No. _____

In the
Supreme Court of the United States

APARTMENT ASSOCIATION OF LOS ANGELES COUNTY, INC., DBA APARTMENT ASSOCIATION OF GREATER LOS ANGELES,
Petitioner,

v.

CITY OF LOS ANGELES,
&
ALLIANCE OF CALIFORNIANS FOR COMMUNITY EMPOWERMENT ACTIONS FOR A JUST ECONOMY,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In March 2020, the City of Los Angeles adopted its COVID-19 eviction moratorium, forcing landlords to furnish housing to *defaulting* tenants impacted by the pandemic, and authorizing tenants to withhold payment of their monthly rents for up to 12 months following the expiration of the "local emergency." While the moratorium does not, on its face, eliminate tenants' contractual obligation to pay back rent in the future, that is the inevitable outcome. Both the district court and Ninth Circuit applied a version of rational basis to uphold the eviction moratorium in the face of Petitioner's Contracts Clause claim, deferring to the City's determination of reasonableness and giving no effect to this Court's precedent that the "severity of the impairment measures the height of the hurdle the state legislation must clear," in that "[m]inimal alteration of contractual obligations may end the inquiry at the first stage," while "[s]evere impairment . . . will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 245 (1978); *see also Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) ("The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.").

The questions presented include:

1. Whether a municipal law challenged under the Contracts Clause as impermissibly impairing private contracts is subject to variable scrutiny based on the severity of the contractual impairment.

2. Whether the Ninth Circuit erred by deferring to the City's determination of "reasonableness" irrespective of the severity of the eviction moratorium's impact on existing leasehold agreements.

CORPORATE DISCLOSURE STATEMENT

Petitioner 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.

STATEMENT OF RELATED PROCEEDINGS

Apartment Association of Los Angeles County, Inc., et al. v. City of Los Angeles, et al., No. 2:20-cv-05193-DDP-JEM, United States District Court, Central District of California. Judgment entered November 13, 2020.

Apartment Association of Los Angeles County, Inc., et al. v. City of Los Angeles, et al., No. 20-56251, United States Court of Appeals for the Ninth Circuit. Judgment entered August 25, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Apartment Association of Los Angeles County, Inc. d.b.a. Apartment Association of Greater Los Angeles ("AAGLA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1–28) is reported at 10 F.4th 905. The district court's order denying Petitioner's preliminary injunction (Pet. App. 29–59) is reported at 500 F. Supp. 3d 1088.

JURISDICTION

The court of appeals entered its judgment on August 25, 2021. Pet App. 1. This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

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

STATEMENT OF THE CASE

A. Factual Background

1. History of Summary Unlawful Detainer Proceedings in California

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); Cal. Code Civ. Proc. § 1159 (prohibiting any type of "forcible entry" to regain possession).

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 Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429–30 (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.

2. The City Radically Alters the Rights and Responsibilities of Tenants and Property Owners by Indefinitely Suspending 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. *See* Pet. App. 60–69; L.A., Cal. Mun. Code ("LAMC") §§ 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 notices, and unlawful detainer actions based on such notices, served or filed on or after the date on which a local emergency was proclaimed." Pet. App. 67; LAMC § 49.99.5. The Local Emergency Period is defined in the Eviction Moratorium as "the period of time from March 4, 2020, to the end of the local emergency as declared by the Mayor." Pet. App. 63; LAMC § 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 the "Local Emergency Period." Pet. App. 64; LAMC § 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, nor does it provide any assurances that landlords will recover the back rent owed by tenants in the future. Pet. App. 64; LAMC § 49.99.2(A).

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 (which would otherwise allow landlords to remove the property from the rental market). Pet. App. 64–65, 66–67; LAMC §§ 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. Pet. App. 64, 65; LAMC §§ 49.99.2(A), (D). Further, while it provides that tenants "may" agree to a repayment plan, they are not required to do so. Pet. App. 64; LAMC § 49.99.2(A).

Thus, a tenant who fails to pay rent during the Local 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 eliminated most all contractual 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, debt service, or any of the other substantial costs incurred by landlords to maintain habitable dwellings.

Importantly, 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. Pet. App. 63; LAMC § 49.99.1(B). The Eviction Moratorium nonetheless prohibits owners from "endeavor[ing] 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. Pet. App. 64, 67; LAMC §§ 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. Pet. App. 68; LAMC § 49.99.8. And what's more, 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. Pet. App. 67–68; LAMC § 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). Pet. App. 67–68; LAMC § 49.99.7.

B. Proceedings Below

AAGLA filed this case seeking primarily to enjoin the City's continued enforcement of the Eviction Moratorium. When the District Court denied AAGLA's Motion for Preliminary Injunction in November 2020, *see* Pet. App. 30–59, AAGLA appealed asserting, among other things, that the District Court erred by deferring to the City's determination of reasonableness and by not giving effect to the variable scrutiny applicable to Contracts Clause claims, as well as by not recognizing the importance of this Court's prior "eviction moratorium" and "foreclosure moratorium" jurisprudence, where interim compensation such as "reasonable rent" during the course of the moratoria saved such legislation in the face of Contracts Clause and similar constitutional challenges. Pet. App. 22–25. *See, e.g.*, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 432 (1934) (conditioning protection under foreclosure moratoria on payment of "reasonable rent" during emergency period); *Block v. Hirsh*, 256 U.S. 135, 153–54 (1921) (upholding eviction moratorium in face of constitutional attack where "[m]achinery is provided to secure to landlord reasonable rent" during emergency); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 61 (1935) (striking down foreclosure moratorium the year after *Blaisdell* was decided where the moratorium was not conditioned on payment of any rent or other compensation during occupancy by defaulting party).

The Ninth Circuit did not apply variable scrutiny to AAGLA's Contract Clause claim based on the severity of the impact and, instead, deferred to the City's determination of reasonableness without determining whether the Eviction Moratorium even effected a "substantial impairment" of existing lease agreements.

1. Legal Framework for Contracts Clause Challenges

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 Contracts Clause's "prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Blaisdell*, 290 U.S. at 434).

This Court has established a three-part test to determine whether a particular law runs afoul of the Contracts Clause. The "threshold inquiry" asks whether the law substantially impairs an existing contractual relationship. *Energy Reserves*, 459 U.S. at 411. "The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." *Id.* The interfering law need not result in the "[t]otal destruction of contractual expectations" in order to constitute a "substantial impairment." *Id.* In determining whether a law "substantially impairs" existing contracts, courts are to consider the extent to which the contractual relationship has historically been subject to the same type of regulation in the past. *Id.* at 411. Only past regulations on the same specific subject

matter are relevant. *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 regulation *on the same topic*.") (emphasis added).

Once a law is found to "substantially impair" an existing contractual relationship, the inquiry shifts to whether the interfering law or regulation serves a "legitimate public purpose" and whether the law is "reasonably conditioned" to effectuate that public purpose. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 245 (1978); *see also U.S. Trust Co. of New York v. New Jersey,* 431 U.S. 1, 22 (1977). Again, the greater the impairment, the more scrutiny the interfering regulation or law will receive. *Allied Structural Steel Co.*, 438 U.S. at 245.

2. The District Court Proceedings

AAGLA is an association comprised of thousands of rental housing providers and managers located in and around the County of Los Angeles, including the owners and managers of some 55,000 properties located within the City of Los Angeles. Pet. App. 13. AAGLA filed suit to enjoin and invalidate the City's Eviction Moratorium on various grounds, including that it violates the Contracts Clause embodied in Article I, Section 10 of the United States Constitution. Pet. App. 13–14. AAGLA argued, among other things, that it was likely to succeed on the merits of its claim that the Eviction Moratorium substantially impairs existing lease agreements by preventing property owners from exercising their right to initiate summary unlawful detainer proceedings to replace defaulting tenants, and

that the Moratorium's effective outright denial of evictions in conjunction with its lack of attestation requirements eviscerated any hope that it is based on reasonable conditions.

On November 13, 2020, the Honorable Judge Pregerson of the Central District of California issued an Order denying AAGLA's motion for preliminary injunction. Pet. App. 59. In its Order, the Court recognized both that "[c]rises of national scope require national responses," and that the Eviction Moratorium "substantially impairs" lease agreements between landlords and residential tenants because "the scope and nature of the COVID-19 pandemic" found "no precedent in the modern era, and that no amount of prior regulation could have led landlords to expect anything like the blanket Moratorium." Pet. App. 32, 38, 41. The Court continued that "it would be difficult to conclude that the Moratorium does not, at a minimum, significantly interfere with landlords' reasonable expectations." Pet. App. 40.

Nonetheless, the Court found that AAGLA failed to show a likelihood of success because, even though the Moratorium substantially impaired existing contracts, the Eviction Moratorium was a "reasonable" response to an admittedly serious problem. Pet. App. 59. Specifically, Judge Pregerson looked to this Court's pronouncement in *Energy Reserves*, 459 U.S. at 412, which suggests that the "second prong" of a Contracts Clause challenge looks to "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a

character appropriate to the public purpose justifying [the legislation's] adoption.'" (alterations original).

In its analysis, the Court leaned heavily upon the City's sweeping determinations relating to the putative health, safety, and welfare justifications undergirding the Eviction Moratorium because, as the Court believed, there is no "specific prerequisite for reasonableness." Pet. App. 46. For example, in discussing the impact of the Eviction Moratorium's provisions prohibiting interest charges and late fees, the Court noted that it would not "second-guess" the City's determination that such provisions served the alleged ends. Pet. App. 50, n.34. The Court also noted that it would "defer to the City Council's weighing of the interests at stake" as to the more general question of the Moratorium's reasonableness. Pet. App. 46.

3. The Ninth Circuit's Decision

AAGLA timely appealed to the Ninth Circuit Court of Appeals, renewing its argument that the Eviction Moratorium constituted a violation of the Contracts Clause. As it did below, AAGLA argued that it was likely to succeed on the merits because the Eviction Moratorium lacked certain hallmark indicators of reasonableness. AAGLA provided a comprehensive analysis of various "emergency" moratoria evaluated by this Court under the Contracts Clause and Due Process Clause during tumultuous periods in our nation's history, and noted that those moratoria which appropriately protected both parties' interests typically survived constitutional challenges, while laws that favored only one of the contracting parties' interests were constitutionally infirm. *See, e.g.*, *W.B. Worthen*

Co. v. Thomas, 292 U.S. 426, 433–34 (1934) (striking down Arkansas foreclosure moratorium where no protections were in place for the mortgagee and explaining that, unlike the moratorium at issue in *Blaisdell* that was found to be "reasonable, *from the standpoint of both mortgagor and mortgagee*," no such even-handed protection was present in the Arkansas law) (emphasis added). Moreover, while the Ninth Circuit disagreed, AAGLA argued that the lack of protections afforded to Los Angeles landlords in the Eviction Moratorium, particularly the lack of any type of assurance of payment or reasonable rent during the emergency, rendered the Moratorium unreasonable. This is particularly true in light of even more recent Contracts Clause cases, where the Court's review and analysis of *Blaisdell* led this Court to conclude that even the *Blaisdell* Court would have struck down the foreclosure moratorium at issue in the case had it not possessed limitations such as the requirement of "reasonable rent" during the period of emergency. *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 Contracts Clause of the Constitution."); *U.S. 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").

AAGLA also argued that the scrutiny to which a challenged law is subjected under the Contracts Clause

depends on the severity of the impairment, citing this Court's opinion in *Allied Structural Steel Co.*, 438 U.S. at 245 ("The severity of the impairment measures the height of the hurdle the state legislation must clear. 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."). So, the argument went, because Judge Pregerson found the Eviction Moratorium to substantially impair private contracts and was extreme by any measure, then something more than simple deference was needed, and under a heightened level of scrutiny, AAGLA was confident of ultimate success.

The Ninth Circuit decided to go in a different direction. Quoting *Energy Reserves*, a case where this Court found that "the reasonable expectations" of the contracting parties had "not been impaired," 459 U.S. at 415, the Ninth Circuit concluded that "when the government is not party to the contract being impaired, 'courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" Pet. App. 18. The Court glossed over the substantial impairment analysis and jumped straight to the second and third prongs of the Contracts Clause test, *i.e.*, whether the impairing law served a legitimate public interest and, if so, whether it was based on "reasonable conditions." In concluding that it was, the Ninth Circuit noted that "given the challenges that COVID-19 presents, the Moratorium's provisions constitute an 'appropriate and reasonable way to advance a significant and legitimate public purpose.'" Pet. App. 19 (quoting *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018)).

Thus, the Court held that AAGLA could "prevail, if at all, only if it can show that the provisions it challenges were not 'appropriate and reasonable.'" Pet. App. 19 (quoting *Sveen*, 138 S. Ct. at 1822). The Court affirmed "because the district court properly deferred to local officials in the reasonableness analysis under modern Contracts Clause precedent." Pet. App. 19 (citing *Energy Reserves*, 459 U.S. at 413). In the face of a single reference to *Allied Structural Steel*'s pronouncement that there must be a "careful examination" of the Moratorium's provisions given the substantiality of impairment, the Court held that "AAGLA is unlikely to show that the eviction moratorium is an unreasonable fit for the problems identified." Pet. App. 19.

4. Subsequent Decision of the Second Circuit

In an unrelated action, the Second Circuit recently weighed in on a Contracts Clause challenge to a similar local ordinance passed in the wake of COVID-19. *See Melendez v. City of New York*, No. 20-4238-cv, 2021 WL 4997666 (Oct. 28, 2021). At issue in *Melendez* was a challenge to, among other things, New York's "Guaranty Law" that renders permanently unenforceable personal liability guaranties on certain commercial leases, as well as for rent obligations arising during a specified period in the pandemic. *Id.* at *8. The district court dismissed plaintiffs' amended complaint pursuant to Rule 12(b)(6) in relevant part because they failed to state a claim to the contrary that the challenged law "advanced a legitimate public purpose and was a reasonable and necessary response to a 'real emergency.'" *Id.* at *12. Though the district

court there did also find that plaintiff-appellants plausibly alleged substantial impairment of their contract rights. *Id.*

On appeal, Senior Circuit Judge Raggi for the majority provided an exhaustive survey of this Court's Contracts Clause jurisprudence. Judge Raggi noted the historic respect accorded to the Contracts Clause by courts, which was understood for the majority of this Country's history to be "'perhaps the strongest single constitutional check on state legislation during our early years as a Nation,'" as one would expect from the plain text of the Clause. *Id.* at *20 (quoting *Allied Structural Steel*, 438 U.S. at 241). Judge Raggi then outlined the Clause's purported fall from grace, noting that in *Blaisdell,* this Court for the first time (over a spirited dissent by four Justices) "provided a full rationale for police power impairment of private contracts, replacing a strict textual view of the Contracts Clause with one that relied on a balancing principle." *Melendez*, 2021 WL 4997666, at *23. The Second Circuit noted that both judges and academics have since strongly criticized the balancing approach to the Contracts Clause. *Id.* at *24–25.

Despite *Blaisdell* and progeny, the Second Circuit understood that "one thing is clear: the Court has specifically rejected the idea that the Clause is 'without meaning in modern constitutional jurisprudence, or that its limitation on state power [is] illusory.'" *Id.* at *27 (quoting *United States Tr. Co. v. New Jersey*, 431 U.S. 1, 16 (1977)) (alteration original). As such, Contracts Clause claims are not guided by "seemingly limitless deference to legislative judgments impairing

contracts," but rather require that for "the second step of [the] analysis," courts must look to the severity of the burden to determine the level of scrutiny. *Id.* at *28 (quoting *Allied Structural Steel*, 438 U.S. at 245 ("[t]he severity of the impairment measures the height of the hurdle the state legislation must clear")).

In other words, the Second Circuit now holds that Contracts Clause analyses necessarily involve a variable level of scrutiny, and something more than mere rational basis applies. *Id.* (quoting *Allied Structural Steel*, 438 U.S. at 245 ("While an impairment causing only '[m]inimal alteration of contractual obligations may end the inquiry at its first stage,' *i.e.*, without consideration of purpose or means, '[s]evere impairment . . . will push the inquiry to a careful examination of the nature and purpose of the state legislation.'")). The standard "is more demanding than the rational basis review that applies when legislation is challenged under the Due Process Clause," although "it is more deferential to legislative judgment than strict scrutiny." *Id.* at *30.

Turning to the merits, the Second Circuit applied this framework to find that the plaintiff-appellants had stated a "sufficiently plausible Contracts Clause challenge to the Guaranty Law to withstand dismissal." *Id.* In so holding, the Court expressly rejected the defendant City's argument that courts must afford "customary deference" to legislative judgments (*i.e.*, rational basis) and instead must apply the "variable standard" of review. *Id.* at *32. While the Court expressed some concern that the variable standard will lead to "unpredictability," "until the

Supreme Court instructs otherwise, we must endeavor faithfully to apply it in conducting the 'careful examination' of a substantial contract impairment[.]" *Id.*

REASONS FOR GRANTING THE PETITION

A. Certiorari Should Be Granted to Resolve a Conflict Between the Courts of Appeals.

The Ninth and Second Circuits are now squarely split on the question of the standard of review that applies to Contracts Clause challenges to local laws affecting private contracts.

On one hand, the Ninth Circuit has instructed that courts look to whether a law is "appropriate and reasonable," and may even skip the substantial impairment analysis altogether. Pet. App. 19. This test is mere "rational basis" by another name: "Under current doctrine, we must 'refuse to second-guess' the City's determination that the eviction moratorium constitutes 'the most appropriate way[] of dealing with the problem[s]' identified." Pet. App. 21 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506 (1987)). The Ninth Circuit has clearly shown how little bite this test provides. In applying it to AAGLA's claim, for instance, the Court noted that "each of the provisions of the eviction moratorium that AAGLA challenges may be viewed as *reasonable* attempts to address that *valid* public purpose." Pet. App. 21 (emphasis added).

On the other hand, the Second Circuit has decidedly established that courts should look *first* to the severity of the impairment to gauge the applicable standard of

review. Depending on the substantiality of impairment, courts in the Second Circuit then scrutinize a law to a greater or lesser degree, but certainly varying from something *more* that rational basis to something less than strict scrutiny. *Melendez*, 2021 WL 4997666, at *30.

Not only does the Ninth Circuit now find itself split with the Second Circuit, it comes down on the wrong side of the ledger. The Second Circuit was not engaging in legal alchemy to hold that Contracts Clause challenges involve a variable form of scrutiny. Rather, as Judge Raggi ably explained, the Second Circuit merely understood this Court to have meant what it said in *Allied Structural Steel*: "[a]s the Court itself stated," minimal impairments lead to less scrutiny, while "'[s]evere impairment . . . will push the inquiry to a careful examination of the nature and purpose' of the challenged state legislation." *Id.* at *28, *32 (quoting *Allied Structural Steel*, 438 U.S. at 245).

As support for its reasoning, the Ninth Circuit cites primarily to three of this Court's opinions: *Sveen v. Melin*, 138 S. Ct. 1815 (2018), *Energy Reserves*, 459 U.S. 400, and *Keystone Bituminous*, 480 U.S. 470. But a careful review of these cases shows that these precedents do not inform the instant analysis as much as the Ninth Circuit believed.

In *Sveen*, for instance, this Court considered a Contracts Clause challenge to a statute that provided for default revocation upon divorce of a life insurance policy holder's beneficiary designation to one's spouse. *Id.* at 1818. But in *Sveen*, this Court only reached the first question of whether the law operated a substantial

impairment to existing contracts. *Id.* at 1821–22. The Court only briefly explained in a single sentence that the "second prong" of the analysis asks "whether the state law is drawn in an 'appropriate' and 'reasonable' way to 'advance a significant and legitimate public purpose.'" *Id.* (citing *Energy Reserves*, 459 U.S. at 411–12). But because this Court in *Sveen* only reached the first question, its holding and rationale has no functional bearing on the second question. Indeed, in *Sveen*, there was simply no "standard of review" to apply because the law was found to not operate a substantial impairment in the first place.

Energy Reserves, in turn, does suggest that if the legislation operates a substantial impairment upon private contracts, then "the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . such as remedying of a broad and general social or economic problem." *Energy Reserves*, 459 U.S. at 411. Given that the private contracting parties impacted by the Kansas law at issue had expressly acknowledged in their contracts the possibility the very price-setting arrangement that was alleged to violate the Contracts Clause, the Court found that the parties "contractual expectations" had not been impaired, the minimal scrutiny applied to the second and third prongs was appropriate even under a variable standard of review. *Id.* at 416. *Energy Reserves* also states plainly that "[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." *Id.* (citing *Allied Structural Steel*, 438 U.S. at 245). Read together, *Sveen* and *Energy Reserves* do nothing to vitiate the main thrust of *Allied Structural Steel* — in other

words, the "variable scrutiny" applicable to Contracts Clause claims appears to retain its vitality.

Finally, in *Keystone Bituminous*, this Court was asked to consider whether certain portions of Pennsylvania's Subsidence Act violated the Contracts Clause. 480 U.S. at 474. There, the district court rejected petitioners' Contracts Clause claim on the grounds that because "only private contractual obligations had been impaired, . . . it [was] appropriate to defer to the legislature's determinations concerning the public purposes served by the legislation." *Id.* at 480. For its part, the Court of Appeals agreed with the district court "that a higher degree of deference should be afforded to legislative determinations respecting economic and social legislation affecting wholly private contracts than when the State impairs its own agreements," and held that the impairment there "was justified by the legislative finding[s]." *Id.* at 481. In affirming the Court of Appeals, this Court noted (once again citing *Energy Reserves*) that the legislation survives the "second prong" of a Contracts Clause challenge if it is based on reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *Id.* at 505. In that case, this Court "refuse[d] to second-guess [Pennsylvania's] determinations that these are the most appropriate ways of dealing with the problem." *Id.* at 506.

This language from *Keystone Bituminous*, of course, is the hook the Ninth Circuit chose to hang its hat upon. Pet. App. 20. But therein lies the problem. *Keystone Bituminous* does not directly reference *Allied*

Structural Steel's pronouncement that merely deferring to the legislature is improper; rather, as *Allied Structural Steel* plainly provides, that may prove true when the impairment is "minimal," but more severe impairments receive harsher scrutiny. *Allied Structural Steel*, 438 U.S. at 245 ("The severity of the impairment measures the height of the hurdle the state legislation must clear.").

After a careful review of this Court's precedents, it is evident that the Second Circuit reaches a stronger conclusion. The Second Circuit is in good company. Several other circuit courts that have considered Contracts Clause challenges have also understood *Allied Structural Steel* to provide a "variable scrutiny" for such claims. *See, e.g.*, *Wisconsin Cent. Ltd. v. Pub. Serv. Comm'n of Wisconsin*, 95 F.3d 1359, 1370–71 (7th Cir. 1996) (noting that *Allied Structural Steel* and *Energy Reserves* brought "renewed vigor" to the Clause such that "[t]he impairment inquiry is case-specific and dictates the extent of further inquiry"); *Elliott v. Bd. of Sch. Trs. of Madison Consol. Schs.*, 876 F.3d 926, 937 (7th Cir. 2017) ("The degree of deference differs depending on the severity of the impairment and on the State's self-interest."); *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 505 (5th Cir. 2001) ("The scrutiny to which the court subjects the state law is proportional to the degree of impairment."); *Am. Express Travel Related Servs. v. Sidamon-Eristoff*, 669 F.3d 359, 368–69 (3d Cir. 2012) ("Where the contract is between private parties, courts may 'defer to legislative judgment as to the necessity and reasonableness of a particular measure.' . . . But this review of legislative judgment is more exacting than the rational basis

standard applied in the due process analysis." (citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984))); *see also Honeywell, Inc. v. Minnesota Life & Health Ins. Guaranty Ass'n*, 110 F.3d 547, 557 (8th Cir. 1997) (Loken, J., concurring) ("The latter two [Contract Clause] factors are interrelated. 'The severity of the impairment measures the height of the hurdle the state legislation must clear.'").

The same is true for district court opinions. *See, e.g.*, *Vanguard Med. Mgmt. Billing, Inc. v. Baker*, No. EDCV 17-965-GW(DTBX), 2018 WL 6137198 (C.D. Cal. Apr. 26, 2018) ("'The severity of the impairment' increases 'the level of scrutiny to which the legislation will be subjected,' although '[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment,' and 'state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment.'"); *Ross v. City of Berkeley*, 655 F. Supp. 820, 827 (N.D. Cal. 1987) ("While complete destruction of the rights of a contracting party is not required to find an impermissible impairment, the degree of contractual interference is critically significant to the constitutional analysis."); *21st Century Oncology, Inc. v. Moody*, 402 F. Supp. 3d 1351, 1358 (N.D. Fla. 2019) ("The severity of the impairment is both the focus of the first step and a means to calibrate the second step; that is, the more severe the impairment, the higher the level of scrutiny a court will apply."); *W. Indian Co. v. Gov't of Virgin Islands*, 643 F. Supp. 869, 881 (D.V.I. 1986) ("The government has a difficult burden to overcome at this second stage because 'the severity of the impairment measures the

height of the hurdle the [territorial] legislation must clear.' . . . Since the Legislature has completely eliminated WICO's rights, we must carefully scrutinize the nature and purpose of the legislation.").

Moreover, there is arguably now tension within the Ninth Circuit as to the import of *Allied Structural Steel*. In *Campanelli v. Allstate Life Ins., Co.*, 322 F.3d 1086 (9th Cir. 2003), the Ninth Circuit was asked to consider a Contracts Clause challenge to a state law that revived certain time-barred insurance claims. In discussing relevant Contracts Clause jurisprudence, the *Campanelli* court opined that "[t]he threshold inquiry in Contract Clause analysis is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' . . . 'The severity of the impairment measures the height of the hurdle the state legislation must clear.' . . . The more severe the impairment, the more searching the examination of the legislation must be." *Id.* at 1098 (quoting *Energy Reserves*, 459 U.S. at 411, and *Allied Structural Steel*, 438 U.S. at 244–45). In the next breath, however, the *Campenelli* court also explained that "[u]nless the state is a party to the contract, courts 'defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Id.* (quoting *Energy Reserves*, 459 U.S. at 412–13). The Ninth Circuit in *Campanelli* appears to conclude that two mutually independent (and, in fact, irreconcilable) principles apply: greater severity leads to greater scrutiny, *but* courts must also defer to all legislative enactments that do not affect public contracts. This reading of this Court's precedents limiting any form of heightened scrutiny to merely laws affecting public

contracts is unsound, of course, because *Allied Structural Steel* itself was a case regarding a state law adjusting pension plan benefits between private employers and employees. 438 U.S. at 238–39.

It is true that some courts have understood the test to mean, as the Ninth Circuit did here, that "unless the State is a party to the contract, as is usual in reviewing economic or social legislation, the Court properly defers to the judgment of the legislature as to the reasonableness and necessity of the legislative action at issue." *Lefrancois v. Rhode Island*, 669 F. Supp. 1204, 1213 (D. R.I. 1987) (citing *Energy Reserves*, 459 U.S. at 412–13); *see also, e.g.*, *Nat'l Collegiate Athletic Ass'n v. Miller*, 795 F. Supp. 1476, 1487 (D. Nev. 1992) ("The Supreme Court has held that the nature of the contractual relationship involved determines the standard of review. If the challenged state law is alleged to have impaired a contractual relationship involving only private parties, the court should willingly defer to legislative judgment regarding the reasonableness and the necessity of the state law."). But these opinions merely show that the question presented by this petition remains in much need of clarification from this Court.

In sum, the Ninth Circuit's opinion is sure to serve as a siren song, enticing future courts to short circuit Contracts Clause claims by reducing their review to simple deference. If this Court meant what it said in *Allied Structural Steel*, this cannot stand.

B. Certiorari Should Be Granted Because This Case Presents a Clean Vehicle to Address an Issue of Nationwide Importance.

In this Court's recent decision addressing the CDC's efforts to extend the national eviction moratorium, *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.,* 141 S. Ct. 2485, 2489 (2021), the Court thoughtfully recognized the "millions" of landlords that were "at risk of irreparable harm," notwithstanding the "CDC's determination that landlords should bear a significant financial cost of the pandemic." And while those landlords that were previously subject to the CDC's eviction moratorium are now free to reclaim their property from defaulting tenants, state and local governments throughout the nation, like Los Angeles, have adopted even more aggressive eviction moratoria directly destroying the primary contractual security landlords have to protect against defaulting tenants — the ability to evict.

The suffering experienced by these landlords is evident from the numerous federal court lawsuits filed against state and local governments seeking to enjoin enforcement of these eviction moratoria. Many of these plaintiffs, like AAGLA did here, sought to enjoin the enforcement on Contracts Clause grounds. *See, e.g.*, *Baptiste v. Kennealy,* 490 F. Supp. 3d 353, 382 (D. Mass. 2020) (denying preliminary injunction on Contracts Clause grounds); *Heights Apartments LLC v. Walz*, 510 F. Supp. 3d 789, 797 (D. Minn. 2020) (dismissing plaintiff's Contracts Clause claim against executive order limiting "landlords' ability to file eviction actions against residential tenants"); *Auracle*

Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 222-26 (D. Conn 2020) (denying motion for preliminary injunction enjoining Connecticut Governor Lamont's executive orders limiting evictions during pandemic and finding no likelihood of success on the merits of plaintiff's Contracts Clause claim); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 349-55 (E.D. Pa. 2020) (denying association plaintiff's motion for preliminary injunction to enjoin Philadelphia's eviction moratorium and determining that plaintiff had not demonstrated a likelihood of success on merits of plaintiff's Contracts Clause claim); *Willowbrook Apartment Assocs.*, *LLC v. Mayor & City Council of Baltimore ,* No. 20-CV-01818-SAG, 2021 WL 4441192 (D. Md. Sept. 27, 2021) (granting various government motions for summary judgment and denying housing provider plaintiffs motion for summary judgment asserting eviction moratoria violated Contracts Clause); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 168–72 (S.D.N.Y. 2020) (rejecting on the merits plaintiffs' claim that Governor Cuomo's eviction moratoria violated Contracts Clause); *Bols v. Newsom,* 515 F. Supp. 3d 1120, 1131 (S.D. Cal. 2021) (denying County and City defendants' motion to dismiss Contracts Clause claim re local eviction moratoria and finding plaintiff had adequately alleged a viable claim).

The foregoing reflect a small sampling of the hundred or more federal and state cases challenging various local and state eviction moratoria adopted in connection with the pandemic, many of which address claims under the Contracts Clause. The pubic importance of this issue is self-evident.

The Ninth Circuit's decision in this case presents an extraordinarily "clean vehicle" to address the appropriate standard of review in this case. While many of the eviction moratoria decisions addressing Contracts Clause claims also address a number of other claims (such as Due Process and Takings claims), AAGLA only appealed Judge Pregerson's denial of AAGLA's preliminary injunction motion under the Contracts Clause. In addition, the Ninth Circuit panel did not address the procedural issues for issuance of a preliminary injunction (such as irreparable harm and the equities attendant to issuance or denial of provisional relief) and, thus, are not the subject of this Petition. Because courts are disinclined to reach constitutional questions if the matter may be disposed of on other grounds, the Ninth Circuit's decision to address only AAGLA's likelihood of success on the merits signals that the panel did not consider the procedural issues to pose a significant obstacle to AAGLA's request.

Finally, it seems fairly obvious that had the District Court or the Ninth Circuit employed more than rational basis scrutiny to determine whether the Moratorium was "reasonably conditioned," a different result would obtain. Prior to the COVID-19 pandemic, no emergency-era moratorium reviewed by this Court under the Contracts Clause survived unless it provided some reasonable compensation to landlords or mortgagees while the defaulting party was still in possession. *See, e.g.*, *Block v. Hirsh,* 256 U.S. 135, 153–54 (1921) (upholding eviction moratorium prohibiting rent increases in Washington D.C. where "machinery" was in place to assure to landlord a

"reasonable rent"); *W.B. Worthen Co. v. Kavanaugh,* 295 U.S. 56, 61 (1935) (striking down foreclosure moratorium where it did not condition relief upon "payment of interest and taxes or the rental value of the premises").

The eviction moratoria adopted during the course of the pandemic provide no assurances to landlords that they will ever receive the rent payments to which they were (and are) entitled under their respective leases. In Los Angeles, landlords will never be made whole even if they do receive back rent, given that, with a stroke of a pen, the City eliminated the landlords' ability to recover late fees and interest on back rent. Thus, the City has forced landlords to become involuntary creditors to their highest risk tenants without any return for the risk that has been foisted on them. In no other context would the government even dare to suggest, let alone mandate, that a particular class of individuals may take receipt of goods or services on the mere promise that the provider of the goods or services may pursue compensation at some distant point in the future. The City, along with countless agencies at all levels of government, have decided that landlords should shoulder the risk and, in addition, continue honoring every contractual obligation landlords have despite not receiving the sole consideration to which landlords are entitled under their lease agreements — the payment of monthly rent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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