02, which makes the legislative power of the District subject to the Contracts Clause in Section 10 of Article I of the U.S. Constitution. Section §1-

203.02 provides "The legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States." The Contracts Clause provides that "no State shall...pass any... Law impairing the Obligation of Contracts."

The Supreme Court "has long applied a two-step test" to determine whether a law affecting pre-existing contracts violates the Contracts Clause. *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). "The threshold issue is whether the state law has operated as a substantial impairment of a contractual relationship." Id at 1821-22 (cleaned up); see *West End Tenants Association v. George Washington University*, 640 A.2d 718, 733 (D.C. 1994). "In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." Sveen, 138 S. Ct at 1822. "As a measure of contractual expectations, one factor to be considered in determining the extent of the impairment is 'whether the industry the complaining party has entered has been regulated in the past." *West End Tenants Association*, 640 A.2d at 733 (quoting *Energy Reserves Group Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)). Impairment may occur not only when a contractual right is extinguished but also when a contractual remedy is restricted because "[t]he ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution

against invation." Von Hoffman v. Quincy, 71 U.S. 535, 552 (1867). However, "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n 17(1977).

The second step of the analysis involves the reasons for a substantial impairment. "If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation," and "the Court has asked whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen*, 138 S. Ct. at 1822 (cleaned up). A party asserting a Contracts Clause claim must show "that the impairment is not justified by a 'significant and legitimate public purpose,' or if so justified... that the impairment is not based upon reasonable conditions or 'of a character appropriate to the public purpose justifying [the legislation's] adoption." *West End Tenants Ass'n*, 640 A.2d at 735 (quoting *Energy Reserves Group*, 459 U.S. at 412). "The States must posses broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *United States Trust Co*, 431 U.S. at 22. "When a regulation affects a private contract, as opposed to a public one, the government entity is given wide latitude in deeming any interference reasonable and necessary, and in defining public purposes as important." *Classic Cab, Inc. v. District of Columbia*, 288 F. Supp. 3d 218, 228, (D.D.C. 2018). "Despite its absolute language, the Clause does not act as a complete bar to legislative alterations of existing contractual obligations because its prohibition must

be accommodated to the inherent police power of the State to safeguard the vital interests of its people." *West End Tenants Ass'n*, 640 A.2d at 732-33.

Whether by a binding holding or persuasive dictum, *Towers II* established that the first requirement for a successful Contracts Clause challenge is not met because the filing moratorium does not substantially impair a contractual relationship. *Towers II* expressly rejected the argument "the filing moratorium violates a fundamental right under the Constitution because it abridges private parties right to contract.":

> This argument might have more force if the moratorium totally deprived property owners of access to the courts, instead of only temporarily delaying such access. But the Supreme Court previously upheld legislation temporarily (though significantly) delaying tenant evictions during an emergency, stating "a limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." Block v Hirsh, 256 U.S. 135, 157 (1921). The District's temporary filing moratorium does not eliminate tenants' lease obligations, including the payment of rent, or alter property owners' title to their property. After the moratorium is lifted, property owners will be able to file for eviction and pursue related claims. Therefore ,the filing moratorium involves no abrogation of contracts or deprivation of the ability to file for eviction.

Towers II, 260 A.3d at 695 (cleaned up); see Home Building & Loan Association v. Blaisdell, 290 U.S.

398, 425 (1934) (upholding a mortgage moratorium that extended the period of redemption to two years because 'the statute does not impair the integrity of the mortgage indebtedness" and the obligation of debtors to pay the fair rental value of the property during the moratorium was "the equivalent of possession during the extended period"); Elmsford Apartment Associates, LLC v. Cuomo, 469 F. Supp. 3d 148, 172 (S.D.N.Y. 2020) (finding that a state eviction moratorium did not substantially impair contract rights because it does not "eliminate" remedies and "merely postpones the date on which landlords may commence summary proceedings against their tenants"), appeal dismissed sub nom. 36 Apartment Associates, LLC v. Cuomo, 860 Fed. Appx. 215 (2. Cir. July 16, 2021).

Additional factors reinforce this conclusion. First, the extensive regulation of landlords by the District diminishes any reasonable expectation that they would be free to file eviction cases at the time of their own choosing during a public health emergency. See *West End Tenants Ass'n*, 640 A.2d at 733; *Towers II*, 260 A.3d at 696 (holding there is no "fundamental constitutional right to evictions on a particular timetable"). The filing moratorium is only another one of the "litany of procedural limitations designed to give tenants a full and meaningful opportunity to defend themselves and maintain their housing." *Towers I*, 250 A.3d at 1054. Second, the filing moratorium had "no effect on the owners' ability to regain immediate possession of the subject property" because the unchallenged eviction moratorium remained in effect. Id. At 1058. Third, any post-moratorium delay in landlords' ability to obtain writs of restitution is not cognizable harm "because it is

unclear that when the moratorium lifts these landlords will be entitled to evictions." Id. Fourth, although property owners were deprived during the filing moratorium of the ability to "obtain interim relief in the form of protective orders requiring payment of rent into the rent registry of the court, the District has put in place a different mechanism for landlords to obtain interim relief in the form of rent assistance programs, most notably Stay DC," which provided over $350 million in rental assistance. Towers II, 260 A.3d at 695; see Towers I, 250 A.3d at 1059 (loss of opportunity to obtain a protective order or undertaking during filing moratorium affected only a subset of property owners and likely would not result in irreparable injury).

Because property owners cannot satisfy the threshold of substantial impairment of a contractual relationship, the Court need not address the second step of the two-part test- whether the filing moratorium advances a significant and legitimate public purpose in a reasonable way. See West End Tenants Ass'n, 640 A.2d at 733. Nevertheless, the Court observes that Towers I, 250 A.3d at 1056-60, held that tenants may suffer irreparable injury without the filing moratorium, the balance of the equities favors tenants over landlords, and the public interest favors compliance with the filing moratorium, which is one part of the Council's comprehensive response to the COVID-19 public health emergency.

For these reasons, the statutory filing moratorium does not violate the Contracts Clause or D.C. Code §1-203.02.

B. Takings

The Court need not and does not decide whether the filing moratorium effects a taking within the meaning of the Takings Clause because even if it does, the remedy would be to order the District to pay just compensation- not to enjoin any continued taking by allowing property owners to file and litigate eviction cases. "As long as just compensation remedies are available- as they have been for nearly 150 years- injunctive relief will be foreclosed," and "courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive full relief through a Fifth Amendment claim." See Knick v. Township of Scott, Pennsylvania, 139 S. Ct. 2162, 2179 (2019). If the filing moratorium effected a taking and caused economic harm to a property owner, the property owner may seek just compensation in a lawsuit against the District of Columbia.

C. The Home Rule Act

The statutory filing moratorium does not violate the Home Rule Act because it does not affect the organization or jurisdiction of the District of Columbia courts.

"The Home Rule Act specified that the Council 'shall have authority to... [e]nact any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts.)." Woodroof v. Cunningham, 147 A.3d 777, 780 (D.C. 2016) (quoting D.C. Code 1-206.02(a)(4)). "Our cases have not construed D.C. Code 1-206.02(a)(4) rigidly, but instead have recognized that the Council may make substantive changes to the law, even when those changes affect the kinds of cases that the courts

adjudicate." Woodroof, 147 A.3d at 781 (upholding a D.C. statute overturning case law that prohibited appellate review of orders staying cases pending arbitration). Section 1-206.02(a)(4) "must be construed as a narrow exception to the Council's otherwise broad legislative power so as not to thwart the paramount purpose of the Home Rule Act, namely, to grant the inhabitants of the District of Columbia powers of local self-government." Id. At 784 (cleaned up). "When the Council's actions do not run directly contrary to the terms of Title 11," the Court of Appeals has "construe[d] this limitation on the Council's power in a flexible, practical manner." Id. "Thus, the Home Rule Act does not prevent the Council from changing the District's substantive law, even if those changes do affect the jurisdiction of the courts in a sense." Id. (cleaned up)

The eviction moratorium does not directly affect the organization or jurisdiction of this Court, which retains jurisdiction to adjudicate eviction cases. *Towers I* makes clear that the eviction filing moratorium is not different in kind or degree from other limitations on eviction cases lawfully imposed by the legislative branch of the District of Columbia:

> But claims for a judgment for possession and eviction are defined exclusively and precisely by statute. Having been defined by the legislature, these claims can likewise be constricted. Claims for possession and eviction are already subject to a litany of procedural limitations designed to give tenants a full and meaningful opportunity to defend themselves and maintain their housing. The additional limitation of a filing moratorium for these types

> of claims during a pandemic does not appear to implicate the right of access to the courts any more than, for example, requiring the filing of a notice to vacate before allowing the filing of a complaint for a judgment of possession. Although both provisions inject delay into the process, they are simply part of the procedural fabric of our eviction statute.

Towers I, 250 A.3d at 1054-55. Just as Title 11 does not prohibit the District from enacting legislation that affects other parts of the procedural fabric of the eviction statute, it does not prohibit the Council from imposing a temporary moratorium on the filing of eviction cases.

D. The scope of the filing moratorium

Some commercial landlords argue that the eviction filing moratorium protects only residential tenants and not commercial tenants. It is true that the Rental Housing Act applies only to residential tenants. See, e.g., D.C. Code 42-3501.03(33) (defining "rental unit" to mean any part of a housing accommodation which is rented or offered for rent "for residential occupancy"). However, 16-1501, which contains the filing moratorium, is not part of the Rental Housing Act in Title 42, and since its enactment early in the pandemic, 16-1501 has applied to any "person" (and not just a landlord, much less a residential landlord) aggrieved by the detention of possession of real property by another "person" (and not just by a tenant, much less a residential tenant). Section 16-1501 does not exclude from the filing moratorium cases brought by commercial landlords against commercial tenants.

Other landlords make conclusory assertions that the filing moratorium in 16-1501 does not apply to landlords that own fewer than five units or to occupants of residential property who are squatters or trespassers and not tenants, but these assertions are equally inconsistent with the plain and categorial language of the statute.

E. The Remedy

Although 16-1501 does not explicitly require dismissal, dismissal without prejudice is the obvious remedy if a property owner filed an eviction case during a period when its filing was prohibited by statute. Indeed, the Court of Appeals expressed surprise that the Court even "permitted" eviction cases to be filed after the moratorium was enacted. See Towers I, 250 A.3d at 1052

Because dismissal of cases filed during the moratorium is without prejudice, property owners may refile these cases. Property owners that refile will experience additional cost and delay. However, dismissal without prejudice simply puts these property owners in the same position as those that complied with the filing moratorium, and allowing property owners that violated the moratorium to proceed with pending cases would put them in a better position than those that complied. Rapid dissemination of information about the filing moratorium when it was enacted in mid-May 2020 explains the precipitous drop in new eviction filings thereafter, and in any event, property owners that filed eviction cases after imposition of the filing moratorium are charged with knowledge of the temporary prohibition.

The statute imposing the filing moratorium was unambiguously retroactive to March 11, 2020, Towers II, 260 A.3d at 692, and property owners that filed eviction cases during the retroactivity period may have had an equitable argument that dismissal is unwarranted and that staying these cases for almost two years achieves the purpose of the filing moratorium. However, of the more than 1,700 cases filed during the retroactivity period, only three remain, and the plaintiffs in these three cases did not make this argument.

III. Conclusion

For these reasons, the Court orders that the remaining evictions cases that were filed during the eviction filing moratorium in D.C. Code 16-1501 and that are not subject to any exception shall be dismissed without prejudice. The Court will docket and serve a dismissal order in each of these other cases.

SO ORDERED.

Anthony C. Epstein
Judge

Date: March 7, 2022