No.

In the Supreme Court of the United States

PATRICIA ITEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF HOWARD ITEN,
Petitioner,

v.

COUNTY OF LOS ANGELES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In response to the COVID-19 pandemic, the County of Los Angeles enacted a moratorium that prohibited commercial landlords from, among other things, evicting defaulting tenants and demanding immediate payment of overdue rent. Petitioner, a retired auto mechanic and small commercial landlord who suffered substantial losses by the moratorium, brought suit to challenge it as an unconstitutional "Law impairing the Obligation of Contracts," U.S. Const. art. I, § 10. The district court dismissed Petitioner's complaint for failure to state a claim, and the Ninth Circuit affirmed, both on the sole ground that the moratorium's enactment and application to Petitioner's lease contract was foreseeable. In contrast, this Court, followed by other lower courts, has used foreseeability as merely one, non-determinative factor to be considered in deciding whether a party has advanced a viable Contracts Clause claim. *See, e.g.*, *Sveen v. Melin*, 584 U.S. 811, 820-24 (2018); *City of El Paso v. Simmons*, 379 U.S. 497, 514-15 (1965); *Melendez v. City of New York*, 16 F.4th 992, 1033-34 (2d Cir. 2021); *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 728-30 (8th Cir. 2022).

The question presented is:

Whether a party is barred from stating a claim for relief for violation of the Contracts Clause merely because the party could have foreseen the enactment of the contract-impairing law?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Howard Iten was the initial Plaintiff and Appellant. During the pendency of the appeal below, Mr. Iten died. His widow and his estate's personal representative, Patricia Iten, was substituted in as the Appellant and is now the Petitioner here.

Respondent County of Los Angeles is a public entity.

STATEMENT OF RELATED CASES

These proceedings are directly related to the above-captioned case under Rule 14.1(b)(iii):

Iten v. County of Los Angeles, No. 24-2974, 2025 WL 733236 (9th Cir. Mar. 7, 2025)

Iten v. County of Los Angeles, No. CV21-00486 DDP, 2024 WL 1930775 (C.D. Cal. May 1, 2024)

Iten v. County of Los Angeles, 81 F.4th 979 (9th Cir. Aug. 30, 2023)

Iten v. County of Los Angeles, No. CV21-00486 DDP, 2022 WL 1127880 (C.D. Cal. Apr. 15, 2022)

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PETITION FOR WRIT OF CERTIORARI

Patricia Iten, personal representative of the estate of Howard Iten, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is unpublished but is available at 2025 WL 733236 (9th Cir. Mar. 7, 2025), and is reprinted at Pet.App. 1a-3a. The District Court's decision granting the County's motion to dismiss is unpublished but is available at 2024 WL 1930775 (C.D. Cal. May 1, 2024), and is reprinted at Pet.App. 4a-13a.

An earlier appeal affirming Petitioner's standing resulted in a published opinion found at 81 F.4th 979 (9th Cir. Aug. 30, 2023). The District Court's order originally dismissing for lack of jurisdiction is unpublished but is available at 2022 WL 1127880 (C.D. Cal. Apr. 15, 2022).

JURISDICTION

The Ninth Circuit rendered its judgment affirming the district court's dismissal of Petitioner's action on March 7, 2025. Pet.App. 1a-3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10, Clause 1, of the United States Constitution provides, in relevant part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]"

Respondent's commercial eviction moratorium is reprinted in relevant part at Pet.App. 19a-20a, 32a-70a.

INTRODUCTION

The Contracts Clause prohibits state and local governments from enacting any "Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. The Clause thus adopts the principle that "contracts should be inviolable." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 206 (1819). Strict adherence to this principle persisted in this Court and the lower courts for over a century, making the Contracts Clause "the strongest single constitutional check on state legislation" during the early years of America. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978). That changed with this Court's decision in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), which permitted significant interference with private contracts during an emergency. *Id.* at 425. However, as the majority in *Blaisdell* admonished, "[e]mergency does not create power" nor does it "increase granted power." *Id.*

Despite *Blaisdell*'s cautionary statement, the Contracts Clause weakened further in subsequent decades. *See* James W. Ely Jr., *The Contract Clause* 237-41 (2016). Not surprisingly, then, modern cases "seem[] hard to square with the Constitution's original public meaning," *Sveen v. Melin*, 584 U.S. 811, 829 (2018) (Gorsuch, J., dissenting), which was followed faithfully in early decisions like *Sturges*, 17 U.S. (4 Wheat.) at 206. That is because these later rulings employ a balancing test of several factors which often allow state and local governments to substantially impair contracts without any legal brake.

As troubling as this post-New Deal case law is, the decision in this case augurs even worse outcomes for contract rights. The Ninth Circuit, evidently following a theory of "you should have seen it coming"—one which has been adopted by other lower courts rejecting Contracts Clause claims—held that Petitioner ought to have foreseen the enactment of Respondent County of Los Angeles's emergency moratorium resolution, arising from the unprecedented COVID-19 pandemic. And because the moratorium was purportedly foreseeable, the Ninth Circuit held that Petitioner was barred from stating a claim for relief under the Contracts Clause—even where, as in this case, the challenged law completely undermines the contractual bargain.

In an era when governments at all levels are declaring more and more emergencies that inspire increasingly novel regulatory actions, the "foreseeability bar" adopted by the Ninth Circuit and other lower courts threatens to read the Contracts Clause out of the Constitution, contrary to this Court's promise that the Clause "is not a dead letter." *Allied Structural Steel*, 438 U.S. at 241. Indeed, allowing the foreseeability bar to persist would violate "one of the highest duties of this court," namely, "to take care [that] the prohibition [of the Contracts Clause] shall neither be evaded nor frittered away." *Murray v. City of Charleston*, 96 U.S. 432, 448 (1877). This Court should intervene now to shore up the constitutional rights of contracting parties before they are buffeted again by the next wave of emergency-inspired government impairments.

STATEMENT OF THE CASE

For several decades, Petitioner[1] ran a successful auto repair shop, located within the County of Los Angeles and the City of Lawndale. Pet.App. 16a, 21a. Following his retirement, Petitioner leased the property to a tenant who later subleased the property to a franchisee of a nationwide auto repair company. Pet.App. 21a. Revenue from the lease of the property was Petitioner's principal means for funding his retirement. Pet.App. 16a, 21a.

In April 2020, the sub-tenant notified Petitioner's property management company that he was "very adversely [a]ffected by Covid 19" and therefore would not pay rent. Pet.App. 21a. Between April and August of that year, the sub-tenant paid nothing. Pet.App. 21a-22a. With the principal lease set to expire at the end of August 2020, Petitioner negotiated with his sub-tenant for a new direct lease. Pet.App. 22a. This lease would go into effect in September 2020 for a term of five years. Pet.App. 22a. As part of the new lease, the tenant agreed not just to make current rent payments, but also to pay back in installments the money still owed under the prior sub-lease. Pet.App. 22a. By securing the tenant to a new contract, Petitioner hoped to be made whole in due course. Pet.App. 22a.

Within a few days of the tenant's agreement to the new lease, Respondent enacted an expanded eviction moratorium. Pet.App. 19a-23a. Prior versions of the moratorium had excluded those incorporated cities,

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[1] For ease of reference, the Petition designates as "Petitioner" both the late Howard Iten and his widow and personal representative Patricia Iten.

like Lawndale, that already had an eviction moratorium in place.[2] But the September 2020 version of Respondent's moratorium established a new baseline of protections throughout the County, and thus for the first time applied to Petitioner's tenant. As relevant to the injuries alleged by Petitioner, the moratorium:

- Halted the eviction of commercial tenants for nonpayment of rent due to COVID hardship;
- Forbade landlords from suing for breach of contract or otherwise seeking to compel immediate payment of rent or other monies due;
- Granted commercial tenants with fewer than 10 employees a forbearance period of one year, following expiration of the eviction moratorium, to pay overdue rent;
- Permanently prohibited the collection of late fees and interest on unpaid moratorium rent; and
- Threatened substantial civil and criminal penalties on landlords who violated the moratorium by harassing tenants, with "harassment" broadly defined to include potentially any unsuccessful eviction action.

Pet.App. 19a-20a.

Petitioner's tenant soon failed to adhere to the obligations of the new lease, while also notifying Peti-

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[2] Although Lawndale's moratorium had been in effect since April 2020, it only covered tenants who provided proof that their inability to pay stemmed from COVID. Pet.App. 20a-21a. Petitioner's tenant never provided such proof and thus was never covered by the Lawndale moratorium. Pet.App. 20a-21a, 23a. No such proof was required under Respondent's moratorium at issue here. Pet.App. 20a-21a.

tioner of his intent to invoke the protections of Respondent's moratorium. Pet.App. 23a. With the tenant's unpaid rent obligation quickly piling up, Petitioner commenced an action for damages and declaratory relief under 42 U.S.C. § 1983. Pet.App. 14a. The lawsuit challenged the moratorium as a violation of the Contracts Clause. Pet.App. 24a-31a.

Under this Court's recent Contracts Clause jurisprudence, a party like Petitioner may prevail only by establishing that the challenged law produced a "substantial impairment" of his contract, and that the contract-impairing law is neither "appropriate" for nor "reasonable" to advancing any "significant and legitimate public purpose." *Sveen*, 584 U.S. at 819 (quoting *Allied Structural Steel*, 438 U.S. at 244, and *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983)). Whether an impairment is substantial depends on "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*, 584 U.S. at 819.

Petitioner argued that, even under this government-indulgent standard, he should win. Respondent's moratorium abrogated critical rights and remedies that Petitioner otherwise enjoyed under his lease contract, including the right to evict upon nonpayment of rent, the right to immediately sue for and obtain payment of overdue rent, and the right to charge late fees and interest. Pet.App. 25a-27a. These impairments were substantial because they went to the heart of the lease contract: the ability to obtain a reliable, monthly stream of income from one's tenant or to quickly remove and replace a defaulting tenant.

Further, Petitioner argued that these substantial impairments were not appropriately tailored. Pet.App. 25a-27a. Unlike residential eviction moratoriums, keeping commercial tenants "housed" had little effect on the governmental interest in stopping the spread of COVID-19. Moreover, even assuming that widespread abrogation of lease contract rights could be justified as part of a second-order effort to mitigate the economic harm caused by the government's first-order public health measures, the moratorium was not reasonably related to that goal. For example, the moratorium gave the same protection to all qualifying tenants, even those like Petitioner's who, because designated as an "essential business," remained open for business throughout the pandemic. Pet.App. 29a-30a. Moreover, unlike the foreclosure moratorium upheld by this Court in *Blaisdell*, Respondent's moratorium provided landlords with no right to any income stream during the eviction moratorium period.

Respondent moved to dismiss for failure to state a claim, which motion the district court granted,[3] concluding that the moratorium did not substantially impair Petitioner's lease contract. The court explained that there could be no substantial impairment because Petitioner's contract arose after the pandemic had begun and, at the time of contract negotiation, Petitioner should have known that application of a commercial eviction moratorium to his property was likely. Pet.App. 11a-13a.

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[3] Earlier in the litigation, the district court had dismissed the action *sua sponte* for lack of standing, but the Ninth Circuit reversed, remanding the matter for the district court to address the merits of Petitioner's claim. *Iten v. County of Los Angeles*, 81 F.4th 979, 992 (9th Cir. 2023).

Petitioner appealed, arguing among other points that, even if he should have foreseen application of Respondent's moratorium, his lease contract was still substantially impaired. This conclusion follows, Petitioner argued, if one takes into account, as this Court directed in *Sveen*, the extent to which the moratorium undermined the contractual bargain with his tenant and rendered Petitioner unable to protect or reinstate his contract rights. The Ninth Circuit disagreed. Pet.App. 1a-3a. Although the court cited all three factors discussed in *Sveen* for assessing substantial impairment, it only considered Petitioner's "reasonable expectations," reducing it to a single question: Whether Respondent's moratorium was foreseeable to a politically clairvoyant landlord. Based on that sole consideration, the court held that there was no substantial impairment, because (i) both Respondent and other jurisdictions in the Los Angeles area had been enacting eviction moratoriums for several months prior to the execution of Petitioner's lease contract, and (ii) there is a history of "some measure of government oversight" of commercial lease contracts. Pet.App. 1a-3a.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for three reasons.

First, the Ninth Circuit is just one of many courts to hold that a party cannot state a Contracts Clause claim if the contract-impairing law was foreseeable. This "foreseeability bar" to successfully stating a Contracts Clause claim conflicts with decisions of this Court, as well as of lower federal and state courts, in which foreseeability was merely a consideration in assessing whether a law's contractual impairments were substantial, *not* a necessary hurdle to be surmounted

in order to state a Contracts Clause claim. Moreover, the foreseeability bar conflicts even with those decisions of this Court and lower courts in which foreseeability played a more prominent role in the substantial impairment analysis because of the contract's being made within an already heavily regulated industry. There is a meaningful distinction, recognized by the decisions of this Court, between expectations arising from a history of *some* regulation and expectations arising from a history of *heavy* regulation; the foreseeability bar impermissibly ignores that distinction.

Second, these conflicts raise an important issue of federal constitutional law meriting the Court's review. The foreseeability bar further moves this Court's jurisprudence from the Contracts Clause's original meaning, which made actionable *any* impairment of the obligation of contract. The bar also threatens to vacate the Clause's protections during an emergency, given how the COVID-19 pandemic revealed that most states' emergency powers statutes authorize virtually all conceivable contract-impairing actions. Further, rejecting the bar is particularly needed in cases like Petitioner's, in which there is no plausible way for a contracting party to price into the agreement the risk of the agreement's complete gutting by subsequent legislation.

Third, the Petition is an appropriate vehicle for the Court to address the foreseeability bar. There is no justiciability obstacle to the Court's reaching the merits, the bar was determinative in the lower courts, and the issue presented does not depend on any disputed question of fact. Moreover, the Petition is probably the last opportunity, arising from the COVID-19 pandemic, for this Court to provide

guidance to the lower courts on how to apply the Contracts Clause in an emergency.

I. The Foreseeability Bar Employed By The Ninth Circuit And Other Lower Courts Conflicts With The Mode Of Analysis Followed In Decisions Of This Court

As noted above, the Ninth Circuit began and ended its Contracts Clause analysis on the determination that Petitioner should have foreseen the enactment of Respondent's moratorium and, consequently, the moratorium's impairments of Petitioner's lease contract were *per se* insubstantial. Pet.App. 1a-3a. *Accord Grass Valley Disposal, Inc. v County of Nevada*, 46 F.3d 1141, *3 n.1 (9th Cir. 1995) (table) (no substantial impairment where the party "knew that future imposition of gate fees was foreseeable as the type of law that would alter contract obligations") (cleaned up).

Unfortunately, the Ninth Circuit is not the only court to have deployed the foreseeability bar. For example, the Seventh Circuit in *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894 (7th Cir. 1998), observed that, "[o]f great, and we are inclined to say controlling, importance in the determination of whether a law violates the contracts clause is the foreseeability of the law when the original contract was made." It went on to reject the challenger's Contracts Clause claim on the ground of lack of substantial impairment because "a contractual obligation is not impaired . . . if at the time the contract was made the parties should have foreseen the new regulation challenged under the clause." *Id.* at 897.

Similarly, in *Alliance of Automobile Manufacturers v. Gwadosky*, 430 F.3d 30 (1st Cir. 2005), the First Circuit rejected a Contracts Clause challenge on the sole ground that the agreements at issue "were executed with the knowledge and expectation of pervasive state regulation." *Id*. at 42. *Accord Fraternal Order of Police v. District of Columbia*, 45 F.4th 954, 961 (D.C. Cir. 2022) (a police union's contract was not substantially impaired because "the union was on notice that future statutory changes were likely"); *S. Cal. Rental Housing Ass'n v. County of San Diego*, 550 F. Supp. 3d 853, 862 (S.D. Cal. 2021) (landlords' lease contracts were not substantially impaired because the challenged "Ordinance at issue followed the issuance of many similar regulations [and as] such, it was foreseeable"); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 170 (S.D.N.Y. 2020) (challenged eviction moratorium "should have come as a no surprise to the landlord Plaintiffs, and thus could not amount to a substantial impairment of their rights under their rental agreements").

This privileging of foreseeability within the substantial impairment analysis is contrary to the reasoning of several decisions of this Court.

First, in *Sveen*, the Court examined whether Minnesota's automatic-revocation rule, which revokes spousal life insurance beneficiary designations upon divorce, violated the Contracts Clause for beneficiary designations made before the Minnesota statute's enactment. 584 U.S. at 813-14. In evaluating the statute's impairment, this Court examined the "[1] the extent to which the law undermines the contractual bargain, [2] interferes with a party's reasonable expectations, and [3] prevents the party from safeguarding or reinstating his rights." *Id.* at 819. Notably, the Court

did not limit its analysis to any one factor but rather analyzed all three. *See id.* at 820-24. Indeed, despite finding that the challenger had *no* reasonable expectation of being free from the challenged impairment, *see id.* at 822 ("So his reliance interests are next to nil."), the Court merely concluded that this "fact cuts against providing protection under the Contracts Clause," *id.* The foreseeability bar adopted by the Ninth Circuit and other lower courts is plainly inconsistent with this Court's far more flexible analysis in *Sveen*.

Second, in *El Paso*, the Court addressed a Contracts Clause challenge to a Texas statute of repose establishing a five-year time limit on reinstatement of defaulted contracts for the purchase of state land. In rejecting the challenge, the Court admittedly did look to the contracting party's expectations, concluding that, given Texas's land sale policies when the contract was entered into, the purchaser could not have reasonably expected that his right to reinstatement would be "of everlasting effect." *City of El Paso v. Simmons*, 379 U.S. 497, 514 (1965). But the Court did not rest its analysis on that point. Rather, it looked primarily to the parties' contractual bargain, concluding that the right to reinstatement "was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking." *Id.* at 513-14. Thus, just as with *Sveen*, the foreseeability bar followed by the Ninth Circuit and other lower courts runs counter to the Court's analysis in *El Paso*.

Indeed, even in decisions of this Court in which foreseeability figured prominently, the Court's analysis was closely tethered to the fact that the pertinent industries were heavily regulated. For example, in

Energy Reserves Group, 459 U.S. 400, the Court addressed a Contracts Clause challenge to a Kansas law that capped a price escalator clause within a natural gas purchase agreement. In rejecting the challenge, the Court emphasized that the natural gas industry has a long history of significant government intervention. *Id*. at 413 ("Significant here is the fact that the parties are operating in a heavily regulated industry."). Similarly, in *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), the Court was presented with a Contracts Clause challenge to an Alabama law that limited the ability of oil and gas producers to pass on an increase in state severance tax to royalty owners. In upholding the law, the Court observed that the challengers "operate in industries that have been subject to heavy regulation." *Id.* at 194 n.14. Finally, in *Veix v. Sixth Ward Building & Loan Association of Newark*, 310 U.S. 32 (1940), the Court reviewed a New Jersey law that sharply limited the ability of parties to withdraw shares from building and loan associations. In affirming the constitutionality of the law, the Court emphasized that the statute "was one of a long series regulating the many integrated phases of the building and loan business such as formation, membership, powers, investments, reports, liquidations, foreign associations and examinations." *Id*. at 37.

In contrast, the commercial real estate industry has no history of heavy regulation comparable to that of the utilities and banking industries. *Cf. NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 328 (5th Cir. 2022) (noting that the "expectation of possible regulation" "is especially true in highly regulated industries like power"). Yet the foreseeability bar elides this distinction. Indeed, the Ninth Circuit below concluded that, merely because commercial real

estate contracts have been subject to *some* measure of regulation, therefore *any* regulation thereof is foreseeable. Pet.App. 1a-3a. *Accord Williams v. Alameda County*, 642 F. Supp. 3d 1001, 1023 (N.D. Cal. 2022) (no reasonable expectations because "there is a long history of regulations governing the landlord-tenant relationship"); *Elmsford*, 469 F. Supp. 3d at 170 (because "residential leases are subject to a number of regulations," the challenged order could not substantially impair lease contracts); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 351-52 (E.D. Pa. 2020) (same); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 224 (D. Conn. 2020). Given that there is no such thing as an entirely "unregulated" industry, the foreseeability bar means that no contracting party can expect any protection from the Contracts Clause. *But see Allied Structural Steel*, 438 U.S. at 241.

Thus, both in privileging foreseeability within the substantial impairment analysis, and in employing a very loose understanding of what constitutes a heavily regulated industry, the foreseeability bar wielded by the Ninth Circuit below and other lower courts conflicts with the decisions of this Court.

II. The Foreseeability Bar Conflicts With The Reasoning Of Decisions Of The Second And Eighth Circuits, And Of Other Lower Courts

In *Melendez v. City of New York*, 16 F.4th 992 (2d Cir. 2021), the Second Circuit reviewed a New York City ordinance that rendered unenforceable personal liability guaranties within certain commercial leases. The court held that the landlord plaintiffs had stated a claim for relief under the Contracts Clause. In reaching that conclusion, the court applied the analysis set forth in *Sveen*. *Id*. at 1033. But unlike the

Ninth Circuit and other adherents to the foreseeability bar, the Second Circuit did not limit its analysis to foreseeability. Rather, the court also analyzed whether the ordinance undermined the parties' contractual bargain, concluding that it did because "commercial landlords generally . . . will not rent commercial space to small businesses without the security of a personal guaranty." *Id.* at 1034. Moreover, contrary to what the foreseeability bar would dictate, the Second Circuit refused to downplay the significance of the ordinance's impairments just because "New York has sometimes, and to varying degrees, regulated its commercial real estate market." *Id.*

The Eighth Circuit reached a similar result in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), in which residential landlords challenged a Minnesota gubernatorial order imposing an eviction moratorium. Holding that the challengers had stated a claim for relief under the Contracts Clause, the Eighth Circuit focused principally not on the landlords' supposed expectations, nor on the foreseeability of the moratorium, but rather on the impact that the moratorium had on the landlords' contract rights. Specifically, the Eighth Circuit observed that the moratorium infringed the landlords' "fundamental right to exclude," and "greatly diminished" the bargained-for right of receiving rent. *Id.* at 728-29. And even with respect to foreseeability, the Eighth Circuit held only that a contracting party's power of prognostication is relevant just to assessing his reasonable expectations; it's not determinative of the larger question of substantial impairment. *See id.* at 729. Finally, like the Second Circuit in *Melendez*, the Eighth Circuit re-

jected the argument that a mere history of some regulation means that a contracting party is on notice of *any* regulation. *See id*. at 729-30.

Although it's possible that the foreseeability bar could have been overcome in *Melendez* and *Heights Apartments*, these decisions' mode of analysis is nevertheless in sharp conflict with that which undergirds the bar. As discussed in the preceding section, foreseeability or reasonable expectations in these foreseeability bar cases becomes not just one factor—not even simply an important factor—to be assessed, but rather a necessary and oftentimes determinative consideration. Moreover, these decisions unjustifiably expand the heavily regulated industry rationale to render virtually any government action in any regulated industry (which is effectively all industry) foreseeable. Both propositions conflict with the analysis in cases like *Melendez* and *Heights Apartments*. In these cases, foreseeability is not treated as determinative and a mere history of some regulation cannot justify regulation resulting in any and all potential contractual impairments. *Accord Baltimore Teachers Union v. Mayor & City Council of Baltimore*, 6 F.3d 1012, 1017 (4th Cir. 1993) (observing that "an impairment is substantial *at least* where the right abridged was one that induced the parties to contract in the first place"); *Black v. Bureau of Parks & Lands*, 288 A.3d 346, 363 (Me. 2022) (because retroactive invalidation of a lease results in a "total destruction" of the contractual bargain, it "is therefore a substantial impairment," despite the lease's subject matter comprising "regulated activities" and despite the lease "expressly contemplate[ing] retroactive legislation" (cleaned up)); *Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Ass'n*, 992 A.2d 624, 642 (N.H. 2010)

("The simple fact that insurance is a heavily regulated industry does not preclude a conclusion that the Act substantially impairs" the contract.); *Segura v. Frank*, 630 So. 2d 714, 731 (La. 1994) (holding that "the impairments in these cases constitute more than minimal alteration of the UM insurers' contractual obligations and therefore are of constitutional dimension," despite the insurers having "reason to anticipate their obligations under the UM policies . . . might be altered by further legislation").

III. These Analytical Conflicts Raise An Important Federal Issue

The conflicts raised by those decisions that follow the foreseeability bar merit this Court's review, for several reasons.

First, privileging foreseeability cannot be reconciled with the original understanding of "impairing the Obligation of Contracts." Given that the Contracts Clause's text provides no modifier for "impairing," it's not surprising that the Clause's original meaning included *any* impairment. *See Sveen*, 584 U.S. at 827-28 (Gorsuch, J., dissenting). One might plausibly argue that the extent to which a law undermines the contractual bargain or precludes a party from protecting or reinstating his rights is relevant to the question of whether an impairment, as originally understood, has occurred. *See id.* at 820 n.3 (majority opinion). But foreseeability has nothing to do with impairment; at most it concerns the *significance* of impairment. And more broadly, the general weakening of the Contracts Clause that results from the foreseeability bar employed by the Ninth Circuit and other courts runs athwart the expectation of the Framers

that the Clause would help ensure "a government constrained by a concept of the rule of law, restrained in circumstances which present particular risks of majoritarian disregard for minority rights, and rendered stable by barriers against abrupt change in social policy and organization." Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 526 (1987).

Second, privileging foreseeability, especially after the COVID-19 pandemic, risks total elimination of the Contracts Clause. Under states' emergency powers legislation, governors and delegated local governments are free to exercise any and all possible governmental authority. *See, e.g.*, *Ghost Golf, Inc. v. Newsom*, 321 Cal. Rptr. 3d 203, 213 (Ct. App. 2024) (the California Emergency Services Act "delegates to the Governor *all* police power vested in the state by the Constitution and laws of the State of California") (cleaned up). Hence, because citizens are now after COVID on notice that state and local officials are authorized to do essentially anything during an emergency, it follows—at least under the foreseeability bar—that all contractual impairments are foreseeable and, for that reason, *per se* insubstantial. In fact, some courts followed this Contracts-Clause-eviscerating reasoning even during the recent pandemic. *See Williams*, 642 F. Supp. 3d at 1023 ("The fact that an emergency eviction moratorium was not previously part of state law does not mean that landlords could not have reasonably expected the possibility."); *Gallo v. District of Columbia*, 610 F. Supp. 3d 73, 85 (D.D.C. 2022) ("For over a century, landlords in the District have had fair warning that legislation enacted because of

emergencies can impact landlord rights."). This weakening of the Contracts Clause will only accelerate in the next emergency, with the constitutional rights of contracting parties sure to suffer.[4]

Third, the rationale supposedly justifying the privileging of foreseeability—"the expected costs of foreseeable future regulation are already presumed to be priced into the contracts formed under the prior regulation," *Elmsford*, 469 F. Supp. 3d at 169—falls apart when, as with Petitioner's lease contract, the impairment attacks the heart of the bargained-for consideration: the right to receive a monthly stream of rental income and the right to take action to regain the leasehold in the event of a lease breach. *Cf. Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 594 U.S. 758, 765 (2021) (per curiam) ("[P]reventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude."). There is no effective way to price into a contract the likelihood that the contract itself will become a nullity. Rather, in such cases, a contract likely wouldn't form. But that's no answer to the question of whether, as with

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[4] Indeed, robust eviction moratoriums are already being enacted in response to new declarations of emergency. *See, e.g.*, Resolution of the County of Los Angeles Board of Supervisors Protecting Qualifying Income Eligible Tenants Directly Financially Impacted by the January 2025 Windstorm and Critical Wildfire Events (Feb. 25, 2025), *available at* https://file.lacounty.gov/SDSInter/bos/supdocs/200982.pdf; County of Sonoma Board of Supervisors, Lower Russian River Eviction Defense Urgency Ordinance Related to Declared Flood State of Emergency (2025), *available at* https://library.municode.com/ca/sonoma_county/ordinances/code_of_ordinances?nodeId=1344915.

existing contracts like Petitioner's, a substantial impairment of the contract's obligations has occurred. *Cf*. Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 726 (1984) ("Giving notice permits individuals to mitigate their private losses, but is unlikely to leave individuals newly subject to regulation as well off as they were in the absence of the regulation.").

IV. The Petition Presents An Excellent Vehicle To Resolve These Conflicts Over The Foreseeability Bar

First, no justiciability obstacles stand in the way of this Court's review of the question presented. Petitioner's standing has been affirmed by the Ninth Circuit. *Iten*, 81 F.4th at 992. Although the pandemic and Respondent's moratorium have (thankfully) passed, Petitioner's challenge is not moot because Petitioner seeks actual and nominal damages for the injuries caused by the moratorium. Pet.App. 30a-31a. And although Mr. Iten died during the pendency of this appeal, his widow and personal representative has been substituted in to maintain this litigation on behalf of Mr. Iten's estate.

Second, the Petition cleanly presents the issue of the soundness of the foreseeability bar. The Ninth Circuit's ruling on foreseeability was determinative of Petitioner's appeal as well as of the district court's dismissal, and the foreseeability bar constituted the sole ground for both courts' judgments.[5] Pet.App. 1a-3a.

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[5] The district court considered, but did not decide, whether the Contracts Clause claim would be barred if Petitioner's lease did not arise until after the challenged moratorium began to apply to

Third, because the district court dismissed Petitioner's complaint for failure to state a claim, and the Ninth Circuit affirmed on that ground, there are no disputed issues of fact that this Court would need to address to answer the question presented. Pet.App. 1a-3a.

Fourth, the Petition likely presents the last opportunity that this Court has to address Contracts Clause controversies arising from the COVID-19 emergency. As the foregoing discussion of the case law reveals, the Contracts Clause was frequently litigated during the pandemic, with the lower courts arriving at starkly different conclusions about how to apply this Court's case law. Guidance from this Court is needed, especially before the next emergency besets the nation.

Finally, the question of whether the foreseeability bar should be abrogated can be resolved by this Court through a short, per curiam opinion, thereby preserving this Court's resources. The issue is narrow enough that extended treatment by this Court would not be necessary, but even a per curiam opinion would still provide the lower courts with important guidance on how to assess claims under this Court's existing Contracts Clause jurisprudence. *See, e.g.*, *Pakdel v. City*

Petitioner's property in September 2020. Pet.App. 11a-13a. *Cf. Texaco, Inc. v. Short*, 454 U.S. 516, 531 (1982) ("The statute cannot be said to impair a contract that did not exist at the time of its enactment."). Although the County pressed that alternative argument on appeal, the Ninth Circuit did not address it, instead resting its decision solely on the ground that a foreseeable impairment is not actionable. Pet.App. 1a-3a. Should Petitioner prevail in this Court, Petitioner will advance several arguments on remand as to why this alternative argument is without merit. Petitioner's Opening Brief, No. 24-2974, ECF 12 at 21-23 (Aug. 19, 2024); Petitioner's Reply Brief, No. 24-2974, ECF 26 at 4-6 (Nov. 8, 2024).

& County of San Francisco, 594 U.S. 474 (2021) (per curiam) (abrogating the Ninth Circuit's hyper-finality requirements for takings claimants).

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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