No. 20-56251

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APARTMENT ASSOCIATION OF LOS ANGELES COUNTY, INC., dba "APARTMENT ASSOCIATION OF GREATER LOS ANGELES,"

Plaintiff-Appellant,

vs.

CITY OF LOS ANGELES; ERIC GARCETTI, in his official capacity as Mayor of Los Angeles; and CITY COUNCIL OF THE CITY OF LOS ANGELES, in its official capacity; DOES 1 through 25, inclusive,

Defendants-Appellees;

ALLIANCE OF CALIFORNIANS FOR COMMUNITY EMPOWERMENT ACTION and STRATEGIC ACTIONS FOR A JUST ECONOMY,

Intervenors.

APPELLANT'S OPENING BRIEF

Appeal from United States District Court
for the Central District of California
Case No. 2:20-cv-05193-DDP-JEM
The Honorable Dean D. Pregerson

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant APARTMENT ASSOCIATION OF LOS ANGELES COUNTY, INC. dba APARTMENT ASSOCIATION OF GREATER LOS ANGELES (AAGLA) is a mutual benefit C corporation with no parent corporation and no outstanding stock shares or other securities in the hands of the public. AAGLA does not have any parent, subsidiary, or affiliate that has issued stock shares or other securities to the public. No publicly held corporation owns any stock in AAGLA.

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INTRODUCTION

In the wake of the novel COVID-19 pandemic, states and municipalities throughout the nation struggled to contain the fallout from a once-in-a-lifetime public health crisis. One way that well-meaning local governments attempted to do so was by adopting eviction moratoria to prevent the displacement of tenants who were financially impacted by the pandemic. Nobody seriously disputes the government's legitimate interest in keeping people off the streets, particularly during the course of a global emergency necessitating "shelter in place" orders aimed at reducing the spread of a virulent pathogen. Nor does anyone want to see hardworking Americans evicted because they lost their jobs through no fault of their own.

To address what was speculated to be an impending "flood of evictions" in the City of Los Angeles ("City"), the City cobbled together its own Eviction Moratorium. But by any measure, the City's response proves too much. That enactment doesn't just effectively freeze a landlord's ability to evict defaulting tenants, it also allows tenants to unilaterally withhold all rent payments coming due during the indefinite "Local Emergency Period," and further allows tenants a full one-year grace period to repay those rents once the emergency is declared to be over. And what's more — unlike the State's own moratorium that is displaced by the City's ordinance — tenants need not provide to their landlords *any evidence* of

an inability to pay, nor does it even require that tenants put their landlords on notice that they do not intend to pay. In other words, tenants may simply stop paying and cease communications with their landlords, while landlords are left to guess the reason. If a landlord then "endeavor[s] to evict" that tenant, she faces a serious gamble. If the tenant — who has provided no evidence of an inability to pay, and may not have even communicated with the landlord about the situation — turns out to truly be impacted, the landlord then faces administrative penalties by the City *and* liability in the form of a private right of action for tenants, resulting in up to $15,000 per violation.

Going further, the Moratorium prohibits any property owner from "endeavoring to evict" any tenant for the material breach of other essential lease terms like the housing of unauthorized persons or pets. The Eviction Moratorium also prohibits landlords from recovering late fees or interest on the back rents owed, regardless of whether the parties agreed to such terms at the onset of their agreement.

While the Eviction Moratorium provides a cornucopia of protections to tenants, it doesn't even throw landlords a bone. The City has yet to explain why it thinks struggling tenants who are unable to pay monthly rent now will be in a position to pay back what will likely be a year's worth of rent at the expiration of the City's one-year grace period. Moreover, by allowing defaulting tenants to

withhold all rent and remain in their premises indefinitely, the City has obliterated landlords' ability to mitigate damages by re-letting the premises to paying tenants.

Plaintiff and Appellant Apartment Association of Los Angeles Co., Inc. dba "Apartment Association of Greater Los Angeles" ("AAGLA") filed this action to enjoin and invalidate the City's Eviction Moratorium on various grounds, including that it violates the Contract Clause embodied in Article I, Section 10 of the United States Constitution. As the Supreme Court has repeatedly emphasized in its "moratorium" jurisprudence in times of emergency, eviction and foreclosure moratoria must balance the interests of both those in actual possession and those holding the right to possession. The only moratoria the Supreme Court has upheld are those that required the party in possession to pay the "reasonable rental value" to the party prevented from regaining possession. *See, e.g.*, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 424 (1934) (upholding moratorium where party in possession required to pay reasonable rent determined in court proceedings during moratorium); and *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 63 (1935) (the following year, invalidating moratorium where party in possession was not required to pay reasonable rent during moratorium).

AAGLA now appeals the district court's November 13, 2020 order denying AAGLA's Motion for Preliminary Injunction seeking to enjoin further implementation of the City's Eviction Moratorium. In light of the new statewide

eviction moratorium, fears of an impending flood of evictions are simply unfounded. Indeed, under the statewide moratorium, tenants providing a declaration of COVID-19-related financial distress (and who pay at least 25% of their rent between September 1, 2020 and January 31, 2021) may *never* be evicted for those missed rent payments.

AAGLA's members, as well as all property owners who lease residential properties in the City, should at least have the opportunity to enjoy the benefits of the state law that the City has deemed to not apply within its boundaries. Even well-intentioned laws must pass Constitutional muster. The City's Eviction Moratorium does not. It must be enjoined.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

The district court's Order denying the preliminary injunction was entered on November 13, 2020. ER 502. AAGLA timely filed a notice of appeal on November 25, 2020. ER 31–32, 503; *see also* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Did the district court err in concluding that AAGLA was not likely to succeed on the merits of its Contract Clause claim, despite the City of Los Angeles's Eviction Moratorium indefinitely suspending summary unlawful detainer proceedings, which represent the exclusive legal remedy available to

property owners who need to regain possession of their properties from defaulting tenants in order to mitigate their losses?

2. Did the district court err in concluding that AAGLA did not meet its burden to establish a likelihood of irreparable harm absent an injunction?

3. Did the district court err in concluding that AAGLA did not meet its burden to establish that the balance of equities and the public interest weighed in its favor?

STATEMENT OF THE CASE

I. For Nearly 150 Years, Summary Unlawful Detainer Proceedings Have Been the Sole Legal Remedy For Property Owners in California to Regain Possession of Property From Defaulting or Holdover Tenants.

In 1872, the California Legislature enacted its unlawful detainer statutes to provide for an expedited summary process for property owners seeking to regain possession of real property from defaulting tenants. *See Childs v. Eltinge*, 29 Cal. App. 3d 843, 853 (1979); *Lindsey v. Normet*, 405 U.S. 56, 71 (1972). The idea was simple: Property owners would give up their common law right to evict defaulting tenants through "self-help" measures, and in exchange would be guaranteed an expeditious legal process to remove the tenant in what is known as a summary unlawful detainer proceeding. *See Eltinge*, 29 Cal. App. 3d at 853; *see also* Cal. Civ. Code § 789.3 (prohibiting landlords from disabling utilities, locking out tenants, and removing tenants' personal belongings, among other things);

§ 1159 (prohibiting any type of "forcible entry" to regain possession).

The statutory scheme for unlawful detainers in California is set forth in Code of Civil Procedure §§ 1159 *et seq*. To regain possession, a property owner must serve the tenant with a notice to pay rent or quit, wait the requisite time after service (typically three days), then initiate a summary process eviction action in court by serving the tenant with a summons and complaint. *Id.* §§ 1167, 1167.1, 1167.3.

While the statutory scheme for unlawful detainers restricts how property owners regain possession of their properties, the proceedings provide a reliable and expedited process to recover possession. These legal assurances necessarily undergird the rights and obligations of the parties in each and every lease agreement in California. *See Blaisdell*, 290 U.S. at 429–430 (1934) ("the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms"). So, when contracting with tenants, property owners depend on their right to initiate summary proceedings when drafting the terms under which to lease the properties. Such terms invariably include the amount of the rent, the amount of the security deposit, the length of the tenancy, whether or not pets or other occupants are allowed, and the grounds on which the parties may terminate the lease. *See, e.g.*, ER 420–29 (example of a standard residential lease agreement). The unlawful

detainer provisions, implied in every lease in California, are also necessary for landlords to mitigate damages from a defaulting tenant by re-letting the premises to a paying tenant. *See Green v. Smith*, 261 Cal. App. 2d 392, 396 (1968) ("It has been the policy of the courts to promote the mitigation of damages . . . A plaintiff cannot be compensated for damages which he could have avoided by reasonable effort or expenditures."); *see also* Cal. Civ. Code § 1951.2 (West 2010) (providing a statutory duty requiring landlords to mitigate damages after tenant's breach for nonpayment, with legislative committee comments citing *Green v. Smith* to note that "[t]he general principles that govern mitigation of damages apply" in such circumstances).

II. The City Radically Alters the Rights and Responsibilities of Tenants and Property Owners by Indefinitely Suspending Property Owners' Ability to Initiate Summary Unlawful Detainer Proceedings.

On March 27, 2020, the Los Angeles City Council enacted Ordinance No. 186585 (the "Eviction Moratorium"), imposing a moratorium on most evictions in response to the COVID-19 pandemic.[1] *See* L.A., Cal. Mun. Code §§ 49.99 *et seq*. The Eviction Moratorium was signed by Mayor Eric Garcetti on March 31, 2020, but retroactively applied to "nonpayment eviction notices, no-fault eviction

[1] The moratorium was amended on May 6, 2020, by Ordinance No. 186606, which added additional protections for tenants. *See* L.A., Cal. Mun. Code § 49.99.

notices, and unlawful detainer actions based on such notices, served or filed on or after the date on which a local emergency was proclaimed." *Id.* § 49.99.5. The Local Emergency Period is defined as "the period of time from March 4, 2020, to the end of the local emergency as declared by the Mayor."[2] *Id.* § 49.99.1(C). The Eviction Moratorium remains in effect for the duration of the indefinite Local Emergency Period, but evictions also remain prohibited for an additional twelve months thereafter for any rent debts accruing during that time. *Id.* § 49.99.2(A). The Eviction Moratorium does not eliminate the obligation to pay lawfully charged rent at the end of the one-year grace period. *Id.*

The City's Eviction Moratorium prohibits property owners from terminating tenancies based on: (1) non-payment of rent due to COVID-19 related inability to pay (without requiring documentation of such inability); (2) any "no fault" reason for termination; (3) certain lease violations related to unauthorized occupants, unauthorized pets, and nuisance; and (4) the Ellis Act. *Id.* §§ 49.99.2(A)–(C), 49.99.4. The Eviction Moratorium also provides for an extended grace period — giving tenants up to 12 months after the end of the Local Emergency to repay the delayed rent — and forbids landlords from charging any interest or late fees. *Id.*

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[2] Pursuant to state law, *i.e.*, AB 3088 (discussed below), any grace period tied to the end of the local emergency (such as the City's Eviction Moratorium) must begin to run by March 1, 2021, and may not run beyond March 31, 2022. *See* Cal. Civ. Proc. § 1179.05(a)(2)(B), (C).

§§ 49.99.2(A), (D). Further, while it provides that tenants "may" agree to a repayment plan, they are not required to do so. *Id.* § 49.99.2(A). Thus, a tenant who fails to pay rent during the emergency period can refuse to pay any of that back rent for another full year after the emergency is lifted, before the property owner has any recourse. And while the City has dramatically reduced the obligations of tenants, property owners are not given any relief from express or implied lease conditions requiring them to pay for tenants' utilities and maintain secure and habitable living units, nor are owners excused from property tax liabilities, insurance costs, or debt service.

Of note — and in contrast to recent state legislation — the Eviction Moratorium does not require tenants to provide any evidence of pandemic-related inability to pay rent, or even to give their landlords notice before they stop paying. *Compare* L.A. Mun. Code § 49.99.1(B) (City's moratorium placing onus on landlord to have "good faith" belief that a tenant does not qualify for protections), *with* Cal. Civ. Proc. Code § 1179.03(g) (state moratorium requiring tenant to submit a declaration to landlord evidencing that he or she qualifies for protections). The Eviction Moratorium nonetheless prohibits owners from "endeavoring to evict" any tenant with such an inability, in addition to providing that COVID-19-related inability to pay serves as an affirmative defense to eviction for non-payment. *Id.* §§ 49.99.2(A), 49.99.6. As a result, landlords have no opportunity or

forum in which to contest a tenant's claim for protection.

Landlords who violate the Eviction Moratorium — *e.g.*, by attempting to exercise their rights under the unlawful detainer statutes — are subject to penalties, including administrative citations. *Id.* § 49.99.8. Moreover, the Eviction Moratorium also creates a private right of action exclusively in favor of tenants, allowing tenants to sue their landlords for violating the Eviction Moratorium, after providing notice and a 15-day period to cure the violation. *Id.* § 49.99.7. A tenant may bring an action for civil penalties of up to $10,000 per violation (plus up to an additional $5,000 per violation if the tenant is a senior citizen or disabled). *Id.*

Finally, the City established the Emergency Rental Assistance Subsidy Program, which subsidized 50,000 low-income tenants living in multifamily units by sending cash payments directly to landlords. ER 327–28. This program distributed funds in two $1,000 increments, for a maximum of $2,000 in assistance to a qualified tenant. ER 328. Tenants could apply for assistance over the course of five days between July 13 and July 17, 2020.[3] Landlords were not able to apply for funding on behalf of their tenants. Rather, tenants were required to voluntarily initiate the process by submitting to the City proof of tenancy, low-income status,

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[3] *See* Los Angeles Housing & Community Investment Department, *Emergency Renters Relief Program: About the Program*, https://hcidla2.lacity.org/wp-content/uploads/2020/07/ERAS-FLYER.pdf (last visited December 15, 2020).

and *documentary* evidence showing "loss or reduction of income due to COVID-19."[4] ER 328. The subsidy program's funds — just over $100 million — have been exhausted. ER 327 (noting that "the demand for rental assistance exceeds the available funds").

Despite the subsidy, existing rent debt obligations are still projected to balloon to as much as $909 million by January 2021. ER 187 (Professor Emily Benfer citing study by investment banking firm Stout Risius Ross, LLC). Indeed, the Intervenors' declarations in the court below show the rapidly increasing magnitude of the problem. *See, e.g.*, ER 280 (declarant owed $9,000 at the time of declaration, October 2020), 286 ("now close to 9,000"), 299 ("approximately $9,205" for rent owed between April and October). And for tenants who qualified for the City's subsidy, the program likely had a relatively minor impact on individual debt loads. *See* ER 280 (declarant stating that he applied for assistance from the City, but "[e]ven if I did get these funds, it would only cover a small portion of my accumulating debt").

III. The California Legislature Passes a Less Aggressive Statewide Eviction Moratorium.

While AB 3088 is not challenged in this proceeding, a review of its

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[4] AAGLA notes the irony of the requirement that tenants provide evidentiary support to show eligibility when the City's money is involved, while the City does not require tenants demonstrate COVID-19-related financial distress when a landlord's money is involved.

provisions is helpful to understand the scope and scale of the City's Eviction Moratorium, and to understand why invalidation of the City's Eviction Moratorium could not possibly lead to evictions en masse. On August 31, 2020, the California Legislature adopted the COVID-19 Tenant Relief Act embodied in Assembly Bill 3088 ("AB 3088"), which imposes a statewide moratorium in favor of all California tenants experiencing "COVID-19 related financial distress." *See* Cal. Civ. Proc. Code §§ 1179.01 *et seq*. Under AB 3088, tenants who sign a declaration stating that they are unable to pay their rent due to COVID-19-related financial distress may not (ever) be evicted for failure to pay any rent that came due between March 1, 2020, and August 31, 2020. *See* Civ. Proc. Code § 1179.03(b)(3) (notice to tenant demanding payment of rent due during "protected time period" must advise "tenant that the tenant cannot be evicted for failure to comply with the notice if the tenant delivers a signed declaration of COVID-19-related financial distress"); *see also* § 1179.02(f) (defining "protected time period" to run "between March 1, 2020, and August 31, 2020").

Further, tenants who sign a similar declaration cannot be evicted for failure to pay any rent that came due between September 1, 2020 and January 31, 2021, as long as they pay 25% of such rental obligations no later than January 31, 2021. *Id.* § 1179.03(3)–(4) (notice to tenant demanding payment that came due during "transition time period" must advise tenant that tenant cannot be evicted if it

provides declaration of COVID-19-related financial distress and tenant pays "at least 25% of each rental payment that came due or will come due during period between September 1, 2020, and January 31, 2021" on or before January 31, 2021). Certain "high-income" tenants may be required to provide documentation supporting their declaration. *Id.* § 1179.02.5.

While the unlawful detainer statutes ordinarily allow landlords to serve a three day notice to pay or quit when a tenant defaults on rent (*see* Civil Code § 1161(2)), AB 3088 provides that any such notice seeking COVID-19 rental debt must specify a period no shorter than "15 days, excluding Saturdays, Sundays, and other judicial holidays" for the tenant to pay the amount due or deliver possession of the property. Civ. Proc. Code § 1179.03(b)(1). In addition, the notice must advise the tenant of her rights under AB 3088, and include both a specified notice from the State and an unsigned copy of the declaration necessary to obtain protection from eviction. *Id.* § 1179.03(b)–(e).

Although AB 3088 restricts cities and counties from taking additional (post-August 19, 2020) measures to protect tenants from eviction in response to the COVID-19 pandemic, it does not expressly preempt most aspects of existing local ordinances. *See generally* Civ. Proc. Code § 1179.05. Thus, property owners within the City must comply with potentially conflicting requirements of both the City and State moratoria. For example, a landlord who attempts to follow AB

3088's process for demanding unpaid rent may violate the City's prohibition on "endeavor[ing] to evict a tenant," which is defined to include the service of any "notice to pay or quit." *Compare* Civ. Proc. Code § 1179.03 (providing a process to serve notice demanding payment), *with* L.A., Cal. Mun. Code §§ 49.99.1(B), 49.99.2(A)–(C) (prohibiting service of notice). So, merely by following state law, a property owner might find herself subject to tens of thousands of dollars in administrative or civil penalties at the hands of the City or her tenants. *See* L.A., Cal. Mun. Code §§ 49.99.7, 49.99.8.

The Eviction Moratorium also bars other evictions or attempted evictions that are not prohibited under AB 3088, including those based on unauthorized occupants or pets or "for nuisance related to COVID-19." *Id.* § 49.99.2(C). Further, unlike AB 3088, the Eviction Moratorium prohibits landlords from charging interest or late fees on unpaid rent. *Id.* § 49.99.2(D).

IV. Procedural History.

A. AAGLA Challenges the City's Eviction Moratorium.

AAGLA is comprised of over 10,000 members that own or manage over 150,000 rental housing units throughout the greater Los Angeles area, including 55,000 units within the City. ER 418, 419. On June 11, 2020, AAGLA sued the City of Los Angeles, its Mayor Eric Garcetti in his official capacity, and its City Council, alleging among other things that the COVID-19-related Eviction

Moratorium violates property owners' constitutional rights under the Contract Clause of the United States Constitution, the Due Process Clause, the Takings Clause, and the Tenth Amendment. *See generally* ER 447–86 (Third Amended Complaint). AAGLA then moved to preliminarily enjoin the Eviction Moratorium on Contract Clause and Due Process grounds.[5] *See generally* ER 385–416 (Motion for Preliminary Injunction). Relevant to this appeal, AAGLA argued that the Eviction Moratorium substantially impairs existing contracts by preventing property owners from exercising their right to initiate summary unlawful detainer proceedings to replace defaulting tenants with paying tenants.[6] ER 403–11.

B. The District Court Declines to Issue a Preliminary Injunction Enjoining the Eviction Moratorium.

On November 13, 2020, the district court entered its Order denying AAGLA's motion to preliminarily enjoin the City's Eviction Moratorium. *See generally* ER 2–29. The district court held that AAGLA was not likely to succeed on the merits of its Contract Clause claim, that AAGLA failed to demonstrate a likelihood of irreparable harm, that the balance of equities did not favor AAGLA, and that a preliminary injunction was not in the public interest. *See* ER 9–20 (success on the merits), 20–27 (irreparable harm), 27–28 (balance of equities and

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[5] AAGLA also challenged the City's Rent Freeze Ordinance on similar grounds. The district court's ruling as to that Ordinance is not appealed here.

[6] AAGLA does not appeal the district court's ruling as to its Due Process claim.

public interest).

As to the likelihood of success on the merits, the court looked to "(1) whether the law operate[s] as a substantial impairment of a contractual relationship, (2) whether the City has a significant and legitimate public purpose in enacting the moratorium, and (3) whether the adjustment of the rights of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." ER 9 (quoting *Energy Reserves Grp., Inc. v. Kansas Power & Light*, 459 U.S. 400, 411–12) (1983) (quotation marks omitted)).

The district court found that the Eviction Moratorium operates as a substantial impairment on existing lease agreements because "it would be difficult to conclude that the Moratorium does not, at a minimum, significantly interfere with landlords' reasonable expectations." ER 11. The district court thus disagreed with other district court decisions across the nation that held similar eviction moratoria to be "relatively minor alterations to existing regulatory frameworks." ER 12. Instead, the court concluded "that the scope and nature of the COVID-19 pandemic, and of the public health measures necessary to combat it, have no precedent in the modern era, and that no amount of prior regulation could have led landlords to expect anything like the blanket Moratorium." ER 12 (citing *Baptiste v. Kennealy*, No. 1:20-CV-11335-MLW, 2020 WL 5751572, at *16 (D. Mass.

Sept. 25, 2020)).

Moving to the question of the Eviction Moratorium's reasonableness,[7] the court concluded that AAGLA was not likely to succeed because the Moratorium is reasonably conditioned to the public purposes it purports to serve. ER 13–20. To hold as much, the court opted to "defer to the City Council's weighing of the interests at stake," as the court believed there to be an "absence of any specific prerequisite for reasonableness, let alone a requirement that the Moratorium provide for rent payments to landlords." ER 17. The court further found that the Eviction Moratorium "is addressed to protect a basic societal need, is temporary in nature, does not disturb landlords' ability to obtain a judgment for contract damages, does not absolve tenants of any obligation to pay any amount of rent, does not appear to impact landlords' ability to obtain housing, and was implemented in the context of a state of emergency." ER 18; *see also* ER 19 (citing the City's rental assistance program). Because the court found that the Moratorium is reasonable, it held that AAGLA was unlikely to succeed on the merits of its Contract Clause claim, despite its finding that the Moratorium substantially impairs existing lease agreements. ER 20.

The district court also held that AAGLA did not show a likelihood of

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[7] AAGLA did not contend in the court below that the Eviction Moratorium does not seek to advance a significant and legitimate public purpose. *See* ER 25, 375.

irreparable harm. ER 20–27. AAGLA contended that under this Court's precedent, a variety of constitutional injuries are presumed to cause irreparable harm and that the presumption should extend to violations of the Contract Clause. ER 402–03, 134–36. The district court noted "tension" in Ninth Circuit precedent between presuming harm and avoiding the analysis "collaps[ing] into the merits question." ER 20–21 (citing *Cuviello v. City of Vallejo*, 944 F.3d 816, 831 (9th Cir. 2019). The district court believed it unnecessary to resolve the question, however, as "AAGLA ha[d] not demonstrated a likelihood of success on the merits of its constitutional claims." ER 21.

The court proceeded to hold that economic harms are not irreparable and distinguished cases cited by AAGLA suggesting that where a defendant is judgment proof, economic harms may rise to irreparable harm because any judgments secured would not be collectible. ER 21-23. The extent of the district court's analysis distinguishing the cases cited by AAGLA was a single assertion that they "bear little resemblance to the instant suit" because "AAGLA seeks only declaratory and injunctive relief, not monetary damages." ER 22. The court noted that foreclosure could constitute irreparable harm, but held that AAGLA did not show imminence by way of the declarations submitted in support of its motion. ER 23–24.

Finally, the court believed that the preliminary injunction sought by AAGLA

would not prevent the harm that it alleged. Namely, the court opined that the City's Eviction Moratorium is "but one layer of protection Los Angeles renters currently enjoy," including Assembly Bill 3088, passed by the California legislature. ER 24–26.

As to the remaining factors for a preliminary injunction to issue, the district court held that the balance of equities and the public interest favored denying the injunction. ER 27–28. Accordingly, the court declined to enjoin the Eviction Moratorium. ER 28–29. AAGLA, the City, and the Intervenors stipulated to stay proceedings in the court below pending this appeal. ER 503. AAGLA timely appealed. ER 31–32, 503.

SUMMARY OF THE ARGUMENT

The district court committed reversible error by declining to enjoin the Eviction Moratorium. AAGLA satisfies all requirements for a preliminary injunction to issue. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Namely, AAGLA is likely to succeed on the merits of its claim that the Eviction Moratorium violates the Contract Clause of the United States Constitution. AAGLA also showed a likelihood of irreparable harm to its members absent injunction. And finally, AAGLA demonstrated that the balance of equities and public interest favors enjoining the Moratorium.

On the merits, AAGLA must show that the Eviction Moratorium (1)

"operate[s] a substantial impairment of a contractual relationship," and either (2) does not serve a "significant and legitimate public purpose," or, if it does, (3) that the "adjustment" of contract rights affected by the law is not "based upon reasonable conditions and . . . of a character appropriate to the public purpose." *See Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983). The district court held that AAGLA was unlikely to succeed on the merits of its claim, but only after *agreeing with AAGLA* that the Eviction Moratorium substantially impairs existing contracts. ER 12. The district court incorrectly believed, however, that the Moratorium is reasonably conditioned to advance admittedly important public goals. ER 16–17.

It is clear that the Eviction Moratorium substantially impairs contracts. *See* ER 12. But contrary to the district court's erroneous ruling, the Eviction Moratorium's "adjustment" of contract rights is not based upon reasonable conditions. In analyzing this point, the district court believed there to be no "specific prerequisite for reasonableness" and instead chose to "defer to the City Council's weighing of the interests at stake." ER 17. This was error — the Supreme Court *has* established a standard for reasonableness for Contract Clause claims like those here. That standard asks whether a property owner is ensured *fair rental compensation* during the pendency of a moratorium delaying her right to regain possession of her property. *See Blaisdell*, 290 U.S. at 445; *see also*

Kavanaugh, supra, 295 U.S. 56, 63 (1935).

The standard from *Blaisdell* and *Kavanaugh* has not been satisfied here. By the Eviction Moratorium's own terms, tenants may unilaterally decline to pay *any rent* (and without any evidence of an inability to pay) so long as the local emergency proclamation remains in place. *See* L.A., Cal. Mun. Code § 49.99.2(A). Property owners, who must continue to meet their own obligations and expenses, are meanwhile prevented from initiating summary proceedings to remedy tenant default. *See id.* These are the hallmarks of unreasonableness and fly in the face of clear Supreme Court authority.

Furthermore, AAGLA's members face a likelihood of irreparable harm absent injunctive relief. The district court's decision is fatally flawed on this point for three reasons. First, the district court erred by holding as a matter of law that a landlord's right to sue unidentified third parties at some future and uncertain date vitiated any potential "harms" landlords are presently and actually suffering. ER 22-23. Moreover, the court erred by not recognizing the actual harms suffered by landlords at the hands of the City's Moratorium. ER 23-24.[8] And finally, the court

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[8] The district court conceded that actual foreclosures would satisfy the irreparable harm requirement, citing to *Sundance Land Corp. v. Community First Fed. Savings & Loan Ass'n,* 840 F.2d 653, 661 (9th Cir. 1988). ER 22. But the district court determined that it did not believe such foreclosures were yet "imminent" and speculated that lenders might have an incentive to accommodate borrowers. *Id*. Of course, as this Court has previously recognized, where irreparable harm will likely

failed to apply a presumption of irreparable harm that this Court has consistently applied when reviewing appeals of preliminary injunctions for a kaleidoscope of other constitutional violations. ER 19–20; *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2019).

Lastly, AAGLA amply demonstrated that the balance of equities and the public interest favor issuing an injunction. This is so because, contrary to the district court's fears, enjoining the City's Eviction Moratorium will merely place landlords and tenants on equal footing, by making property owners and tenants subject to the State's moratorium. As this Court and other circuits have repeatedly held, "it is always in the public interest to prevent the violation of a party's constitutional rights." *See Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002) (quoting *G&V Lounge, Inc. v. Mich. Liquor Cont. Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)); *Melendres*, 695 F.3d at 1002 (same).

STANDARD OF REVIEW

This Court reviews a district court's denial of a preliminary injunction for abuse of discretion. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d

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occur sometime in the future, preliminary injunctions are appropriate. *Privitera v. Calif. Bd. of Med. Quality Assurance,* 926 F.2d 890, 897 (9th Cir. 1991) (holding district court erred by denying preliminary injunction on grounds that hearing on license revocation was three months away).

914, 918 (9th Cir. 2003) (en banc). A district court abuses its discretion if its decision is based "on an erroneous legal standard or clearly erroneous findings of fact." *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc). A two-part test is used to determine whether a district court has abused its discretion. First, this Court must "determine de novo whether the trial court identified the correct legal rule to apply to the relief requested." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009). If not, the court necessarily abused its discretion. *See id.* Second, and only if the district court identified the correct legal rule, this Court must "determine whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (quotation marks and citation omitted). "If any of these three apply," then a district court has "abused its discretion by making a clearly erroneous finding of fact." *Id.* "[F]actual findings predicated on a misunderstanding of the governing rules of law" amount to clear error. *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 944 (9th Cir. 2014).

To secure a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555

U.S. 7, 20 (2008). "Where the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge." *Padilla v. Immigration & Customs Enf't*, 953 F.3d 1134, 1141 (9th Cir. 2020) (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)).

Alternatively, "[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (citation omitted).

ARGUMENT

I. AAGLA is Likely to Succeed on the Merits of Its Contract Clause Claim.

A. To Succeed on a Contract Clause Claim, a Plaintiff Must Show that the Challenged Law Substantially Impairs an Existing Contract and is Not Reasonably Conditioned to Effectuate a Legitimate Public Purpose.

Article I, Section 10 of the United States Constitution provides in part: "No State shall . . . pass any Law impairing the Obligation of Contracts." While "facially absolute," the Contract Clause's "prohibition must be accommodated to the inherent police power of the State 'to safeguard against the vital interests of its people.'" *Energy Reserves, supra,* 459 U.S. at 410 (1983) (quoting *Blaisdell*, 290 U.S. at 434 (1934)). The Supreme Court has established a three-part test to determine whether a particular law runs afoul of the Contract Clause. First, the

"threshold inquiry" asks whether the law substantially impairs an existing contractual relationship. *Id.* at 411. "The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." *Id.* (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978)). Second, if the law or regulation constitutes a substantial impairment, the government "must have a significant and legitimate public purpose behind the regulation." *Energy Reserves*, 459 U.S. at 411. Finally, the means by which the government seeks to advance the public interest "must be upon reasonable conditions and of a character appropriate to the public purpose justifying [the law's] adoption." *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977).

B. As the District Court Correctly Held, the City's Eviction Moratorium Substantially Impairs Existing Contracts Between AAGLA's Members and Their Tenants.

To establish "substantial impairment," a plaintiff need not demonstrate a "[t]otal destruction of contractual expectations." *Energy Reserves*, 459 U.S. at 411 (citing *U.S. Trust Co.*, 431 U.S. at 26–27). Instead, impairment is substantial where a law "undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018). A court will consider the extent to which the contractual relationship impaired has historically been subject to the same type of regulation in the past. *See Energy Reserves*, 459 U.S. at 411;

see also Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.")

The district court correctly found that the City's Eviction Moratorium substantially impairs existing lease agreements because "no amount of prior regulation could have led landlords to expect anything like the blanket Moratorium." ER 12. At the heart of any rental lease is the tenant's agreement to pay rent — typically on a monthly basis, with rent paid in advance for the coming month — in exchange for the right to occupy housing. *See* ER 420 (first page of a standard lease showing payment terms as paramount). Payment of rent is typically the only affirmative obligation borne by a residential tenant. That rent is the consideration for every obligation a landlord is required to undertake in order to provide habitable housing, including not only providing shelter in the first instance, but maintaining the property and providing amenities. The Eviction Moratorium thus requires landlords to continue to uphold their end of the bargain, even when a tenant has defaulted on their sole obligation, *i.e.*, where there is a complete failure of consideration. So, by requiring landlords to continue to provide housing even where tenants have entirely failed to abide by essential terms of their agreements, the City has dramatically altered existing contracts in a way that is inconsistent with historic regulation and fundamentally changes the landlord-tenant

relationship.[9]

Moreover, as the Supreme Court made clear in *Blaisdell*, the Contract Clause cases demonstrate a heightened concern for government measures that impair the "means of enforcement" of the contract:

> This Court has said that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. *Nothing can be more material to the obligation than the means of enforcement.*

Blaisdell, 290 U.S. at 430 (quotation marks omitted, emphasis added); *see also Bronson v. Kinzie*, 163 U.S. 118, 122 (1896) (same).

By precluding landlords from "endeavoring to evict" tenants for nonpayment of rent, "no fault reasons," or for unauthorized occupants or pets, the Eviction Moratorium obliterates the primary enforcement mechanism embodied in

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[9] AAGLA did not dispute in the court below that the landlord-tenant relationship has been subject to historic regulation. Indeed, rent control ordinances have survived constitutional scrutiny, provided they assure landlords a fair and reasonable return on regulated properties. *See, e.g.*, *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988). In the case of the Eviction Moratorium, however, the provisions precluding eviction apply to all residential properties, whether rent-controlled or otherwise. In addition, the City has not simply limited the amount of rent a particular landlord may charge. The Eviction Moratorium instead wholly eliminates a landlord's primary remedy for nonpayment of rent for the foreseeable future. And although the Eviction Moratorium purports to limit a tenant's recourse to protection for only those tenants "who cannot pay" due to pandemic-related reasons, such tenants are not required to prove such inability.

residential leases: California's unlawful detainer statutes. As discussed earlier, gone are the days of landlord self-help. Instead, summary eviction proceedings are the only legal remedy — and consequently the primary enforcement mechanism — that a property owner may pursue to regain possession when tenants default. By prohibiting summary unlawful detainer proceedings, the Eviction Moratorium strikes at the core of that which must be protected under the Contract Clause — the means of enforcing a contract. *Id.* at 430.

The Eviction Moratorium allows tenants to remain in their dwellings indefinitely without paying any of their rental obligations through the end of the "local emergency." L.A., Cal. Mun. Code § 49.99.2(A). The Eviction Moratorium further allows a tenant to wait a full year after the local emergency period is lifted before paying any back rent, but does nothing to ensure that a tenant will actually have the ability to pay at the end of the grace period. *Id.* At the same time, the Eviction Moratorium provides no protection for landlords whose tenants depart after exhausting the full rent forbearance. These are the hallmarks of substantial impairment.

It is true that the Eviction Moratorium does not expressly excuse tenants from their duty to pay rent. *See* ER 10; *see also* L.A., Cal. Mun. Code § 49.99.2(A)). Relying on this provision in the court below, the City argued there is no substantial impairment because landlords may simply file what would amount

to hundreds of thousands of lawsuits against tenants at some point in the future and secure money judgments against them. ER 354; *see also* ER 187 (200,000 to 300,000 renter households facing potential default as of October 2020). But as the statistics and declarations in the record make plain, this provision is cold comfort given the explosion in rent debt loads by hundreds of millions of dollars (and growing), *see* ER 187, making any potential future judgments against tenants "largely illusory." *Baptiste v. Kennealy*, No. 1:20-CV-11335-MLW, 2020 WL 5751572, at *9 (D. Mass. Sept. 25, 2020) ("tenants who have not paid their rent for many months . . . are unlikely to pay a money judgment against them"). And indeed, as openly admitted by Intervenors in this very case, the end goal may in fact be outright rent debt cancellation. *See* ER 177 (stating that Intervenors "have been organizing and calling for the cancellation of rent debt" because "low-income tenants are going to have a very hard time scraping together the money to pay back the debt they owe" during the repayment period).

For those tenants who manage to repay back rent, the Eviction Moratorium prohibits a landlord from recovering any late fees or interest on such rent, notwithstanding any contractual provisions (like those found in virtually all rental agreements, *see, e.g.*, ER 420, 421) entitling them to late fees and/or interest if rent is not paid on time. This provision alone constitutes a substantial impairment of the leases held by AAGLA's members, and would deprive landlords of the time

value of such money for up to two years (per AB 3088, the City's grace period will apparently end March 1, 2022, *see* Civ. Proc. Code § 1179.05(a)(2)(B)). These are precisely the types of contractual impairments that are prohibited by the Contract Clause. *See Univ. of Hawaii Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1104 (9th Cir. 1999) (implementation of "after-the-fact payroll system" by delaying paychecks one to three days, for only 6 of the 24 annual paychecks, constitutes "substantial impairment" of contract); *see also S. California Gas Go. v. City of Santa Ana*, 336 F.3d 885, 890 (9th Cir. 2003) (same). Indeed, property owners have a constitutional right to recover the time value of money (*i.e.*, "interest") when a monetary obligation is delayed. *See Phelps v. United States*, 274 U.S. 341, 343–344 (1927) (United States Constitution requires payment of interest between the time property is "taken" and the time "just compensation" is paid). In addition, California law specifically provides for prejudgment interest on contractual obligations at the specified rate in the contract or, if not specified, at 10% per annum, *see* Civil Code § 3289, and post-judgment interest at the rate of 10% per annum under the Code of Civil Procedure § 685.010.

The City also directly interfered with every lease agreement in which additional occupants or pets were forbidden by contract. Rental agreements often include such provisions in order to protect property from damage and excessive wear, as well as to protect other tenants. *See* Jay M. Zitter, Annotation, *Effect, As*

Between Landlord and Tenant, of Lease Clause Restricting Keeping of Pets, 114 A.L.R.5th 443 (2003). Yet, under the Eviction Moratorium, landlords are forced to accept unauthorized occupants and pets on their properties in direct violation of their leases. L.A., Cal. Mun. Code § 49.99.2(C). Such provisions not only substantially interfere with AAGLA's members' contracts, but also violate the fundamental right of property owners to freely exclude others from their properties. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (emphasizing that a property owner's right to exclude constitutes "'one of the most essential sticks in the bundle of rights that are commonly characterized as property'") (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

Changing — or, as here, wholly eliminating — the statutory eviction process drastically alters (after-the-fact) the costs and benefits that property owners must factor into the contracts with their tenants, and thus, the terms under which those contracts are entered. The wholesale prohibition on summary proceedings provided by the Eviction Moratorium constitutes a dramatic departure from regulations a landlord might reasonably expect to be promulgated. On this point, the district court should be affirmed. The Eviction Moratorium has "substantially impaired" every existing lease where the Moratorium was (and will be) invoked by a tenant.

C. The Eviction Moratorium Fails to Set Forth Reasonable Conditions to Effectuate Its Purpose.

Once a law is found to "substantially impair" an existing contractual relationship, courts must then examine the "nature and purpose" of the impairing act, *Allied Structural Steel Co.*, 438 U.S. at 245, and whether the act was made "upon reasonable conditions." *U.S. Trust Co.*, 431 U.S. at 22. The greater the impairment, the more scrutiny the law receives, as the Supreme Court has repeatedly emphasized in its Contract Clause jurisprudence. *See Allied Structural Steel Co.*, 438 U.S. at 245 ("Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.").

While the district court correctly held that the Eviction Moratorium substantially interfered with existing contractual rights and obligations between property owners and tenants, it erred by holding that the Moratorium was reasonably conditioned to effectuate its purpose. In so holding, the district court believed there to be no "specific prerequisite for reasonableness" and instead chose to "defer to the City Council's weighing of the interests at stake." ER 17. This was error. The district court applied the wrong legal standard because the Supreme Court *has* established a standard for reasonableness in the context of moratoria delaying a property owner's right to possession: ensuring *fair rental compensation*

contemporaneous with the extended occupation during the pendency of a moratorium. *Compare Blaisdell*, 290 U.S. at 445 (moratorium on recovery of property through foreclosure upheld in large part due to requirement that the defaulting mortgagor pay "reasonable rent" while purchaser in foreclosure was "ousted" from possession), *with W.B. Worthen Co. v. Kavanaugh,* 295 U.S. 56, 63 (1935) (invalidating similar law extending mortgagee's redemption period by 12 months during the course of an emergency and distinguishing *Blaisdell* on grounds that "none of the[] restrictions" at issue in *Blaisdell* were present, including the requirement that the mortgagee "pay the rental value of the premises as ascertained in judicial proceedings").

Prior to the pandemic, no court — federal or state — had ever held that a government entity, even in an acute and sustained economic emergency, may unilaterally excuse occupants of real property from paying a reasonable amount of rent contemporaneous with occupancy as a condition to avoiding eviction. The Supreme Court has, however, opined on a fair number of "eviction" and "foreclosure" moratoria dating as far back as 1843 when it decided *Bronson, supra,* 42 U.S. 311. The laws challenged in *Bronson* extended the redemption period for defaulting mortgagors by 12 months after a foreclosure sale, and prohibited foreclosure sales for any price lower than two-thirds of the value of the property estimated by "three householders." *Id.* at 312. The Supreme Court found

the laws materially impaired the obligations of pre-existing contracts and held that the property at issue in that case be sold in foreclosure without regard to the extended redemption period or the limitation on the price that could be accepted in the foreclosure sale. *Id.* at 322. While not emphasized in the *Bronson* opinion itself, later Contract Clause decisions upholding foreclosure moratoria distinguished *Bronson* on the grounds that the laws invalidated in *Bronson* failed to include a requirement for reasonable rent to be paid contemporaneously with the extended occupancy. *See, e.g., Blaisdell,* 290 U.S. at 432 ("It will be observed that in the *Bronson* Case, aside from the requirement as to the amount of the bid at the sale, the extension of the period of redemption was unconditional, *and that there was no provision, as in the instant case, to secure to the mortgagee the rental value of the property during the extended period*") (emphasis added).

Moving forward, the Supreme Court had occasion to review a number of eviction moratoria in the landlord-tenant context during the aftermath of World War I, when housing in population centers such as New York City and Washington, D.C. was in short supply, leading to sharp increases in rent. To combat this problem in Washington, D.C., Congress enacted an eviction moratorium allowing tenants, at their option, to remain in possession notwithstanding the expiration of the terms of their leases. *Block v. Hirsh,* 256

U.S. 135, 153–154 (1921).[10] *Block* involved a claim by one such impacted property owner, Hirsh, who sought to regain possession of his property at the expiration of the lease with his tenant, Block, and challenged the constitutionality of the Washington, D.C. moratorium. *Id.* at 153. Finding that the moratorium had a reasonable relationship to the societal ills attendant to the housing emergency (*i.e.*, skyrocketing rents driving people from their homes), the Supreme Court noted that the "only matter that seems to us open to debate is whether the statute goes too far." *Id.* at 156. The Supreme Court answered the question in the negative (affirming the constitutionality of the law), but specifically on account of the requirement that the landlord would continue to receive "reasonable rent" during the period the landlord was ousted from possession. As the Supreme Court explained:

> Machinery is provided to secure to the landlord a reasonable rent . . . It may be assumed that the interpretation of "reasonable" will deprive him in part at least of the power of profiting by the sudden influx of people of Washington caused by the needs of Government and the war, and thus of a right usually incident to fortunately situated property . . . But while it is unjust to pursue such profits from a national misfortune with sweeping denunciations, the policy of restricting them has been embodied in taxation and is accepted. It goes little if at all farther than the restriction put upon the rights of the owner of money by the more debatable usury laws.

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[10] Due to the sharp increase in housing demand, and the shortage of housing, landlords in Washington, D.C. had taken advantage of the escalating rental market by increasing their rents to unaffordable levels.

Id. at 157.

Although *Block* analyzed the constitutionality of the Washington, D.C. law under the Due Process Clause, the Contract Clause cases that followed, such as *Blaisdell,* relied on the reasoning and constitutional limits articulated in *Block* in support of challenges asserted under the Contract Clause. *See, e.g., Blaisdell,* 290 U.S. at 440–42 (discussing the "lease cases" which upheld various post-World War I eviction moratoria and once again emphasizing that such cases involved laws where "provision was made for reasonable compensation to the landlord during the period he was prevented from regaining possession").[11]

Moving forward again, in the mid-1930s, the Supreme Court had occasion to review various foreclosure moratoria adopted in response to another national and global economic emergency (the Great Depression). One of those cases was its landmark decision in *Blaisdell.* There, a building and loan association sought to

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[11] The other "lease cases" relied on by the *Blaisdell* Court include *Edgar A. Levy Leasing Co., Inc. v. Siegel*, 258 U.S. 242 (1922), and *Marcus Brown Holding, Co., Inc. v. Feldman*, 256 U.S. 170 (1921). *Blaisdell* recognized that the eviction moratoria at issue in these "lease cases" withstood constitutional challenges, specifically because the laws included the condition that landlords receive reasonable rent while their tenants were allowed to remain in possession: "In the cases of leases, it will be observed that the relief afforded [to tenants] was temporary and conditional; that it was sustained because of the emergency due to scarcity of housing; *and that provision was made for reasonable compensation to the landlord during the period he was prevented from regaining possession*." *Blaisdell*, 290 U.S. at 441–42 (emphasis added).

invalidate a Minnesota law that postponed foreclosure sales and extended the "redemption" period for mortgagors who defaulted on their promissory notes. 290 U.S. at 416. The Minnesota law, like the City's Eviction Moratorium, was intended to keep people in their homes during an economic emergency that had crippled the national and global economies. *Id.* at 444-445. Unlike the Los Angeles Eviction Moratorium, however, the Minnesota law had a defined "end date" and, most importantly, required those remaining in possession during the pendency of the emergency to pay a "reasonable rent" to the mortgagee or creditor. *Id.* at 424. In fact, the Minnesota law expressly allowed for judicial proceedings and a court determination of the amount of rent that the mortgagor would need to pay to avoid being dispossessed. *Id.* ("While the mortgagor remains in possession, he must pay the rental value as that value has been determined, upon notice and hearing, by the court.").

Noting that times of emergency may provide the occasion for the exercise of existing government powers — but do not create powers that previously did not exist — the Supreme Court analyzed whether the Minnesota law violated the Contract Clause. *Id.* at 440–43. Relying in large part on the Supreme Court's "lease cases" from the post-World War I era where housing shortages in Washington D.C. and New York City persisted, the *Blaisdell* Court held that the Minnesota law withstood Contract Clause scrutiny, but, again, because of the

characteristics of the law, including the requirement that those seeking to remain in possession pay a court-determined "reasonable rent" during the occupancy. *Id.* at 445. The Supreme Court strongly implied it would have reached a different result had the party with the right to possession not been provided compensation during the time he or she was prevented from regaining possession:

> The mortgagor during the extended period is not ousted from possession, but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness. *The mortgagee-purchaser during the time that he cannot obtain possession thus is not left without compensation for the withholding of possession.*

Id. (emphasis added).

Only a few months after the Supreme Court issued its decision in *Blaisdell,* the Supreme Court issued yet another Contract Clause decision in *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934). In *Thomas,* the Supreme Court addressed whether an Arkansas law which exempted life insurance benefits from garnishment on a monetary judgment unconstitutionally impaired the pre-existing lease between W.B. Worthen Co., as lessor, and Thomas, as the defaulting lessee who was found liable for breach of contract in the amount of $1200 plus interest (for back rent). *Id.* at 429-430. The Supreme Court held that the Arkansas law violated the Contracts Clause and distinguished its *Blaisdell* decision issued a few

months earlier on the grounds that the exemption of life insurance policies was not based on reasonable conditions that balanced the competing interests of *all* contracting parties:

> Accordingly, in the case of *Blaisdell*, we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, *from the standpoint of both mortgagor and mortgagee*, and to be limited to the exigency to which the legislation was addressed. *Thomas, supra*, 292 U.S. at 433-434 (emphasis added).

Finally, the following year, the Supreme Court addressed the constitutionality of yet another foreclosure moratorium in *Kavanaugh, supra.* In *Kavanaugh,* the Supreme Court addressed whether a similar foreclosure law that *did not* contain a "reasonable rent" requirement ran afoul of the Contract Clause. *See* 295 U.S. at 58–59. During the same national crisis that gave birth to the Minnesota law in *Blaisdell* (the Great Depression), in March 1933, the Arkansas Legislature passed several acts which had the effect of significantly extending the time a defaulting mortgagee could remain in possession, but such "[r]elief [was] not conditioned upon payment of interest and taxes *or the rental value of the premises*." *Id.* at 61 (emphasis added). The defendants, like the district court below in the case at bar, argued that *Blaisdell* supported the constitutionality of the law. *Id.* at 63. Once again emphasizing the importance of the rent requirement in the Minnesota law at issue in *Blaisdell*, the Supreme Court rejected the defendants'

argument and even highlighted the importance of the reasonable rent requirement in its reasoning:

> Upholders of the challenged acts appeal to the authority of [*Blaisdell*], the case of the Minnesota moratorium. There for a maximum term of two years, but in no event beyond the then existing emergency, a court was empowered, if there was a proper showing of necessity, to stay the foreclosure of a mortgage, but only upon prescribed conditions. 'The mortgagor during the extended period is not ousted from possession, *but he must pay the rental value of the premises as ascertained in judicial proceedings* and this amount is applied to the carrying of the property and to interest upon indebtedness.' . . . None of these restrictions, nor anything approaching them, is present in this case.

Id. at 63 (citation omitted, emphasis added).

More recently, the Supreme Court made clear that the unique characteristics of the Minnesota law at issue in *Blaisdell* (including the requirement to pay a reasonable rent concurrent with occupancy) were critical to the Court upholding the law. *See Allied Structural Steel Co.*, 438 U.S. at 242 ("The *Blaisdell* opinion thus clearly implied that if the Minnesota moratorium legislation had not possessed the characteristics attributed to it by the Court, it would have been invalid under the Contract Clause of the Constitution."); *see also United States Trust Co.*, 431 U.S. at 15–16 (recognizing that the law at issue in *Blaisdell* was conditioned on the requirement that "a mortgagor who remained in possession during the extension period was required to pay a reasonable income or rental value to the mortgagee.")

The district court in this case took issue with AAGLA's emphasis on the

"reasonable rent" requirement in the Minnesota law that withstood the Contract Clause challenge in *Blaisdell*. ER 16–17. In short, the district court minimized the importance of this requirement, no doubt understanding that such a requirement, if mandated, would require the invalidation of the City's Eviction Moratorium, which contains no such requirement. With due respect to the district court, as the foregoing authorities make clear, the Supreme Court itself has time and time again emphasized the extreme importance of the reasonable rent requirement when a moratorium is placed on a property owner's right to possession.

AAGLA has not located a single appellate decision upholding an eviction moratorium without a requirement that "reasonable rent" be paid as a condition to (and concurrently with) occupancy. The Eviction Moratorium in this case is not reasonably conditioned because it does not require, per *Blaisdell*, that tenants pay a "reasonable rent" concurrent with occupancy. While this requirement may not have been elevated to a hard and fast "rule" in every case, there is no question that it was certainly far more important to the Supreme Court than it was to the court below.

To add insult to injury, the Eviction Moratorium does not even require tenants to demonstrate a pandemic-related hardship. Unlike AB 3088, for example, the City's Moratorium does not require tenants to affirm that they have actually suffered pandemic-related hardship in order to qualify for protection, nor

does it require high-income tenants to provide evidence of their inability to pay. It also forces landlords to accept other lease violations — including unauthorized tenants and pets — that have little, if anything, to do with the pandemic. *See id.* § 49.99.2(C). And similarly, the Eviction Moratorium's prohibition on charging interest or late fees is not necessary to ensure housing security during the pandemic. *See id.* § 49.99.2(D).

Meanwhile, despite dramatically tipping the scales in favor of tenants, if a landlord exercises her rights pursuant to AB 3088 and the express lease terms by "endeavor[ing] to evict" a defaulting tenant, the landlord is subject to administrative penalties, and the tenant is allowed to sue the landlord for additional penalties of up to $15,000. *See* L.A., Cal. Mun. Code § 49.99.7.

In sum, the question of "reasonableness" may not be delegated to the City, as the district court did in this case. "Reasonableness" is a function of whether the allegedly impairing law is "reasonable" from the standpoint of all parties to the contract. *Thomas, supra,* 292 U.S. at 434. The Eviction Moratorium is not reasonably conditioned to effectuate the public purposes it purports to serve and, further, by its own terms, it extends a full year beyond the date that the emergency is lifted. The district court erred in deferring to the City's determination of "reasonableness"; AAGLA is likely to succeed on the merits of its Contract Clause claim.

II. AAGLA's Members Face Irreparable Harm Absent Injunctive Relief.

In denying AAGLA's request for preliminary injunction, the district court found that AAGLA had not demonstrated a "probability of irreparable harm." ER 20–27. In doing so, the court elected not to apply the presumption of irreparable harm applicable to constitutional injuries, *see Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2019), and determined that, in any event, the harm suffered by landlords could be "repaired" because landlords, eventually, will be able to sue their tenants for back rent accruing during the Moratorium. But the court failed to explain how a tenant who does not have the funds to pay only a month's worth of rent *now* will somehow be able to save enough money to pay a year's worth of back rent by March 2022.[12] The district court erred by refusing to recognize the irreparable harm created by the City's Moratorium.

A. The District Court Erred when it Found that a Landlord's Theoretical Right to Sue a Tenant for Monetary Damages at Some Distant Point in the Future Defeats Irreparable Harm as a Matter of Law.

In determining that AAGLA failed to demonstrate a "likelihood of

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[12] As noted previously, under the City's moratorium, landlords will not be able to sue for back rent until March 2022, at the earliest. While the City's moratorium does not provide a date certain on which the one-year grace period will begin to run, the statewide eviction moratorium embodied in AB 3088 provides that all grace periods allowed in local moratoria must sunset by March 31, 2022. Civ. Proc. Code § 1179.05(a)(2)(C).

irreparable harm," the district court relied on the general proposition that no irreparable harm is suffered where an award of monetary damages may compensate for the loss. ER 22–23. But in so holding, the district court extruded that general principle into something much more, *i.e.*, that a landlord's ability to sue as-yet unidentified third party tenants at some future and uncertain date vitiates the "irreparability" of any harms presently suffered. This was error. As discussed below, the cases the court cited for the general principle all considered a later damages award *against the defendants* in each case to decide whether a damages award would mitigate the irreparable nature of the harm suffered. Not so here.

Unlike the cases relied on by the district court, the theoretical award for damages here would be potential awards against third parties at some distant point in the future. The ability to theoretically recover damages in the future from third-party tenants, however, does not relate to the actual harm caused by the City's Moratorium. In the preliminary injunction context, this Court has recognized that the remedy analyzed must relate to the rights sought to be vindicated. *See Garcia v. Google, Inc.,* 786 F.3d 733, 745 (9th Cir. 2015) (en banc).

For example, this Court sitting en banc in *Garcia* reviewed a preliminary injunction granted by a three-judge panel on the basis of death threats received after an actress's film performance was unknowingly incorporated into an anti-Islamic video. *Id.* at 737–38. The actress sought to enjoin publication of the video

on a popular streaming website, but did so only under a copyright theory against Google and the video producer, as opposed to other available tort theories. *Id.* at 738. The en banc Court dissolved the injunction and held that the "irreparable harm" asserted by the plaintiff was "untethered" to the copyright-related rights sought to be remediated via preliminary injunction. *Id.* at 746, 747. Put another way, the irreparable harm asserted must share a nexus with the underlying cause of action. In *Garcia*, that meant that the plaintiff's harms (up to and including death threats) were "too attenuated from the purpose of copyright." *Id.* at 746. Instead, the plaintiff would have had to show irreparable harm in the context of her "interests as an author." *Id.*

AAGLA is not aware of any case supporting the district court's opinion that the theoretical possibility of suing third-parties in the future will defeat the "likelihood of irreparable harm" element for issuance of a preliminary injunction. Indeed, the cases relied on by the district court for this determination all addressed potential monetary damages *against the opposing party in the case* for their assessment of whether the harm was irreparable. *See e.g.*, *Rent-A-Ctr., Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 602–603 (9th Cir. 1991) (finding irreparable harm where economic recovery *against the defendant* would not remediate "intangible injuries, such as damage to ongoing recruitment efforts and goodwill"); *L.A. Mem'l Coliseum Comm'n v. NFL,* 634 F.2d 1197,

1202 (9th Cir. 1980) (finding no irreparable injury where the claimed losses all constituted "monetary injuries which could be remedied by a damage award" in that proceeding); *Goldie's Bookstore, Inc. v. Sup. Ct.*, 739 F.2d 466, 471 (9th Cir. 1984) (overturning district court's issuance of preliminary injunction where claimed irreparable harm constituted mere "financial injury" and where "adequate compensatory relief will be available *in the course of the litigation*") (emphasis added).

B. The District Court Erred when it Refused to Recognize the Irreparable Harm Landlords are Suffering, and will Continue to Suffer, from their Substantially Impaired Income Streams.

The district court made clear that in the absence of actual foreclosures, the harm suffered by landlords may be adequately remediated at some distant point in the future through monetary damage awards against struggling tenants. ER 24. Shockingly, and without any evidentiary support, the district court speculated that it did not think lenders had a significant motive to foreclose on defaulting landlords and that lenders possess "significant motivations to come to accommodations with property owners." ER 24. It is unclear why the court believed lenders have a motivation to accommodate borrowers, but did not believe that landlords have the identical incentives to accommodate their tenants. In any event, merely rubberstamping what the City's policymakers asserted in support of the Moratorium is directly contrary to controlling Ninth Circuit precedent on the

fundamental need for contractual payments to be made *on time*.

This Court's decision in *Cayetano* reflects the most analogous Ninth Circuit decision with respect to the mandatory "rent deferment" component of the City's Moratorium. In *Cayetano* — a case discussed in both AAGLA's moving and reply papers below — the Ninth Circuit upheld a district court's preliminary injunction barring enforcement of a Hawaii law which resulted in one to three day delays in the processing of paychecks for professors employed by the University of Hawaii. *See* 183 F.3d at 1099–100. The law at issue in that case (Act 355) sought to convert the state employees' payroll from a "predicted payroll" to an "after-the-fact" payroll. *Id.* at 1099. To do this, Act 355 "would allow the State to postpone (by one to three days) the dates on which state employees [were] to be paid." *Id.* While employees had historically been provided paychecks on the first and fifteenth of each month, Act 355 imposed the one to three day pay lag six times during the course of the year. *Id*.

In upholding the district court's preliminary injunction enjoining Hawaii's application of Act 355, this Court held that the slight delay in 6 (of 24) annual paychecks constituted a "substantial impairment" of the State's collective bargaining agreement with the employee's union and that the law (which would mitigate the overpayment problems associated with the pre-existing "predicted payroll system") was not based on reasonable conditions, leading to a "likelihood

of success on the merits" finding. *Id.* at 1105–06. Important here, the Ninth Circuit agreed with the district court that the one to three day delays in paychecks would work significant "irreparable harm." *Id.* at 1107 ("We agree with the district court that Plaintiffs have met their burden of showing that if the pay lag is implemented, they likely will suffer irreparable harm and that damages, even if available, will not adequately compensate Plaintiffs for hardships caused by the delay in receipt of pay."). The specific harm that would have been suffered by Plaintiff's union members was virtually identical to the harm AAGLA's members have suffered since March 2020 and will continue to suffer for months and years to follow:

> Plaintiffs are wage earners, not volunteers. They have bills, child support obligations, mortgage payments, insurance premiums, and other responsibilities. Plaintiffs have the right to rely on the timely receipt of their paychecks. Even a brief delay in getting paid can cause financial embarrassment and displacement of varying degrees of magnitude.

Id. at 1106.

AAGLA's members have no less of a right to rely on the timely payment of rent. As with the plaintiffs in *Cayetano*, the majority of AAGLA's members are of the "mom and pop" variety with relatively few units. ER 418. AAGLA's members are subject to the same "embarrassment" when they are unable to pay their mortgages, for the upkeep of their properties, security, utilities, repairs needed in their premises, and any number of "other responsibilities." The only material

difference between the union members in *Cayetano* and AAGLA's landlord members in this case is the duration of the delayed payment. Whereas a one-to-three day delay in paychecks constituted "likely irreparable harm" in *Cayetano*, a 2-plus *year* delay in rent is not irreparable according to the district court. The district court's refusal to acknowledge this obvious irreparable harm was clear error.

C. The district court also erred when it refused to apply a presumption of irreparable harm for constitutional injuries premised on the Contract Clause.

The district court erred for a third reason: While recognizing that this Court has repeatedly applied a presumption of irreparable harm for a number of different constitutional injuries, the district court nonetheless found that such a presumption should not apply to AAGLA's Contract Clause claim. ER 20–21. In doing so, the district court relied on dicta from *Cuviello v. City of Vallejo*, 944 F.3d 816, 831 (9th Cir. 2019), where this Court actually found irreparable harm in a First Amendment case. Explaining generally the test for preliminary injunctions (espoused in *Winter*), this Court determined:

> Even if that [prior restraint on speech] is only temporary, the loss or threatened infringement upon free speech rights "for even minimal periods of time [] unquestionably constitutes irreparable injury."

Id. at 832 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

The formulation for irreparable harm set forth in *Elrod,* of course, *is* the

presumption of irreparable harm. This Court has repeatedly applied the *Elrod* presumption (post-*Winter*) in a number of different constitutional contexts. *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 994–95 (9th Cir. 2017) (detention under Due Process Clause of Fifth Amendment); *Melendres v. Arpaio*, 695 F.3d at 1002 (race-based traffic stops under Fourth and Fourteenth Amendments); and *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 917–18 (9th Cir. 2014) (in a challenge to abortion regulations as void for vagueness, violative of a woman's right to bodily integrity, and equal protection, the court cited *Melendres* favorably to assert that constitutional deprivations may generally constitute irreparable injury, but did not reach the question as the defendant failed to brief the issue).

To the extent the district court's refusal to apply a presumption of irreparable harm stems from the Supreme Court's decision in *Winter* (which rejected the Ninth's Circuit's prior "possibility of irreparable harm" standard in favor of a "likelihood of irreparable harm"), the Supreme Court recently reaffirmed the *Elrod* presumption in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo,* ___U.S. ___, No. 20A87, 2020 WL 6948354 (Nov. 25, 2020). There, the Supreme Court found as a matter of law that "[t]here can be no question that the challenged restrictions [on gatherings at houses of worship], if enforced, will cause irreparable harm" to the plaintiffs' free exercise of religion. *Id.* at *3 (reaffirming *Elrod*).

AAGLA is not aware of any Ninth Circuit or Supreme Court authority expressly applying the *Elrod* presumption of irreparable harm in the context of a Contract Clause claim.[13] But that alone is no justification to avoid applying such a presumption here. Contract Clause violations are no less offensive to a citizen's rights under the Constitution than any other constitutional violation. And indeed, the historic importance of the Clause to our constitutional order is manifest. James Madison "denounced laws impairing the obligation of contracts as among those not only violating the Constitution, but 'contrary to the first principles of the social compact and to every principle of sound legislation.'" *Planters' Bank v. Sharp*, 47 U.S. 301, 319 (1848) (quoting The Federalist No. 44). More broadly, Article I, Section 10 was understood by another prominent Framer and signatory, Charles Pinckney, as "the soul of the Constitution." Charles Pinckney, *Speech on the Section Ten of Article One of the Federal Constitution*, 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 333 (Jonathan Elliot ed., 2d ed. 1901). Early court opinions evince a tremendous respect for the Clause by the regular invalidation of laws found to violate it. *See,*

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[13] The Third Circuit, however, affirmed a preliminary injunction based on a district court's holding that "interference with [plaintiff's] contractual rights in violation of the Contract Clause, standing alone, is sufficient irreparable harm" to support an injunction. *See West Indian Co., Ltd. v. Gov't of Virgin Islands*, 643 F. Supp. 869, 882 (D.V.I. 1986), *affirmed* 812 F.2d 134 (3d Cir. 1987).

e.g., *Sturges v. Crowninshield*, 17 U.S. 122, 197 (1819); *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 712 (1819); *Planters' Bank*, 47 U.S. at 318; *see also* Charles Warren, *Earliest Cases of Judicial Review of State Legislation by Federal Courts*, 32 Yale L.J. 15, 26–27 (1922) (discussing the first instance where the federal judiciary invalidated a state law, and did so by holding the law as an unconstitutional impairment of the obligation of contracts where the law allowed a debtor up to three years to pay creditors).

Following this tack, opinions issued by the Supreme Court during the nineteenth century regularly opined on the Clause's persistent importance. *See, e.g.*, *Murray v. Charleston*, 96 U.S. 432, 448 (1877) ("There is no more important provision in the Federal Constitution . . . The inviolability of contracts, and the duty of performing them, as made, are foundations of a well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."); *Barnitz v. Beverly*, 163 U.S. 118, 121 (1896) ("[n]o provision of the constitution . . . has received more frequent consideration by this court").

Arguably, as some commentators have noted, the Clause has only fallen out of judicial favor with the rise of other constitutional theories. *See* Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 704 (1984); *see also* Thomas W. Merrill, *Public Contracts, Private Contracts, and*

the Transformation of the Constitutional Order, 37 Case W. Res. L. Rev. 597, 598 (1987) (noting that "the general pattern of modern case law" shows that "it is difficult to quarrel with Justice Black's conclusion that the Supreme Court has 'balanc[ed] away the plain guarantee of Art. I, § 10'" (citation omitted)).

Nonetheless, the Clause should remain an "essential part of our basic constitutional scheme of limited government," and courts may properly insist on its "revitalization" where "particular doctrinal questions come into focus," as here. *Epstein*, *supra*, at 750. Conferring a presumption of irreparable harm today would recognize the Clause's enduring importance to the nation's constitutional order.

III. The Balance of Equities and Public Interest Factors Tip in AAGLA's Favor.

The district court held that the balance of equities and the public interest weighed against granting AAGLA's requested injunction. ER 27–28. The court believed that the "economic damage the pandemic has wrought, if left unmediated by measures such as the City Moratorium, would likely trigger a tidal wave of evictions" thus exacerbating the public health crisis. ER 27. Accordingly, while the court concluded that the hardships borne by residential landlords "are real, and are significant," property owners' harms nevertheless "must yield precedence to the vital interests of the public as a whole." ER 27.

But contrary to the lower court's fears, the reality of granting this injunction has a far more positive ending for all involved. Were an injunction to issue, the

result would not be the displacement of thousands of impacted tenants. Instead, an injunction would merely put tenants and landlords in Los Angeles on the same footing as they are in the rest of the state, *i.e.*, governed by the newly enacted state law, AB 3088.

AB 3088 sharply tilts the balance of harms analysis in favor of AAGLA and its members, since tenants suffering from COVID-19-related hardship will still be protected from eviction. Under AB 3088, the only tenants subject to eviction for nonpayment of rent prior to February 1, 2021, are those who are unable or unwilling to sign a declaration indicating they are unable to pay their rent due to "COVID-19-related financial distress," and certain high-income tenants who are unable or unwilling to provide documentation demonstrating such distress. *See* Civ. Proc. Code §§ 1179.02, 1179.02.5(c), (g). This small difference makes all the difference. That minimal requirement is critical to ensuring that only tenants who have been impacted by the pandemic may seek the eviction protections. And indeed, AB 3088 does not provide any less protection than the City's Eviction Moratorium for tenants who are legitimately suffering hardship.

CONCLUSION

The Court should reverse the Order denying the preliminary injunction and remand with direction to the district court to grant the preliminary injunction against Los Angeles City Municipal Code Sections 49.99.2(A)–(E) and 49.99.7.

Dated: December 17, 2020

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DOUGLAS J. DENNINGTON

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STATEMENT OF RELATED CASES

To the best of counsel's knowledge, there are no related cases.

ADDENDUM OF STATUTORY AUTHORITY

ARTICLE 14.6

TEMPORARY PROTECTION OF TENANTS DURING COVID-19 PANDEMIC

(Added by Ord. No. 186,585, Eff. 3/31/20; Amended in Entirety by Ord. No. 186,606, Eff. 5/12/20.)

Section
49.99 Findings.
49.99.1 Definitions.
49.99.2 Prohibition on Residential Evictions.
49.99.3 Prohibition on Commercial Evictions.
49.99.4 Prohibition on Removal of Occupied Residential Units.
49.99.5 Retroactivity.
49.99.6 Affirmative Defense.
49.99.7 Private Right of Action for Residential Tenants.
49.99.8 Penalties.
49.99.9 Severability.

SEC. 49.99. FINDINGS.

The City of Los Angeles is experiencing an unprecedented public health crisis brought by the Coronavirus, which causes an acute respiratory illness called COVID-19.

On March 4, 2020, the Governor of the State of California declared a State of Emergency in California as result of the COVID-19 pandemic. That same day, the Mayor also declared a local emergency.

On March 16, 2020, the Governor issued Executive Order N-28-20, which authorizes local jurisdictions to suspend certain evictions of renters and homeowners, among other protections. The Executive Order further authorizes the City of Los Angeles to implement additional measures to promote housing security and stability to protect public health and mitigate the economic impacts of the COVID-19 pandemic.

The economic impacts of COVID-19 have been significant and will have lasting repercussions for the residents of the City of Los Angeles. National, county, and city public health authorities issued recommendations, including, but not limited to, social distancing, staying home if sick, canceling or postponing large group events, working from home, and other precautions to protect public health and prevent transmission of this communicable virus. Residents most vulnerable to COVID-19, including those 65 years of age or older, and those with underlying health issues, have been ordered to self-quarantine, self-isolate, or otherwise remain in their homes. Non-essential businesses have been ordered to close. More recent orders from the Governor and the Mayor have ordered people to stay at home and only leave their homes to visit or work in essential businesses. As a result, many residents are experiencing unexpected expenditures or substantial loss of income as a result of business closures, reduced work hours, or lay-offs related to these government-ordered interventions. Those already experiencing homelessness are especially vulnerable during this public health crisis.

The COVID-19 pandemic threatens to undermine housing security and generate unnecessary displacement of City residents and instability of City businesses. Therefore, the City of Los Angeles has taken and must continue to take measures to protect public health, life, and property.

This ordinance temporarily prohibits evictions of residential and commercial tenants for failure to pay rent due to COVID-19, and prohibits evictions of residential tenants during the emergency for no-fault reasons, for unauthorized occupants or pets, and for nuisance related to COVID-19. This ordinance further suspends withdrawals of occupied residential units from the rental market under the Ellis Act, Government Code Section 7060, et seq.

SEC. 49.99.1. DEFINITIONS.

The following words and phrases, whenever used in this article, shall be construed as defined in this section:

A. **Commercial Real Property.** "Commercial real property" is any parcel of real property that is developed and used either in part or in whole for commercial purposes. This does not include commercial real property leased by a multi-national company, a publicly traded company, or a company that employs more than 500 employees.

B. **Endeavor to Evict.** "Endeavor to evict" is conduct where the Owner lacks a good faith basis to believe that the tenant does not enjoy the benefits of this article and the Owner serves or provides in any way to the tenant: a notice to pay or quit, a notice to perform covenant or quit, a notice of termination, or any other eviction notice.

C. **Local Emergency Period.** "Local emergency period" is the period of time from March 4, 2020, to the end of the local

emergency as declared by the Mayor.

D. **No-fault Reason.** "No-fault reason" is any no-fault reason under California Civil Code Section 1946.2(b) or any no-fault reason under the Rent Stabilization Ordinance.

E. **Owner.** "Owner" is any person, acting as principal or through an agent, offering residential or Commercial Real Property for rent, and includes a successor in interest to the owner.

F. **Residential Real Property.** "Residential real property" is any dwelling or unit that is intended or used for human habitation.

SEC. 49.99.2. PROHIBITION ON RESIDENTIAL EVICTIONS.

A. During the Local Emergency Period and for 12 months after its expiration, no Owner shall endeavor to evict or evict a residential *tenant for non-payment of rent during the Local Emergency Period if the tenant is unable to pay rent due to circumstances related to the* COVID-19 pandemic. These circumstances include loss of income due to a COVID-19 related workplace closure, child care expenditures due to school closures, health-care expenses related to being ill with COVID-19 or caring for a member of the tenant's household or family who is ill with COVID-19, or reasonable expenditures that stem from government-ordered emergency measures. Tenants shall have up to 12 months following the expiration of the Local Emergency Period to repay any rent deferred during the Local Emergency Period. Nothing in this article eliminates any obligation to pay lawfully charged rent. However, the tenant and Owner may, prior to the expiration of the Local Emergency Period or within 90 days of the first missed rent payment, whichever comes first, mutually agree to a plan for repayment of unpaid rent selected from options promulgated by the Housing and Community Investment Department ("HCID") for that purpose.

B. No Owner shall endeavor to evict or evict a residential tenant for a no-fault reason during the Local Emergency Period.

C. No Owner shall endeavor to evict or evict a residential tenant based on the presence of unauthorized occupants or pets, or for nuisance related to COVID-19 during the Local Emergency Period.

D. No Owner shall charge interest or a late fee on rent not paid under the provisions of this article.

E. An Owner shall: (i) provide written notice to each residential tenant of the protections afforded by this article ("Protections Notice") within 15 days of the effective date of this ordinance; and (ii) provide the Protections Notice during the Local Emergency Period and for 12 months after its termination each time the Owner serves a notice to pay or quit, a notice to terminate a residential tenancy, a notice to perform covenant or quit, or any eviction notice, including any notice required under California Code of Civil Procedure Section 1161 and California Civil Code Section 1946.1. HCID shall make available the form of the Protections Notice, which must be used, without modification of content or format, by the Owner to comply with this subparagraph. HCID will produce the form of the Protections Notice in the most commonly used languages in the City, and an Owner must provide the Protections Notice in English and the language predominantly used by each tenant.

F. No Owner shall influence or attempt to influence, through fraud, intimidation or coercion, a residential tenant to transfer or pay to the Owner any sum received by the tenant as part of any governmental relief program.

G. Except as otherwise specified in this article, nothing in this section shall prohibit an Owner from seeking to evict a residential tenant for a lawful purpose and through lawful means.

SEC. 49.99.3. PROHIBITION ON COMMERCIAL EVICTIONS.

During the Local Emergency Period and for three months thereafter, no Owner shall endeavor to evict or evict a tenant of Commercial Real Property for non-payment of rent during the Local Emergency Period if the tenant is unable to pay rent due to circumstances related to the COVID-19 pandemic. These circumstances include loss of business income due to a COVID-19 related workplace closure, child care expenditures due to school closures, health care expenses related to being ill with COVID-19 or caring for a member of the tenant's household or family who is ill with COVID-19, or reasonable expenditures that stem from government-ordered emergency measures. Tenants shall have up to three months following the expiration of the Local Emergency Period to repay any rent deferred during the Local Emergency Period. Nothing in this article eliminates any obligation to pay lawfully charged rent. No Owner shall charge interest or a late fee on rent not paid under the provisions of this article.

SEC. 49.99.4. PROHIBITION ON REMOVAL OF OCCUPIED RESIDENTIAL UNITS.

No Owner may remove occupied Residential Real Property from the rental market under the Ellis Act, Government Code Section 7060, et seq., during the pendency of the Local Emergency Period. Tenancies may not be terminated under the Ellis Act until 60 days after the expiration of the Local Emergency Period.

SEC. 49.99.5. RETROACTIVITY.

This article applies to nonpayment eviction notices, no-fault eviction notices, and unlawful detainer actions based on such notices, served or filed on or after the date on which a local emergency was proclaimed. Nothing in this article eliminates any obligation to pay lawfully charged rent.

SEC. 49.99.6. AFFIRMATIVE DEFENSE.

Tenants may use the protections afforded in this article as an affirmative defense in an unlawful detainer action.

SEC. 49.99.7. PRIVATE RIGHT OF ACTION FOR RESIDENTIAL TENANTS.

If an Owner violates Section 49.99.2, except for 49.99.2(E)(i), an aggrieved residential tenant may institute a civil proceeding for injunctive relief, direct money damages, and any other relief the Court deems appropriate, including, at the discretion of the Court, an award of a civil penalty up to $10,000 per violation depending on the severity of the violation. If the aggrieved residential tenant is older than 65 or disabled, the Court may award an additional civil penalty up to $5,000 per violation depending on the severity of the violation. The Court may award reasonable attorney's fees and costs to a residential tenant who prevails in any such action. The Court may award reasonable attorney's fees and costs to an Owner who prevails in any such action and obtains a Court determination that the tenant's action was frivolous. A civil proceeding by a residential tenant under this section shall commence only after the tenant provides written notice to the Owner of the alleged violation, and the Owner is provided 15 days from the receipt of the notice to cure the alleged violation. The remedies in this paragraph apply on the effective date of this section, and are not exclusive nor preclude any person from seeking any other remedies, penalties or procedures provided by law.

SEC. 49.99.8. PENALTIES.

Upon the effective date of this section, an Owner who violates this article shall be subject to the issuance of an administrative citation as set forth in Article 1.2 of Chapter I of this Code. Issuance of an administrative citation shall not be deemed a waiver of any other enforcement remedies provided in this Code.

SEC. 49.99.9. SEVERABILITY.

If any provision of this article is found to be unconstitutional or otherwise invalid by any court of competent jurisdiction, that invalidity shall not affect the remaining provisions of this article which can be implemented without the invalid provisions, and to this end, the provisions of this article are declared to be severable. The City Council hereby declares that it would have adopted this article and each provision thereof irrespective of whether any one or more provisions are found invalid, unconstitutional or otherwise unenforceable.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-56251

I am the attorney or self-represented party.

This brief contains 13,169 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[**X**] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

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Signature /s/ Douglas J. Dennington **Date December 17, 2020**
(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

Case Name: *Apartment Association of Los Angeles County, Inc. v. City of Los Angeles, et al.* No. 20-56251

I hereby certify that on December 17, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANT'S OPENING BRIEF

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on [Date], at Irvine, California.

Patricia Johnson	/s/ Patricia Johnson
Declarant	Signature