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CALIFORNIA RENTAL HOUSING ASSOCIATION, ET AL.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA RENTAL HOUSING ASSOCIATION, MARY MONTANO, and TRANG HO,

Plaintiffs

v.

GAVIN NEWSOM, in his official capacity as Governor of the State of California; ROB BONTA, in his official capacity as Attorney General of the State of California; and DOES 1 through 20, inclusive,

Defendants.

Case No.: 2:21-cv-01394-JAM-JDP

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: August 23, 2022
Time: 1:30 P.M.
Ctrm: Courtroom 6, 14th Floor
Judge: Hon. John A. Mendez

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 23, 2022, at 1:30 P.M., or as soon thereafter as the matter may be heard, in Courtroom 6, 14th Floor, of the U.S. District Court for the Eastern District of California, before the Honorable John A. Mendez, Plaintiffs will and hereby do move this Court for summary judgment or, in the alternative, summary adjudication..

Plaintiffs' motion is based on this Notice of Motion and Motion, the following Memorandum of Points and Authorities, the Statement of Undisputed Facts, the Declarations of Christine LaMarca, Robert F. Kevane, Mary Montano, and Trang Ho, Plaintiffs' Request for Judicial Notice, all documents and records on file in this action, any further evidence or arguments that may be presented at or before the hearing on this matter, and any and all matters upon which the Court may take judicial notice.

DATED: June 17, 2022.

FISHERBROYLES LLP

By: *s/ Paul Beard II*

PAUL BEARD II
Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES AND RULES

STATE STATUTES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a federal civil rights challenge to the eviction moratorium codified in California's "COVID-19 Tenant Relief Act." Since 2020, the Act has barred rental housing owners from freely repossessing their properties due to tenants' nonpayment of rent based on tenants' self-certification of financial distress. As detailed below, for nearly two years, the moratorium has forced landlords to house their tenants for free or at a fraction of the rent owed, with no hope or expectation of ever recovering rent arrears from largely judgment-proof tenants. This has devastated many landlords, both financially and emotionally, including Plaintiff and senior citizen, Mary Montano. Ms. Montano barely scrapes by on Social Security and can hardly afford her prescriptions because she has had to subsidize a tenant living in her property *to the tune of almost $60,000 in unpaid rent*.

Plaintiffs are California Rental Housing Association, which represents rental housing owners across the State, as well as Ms. Montano and another small mom-and-pop landlord, Trang Ho. Together, they are suing Governor Gavin Newsom and California Attorney General Rob Bonta (collectively, the "State") on the grounds that the moratorium—and any further extension thereof—violates the Federal Constitution.

First, the moratorium has allowed a tenant's self-certification of inability to pay—a self-certification that cannot be meaningfully challenged—to cut off a landlord's right to evict for nonpayment of rent. More recently, the moratorium has allowed a tenant's mere application for rental assistance to achieve the same end: eliminate the owner's right to evict. It is hornbook law that "no man can be a judge in his own case consistent with the Due Process Clause." *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021) Under recent Supreme Court precedent, the law's scheme for depriving landlords of their eviction rights violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.*

Second, the moratorium has resulted in a *per se* taking of landlords' property rights—specifically, the fundamental right to exclude. The taking serves no public use or purpose; it serves only a *private* purpose—i.e., to benefit a subset of tenants who self-certify as unable to pay rent or who file an application for rental assistance. Further, the law provides no mechanism for compensating landlords for the taking.

As such, the moratorium violates both the Public Use and Just Compensation requirements of the Takings Clause of the Fifth Amendment.

Finally, the moratorium violates the Contracts Clause of the Constitution. It does away with the fundamental bargain of all leases (including Plaintiffs' leases)—namely, the right to evict for nonpayment of rent. And it does so in a way that is neither appropriate nor reasonable under the circumstances, especially with the pretext for the moratorium (i.e., the COVID-19 pandemic) subsidizing over time and under relative control for a year or more.

Plaintiffs seek a declaration that the State's eviction moratorium is unconstitutional, as well as an injunction enjoining its enforcement and the enforcement of future extensions. They also seek nominal damages for violation of their federal civil rights. The Court should grant Plaintiffs' motion and the equitable relief they so desperately need.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Eviction Moratorium

On August 31, 2020, the State enacted the "COVID-19 Tenant Relief Act" ("Act"), codified at Code of Civil Procedure section 1179.01, *et seq.* In relevant part, and as described below, the Act bars evictions for the nonpayment of rent at the stroke of a tenant's pen. Code of Civ. Proc. §§ 1179.03-1179.03.5.[1] The moratorium initially was intended to be temporary. But over the last couple of years, even as the pandemic's effects have substantially subsided, the State has repeatedly extended the moratorium through a series of bills, with no realistic end in sight for rental housing owners.[2]

The first bill (AB 3088) was enacted on August 31, 2020. Under sections 1179.03 and 1179.03.5 as codified by AB 3088, a tenant who timely submitted to his landlord a sworn "Declaration of COVID-19-related financial distress" claiming decreased income or increased expenses due to the pandemic was automatically protected against eviction for nonpayment of rent that came due between March 1, 2020,

[1] All section references are to the Code of Civil Procedure.

[2] Those bills are AB 3088 (enacted on August 31, 2020, and referring to the moratorium as a "temporary" measure), SB 91 (enacted on January 29, 2021 to, in part, extend the moratorium), AB 832 (enacted on June 28, 2021 to, in part, extend the moratorium), and AB 2179 (enacted on March 31, 2022 to, in part, extend the moratorium). For convenience, those bills are attached to the Request for Judicial Notice at Exhibits 1, 2, 3, and 4, respectively.

and August 31, 2020. *See* Request for Judicial Notice ("RJN"), Exh. 1; Code of Civ. Proc. §§ 1179.03(b), 1179.03(g), 1179.03.5. The declaration—a self-certification of financial hardship—simply needed to make the following assertions in order to bar an eviction:

> "I am currently unable to pay my rent or other financial obligations under the lease in full because of one or more of the following:
>
> 1. Loss of income caused by the COVID-19 pandemic.
>
> 2. Increased out-of-pocket expenses directly related to performing essential work during the COVID-19 pandemic.
>
> 3. Increased expenses directly related to health impacts of the COVID-19 pandemic.
>
> 4. Childcare responsibilities or responsibilities to care for an elderly, disabled, or sick family member directly related to the COVID-19 pandemic that limit my ability to earn income.
>
> 5. Increased costs for childcare or attending to an elderly, disabled, or sick family member directly related to the COVID-19 pandemic.
>
> 6. Other circumstances related to the COVID-19 pandemic that have reduced my income or increased my expenses.
>
> Any public assistance, including unemployment insurance, pandemic unemployment assistance, state disability insurance (SDI), or paid family leave, that I have received since the start of the COVID-19 pandemic does not fully make up for my loss of income and/or increased expenses."

Code of Civ. Proc. § 1179.02(d).

No owner who received such a declaration, regardless of its truthfulness and regardless of the tenant's actual ability to pay rent, could exercise the right to repossess his property for nonpayment of rent coming due between March 1, 2020, and August 31, 2020. Code of Civ. Proc. §§ 1179.03(b), 1179.03(g).[3]

For rent that came due between September 1, 2020, and January 31, 2021, a tenant would be protected against eviction for nonpayment of rent if the tenant both (1) submitted the sworn declaration described above and (2) paid—by January 31, 2021—at least 25 percent of each rental payment that came due or would come due between September 1, 2020, and January 31, 2021. *See* RJN, Exh.1; Code of Civ.

[3] Even if a tenant fails to timely submit to his landlord the sworn declaration due to "mistake, inadvertence, surprise, or excusable neglect," all is not lost. Code of Civ. Proc. §§ 1179.03(h). He can still file the declaration in court, following the landlord's filing of an unlawful detainer action. Once the declaration is filed, the Court must dismiss the unlawful detainer action. *Id.*

Proc. §§ 1179.03(c)(4), 1179.03(g), 1179.03.5.

Subsequent bills extended the moratorium, including the date by which the tenant had to make the minimum 25% payment in order to avoid eviction for nonpayment of rent.

Enacted on January 29, 2021, SB 91 barred eviction for nonpayment of rent that came due between September 1, 2020, and *June 30, 2021*, if the nonpaying tenant (1) submitted a sworn declaration of COVID-19 financial distress and (2) paid—by June 30, 2021—at least 25% of the of rent missed between September 1, 2020, and June 30, 2021. *See* RJN, Exh. 2; Code of Civ. Proc. §§ 1179.03(c)(5), 1179.03(g), 1179.03.5. Then, AB 832 (enacted on June 28, 2021) again extended the moratorium and time for payment of the minimum 25%. *See* RJN, Exh. 3; Code of Civ. Proc. §§ 1179.03(c)(6), 1179.03.5. AB 832 barred eviction for nonpayment of rent that came due between September 1, 2020, and *September 30, 2021*, if the nonpaying tenant (1) submitted a sworn declaration of COVID-19 financial distress and (2) paid—by September 30, 2021—at least 25% of rent missed between September 1, 2020, and September 30, 2021.

Most recently, on March 31, 2022, AB 2179 was enacted. That bill further extends the moratorium on evictions related to rent coming due between September 1, 2020, and September 30, 2021. *See* RJN, Exh. 4. But there is a different trigger for the moratorium. Instead of submitting a declaration of COVID-19 financial distress, all a tenant needs to do in order to cut off an owner's right to evict for nonpayment of rent is to apply for rental assistance by March 30, 2022. If the application is made by that deadline, the owner has no right to evict for nonpayment of rent until July 1, 2022. *See* RJN, Exh. 4; Code of Civ. Proc. §§ 1179.03(c)(7).

B. Plaintiffs Challenge the Eviction Moratorium, and the Court Orders Cross-Motions for Summary Judgment

In August 2021, Plaintiffs filed this Complaint. It alleges three causes of action under 42 U.S.C. section 1983: (1) the moratorium violates the Due Process Clause; (2) the moratorium violates the Takings Clause; and (3) the moratorium violates the Contracts Clause. Plaintiff seeks equitable relief, as well as nominal damages for violation of their federal constitutional rights.

On January 6, 2022, the Court ordered the parties to file cross-motions for summary judgment.

III. STANDARD OF REVIEW

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as

to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing there is no genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To defeat the motion for summary judgment, the responding party must present admissible evidence sufficient to establish any of the elements that are essential to the moving party's case and for which that party will bear the burden of proof at trial. *See id.*; *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

The Court may grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show the movant is entitled to summary judgment and if the responding party fails to properly address the moving party's assertion of fact as required by Rule 56(c). See Fed. R. Civ. P. 56(e). The responding party cannot point to mere allegations or denials contained in the pleadings. It is not enough for the non-moving party to produce a mere "scintilla" of evidence. *Anderson*, 477 U.S. at 252. Instead, the responding party must set forth, by affidavit or other admissible evidence, specific facts demonstrating the existence of an actual issue for trial. *See KRL v. Moore*, 384 F.3d 1105, 1110 (9th Cir. 2004).

IV. ARGUMENT

A. Plaintiffs' Claims Are Justiciable

1. Plaintiffs Have Standing

"Article III standing requires injury-in-fact, causation, and redressability." *Planned Parenthood of Greater Wash. v. United States HHS*, 946 F.3d 1100, 1108 (9th Cir. 2020). As detailed below, Plaintiffs have standing.

(a) Ms. Montano

Ms. Montano is 77 years old, and owns a duplex in the City of Santa Barbara. Declaration of Mary Montano ("Montano Decl."), ¶ 2. Since July 1, 2019, Ms. Montano has been renting out one unit to a tenant pursuant to a lease that gives her the right to evict for nonpayment of rent. *Id.* ¶ 3. Taking advantage of the State moratorium, the tenant has refused to pay rent for ***18 months***, between April 2020 and September 2021; to date, he has racked up a total of ***$57,600*** in unpaid rent during the moratorium. *Id.*, ¶¶ 3-4.

Following a notice to pay or quit, the tenant timely provided Ms. Montano with a sworn declaration self-certifying to alleged financial distress related to COVID, thereby cutting off her right to repossess the property during those many months when she fully subsidized his occupancy. *Id.* After September 2021, the tenant began paying monthly rent. *Id.*, ¶ 4. Until March 2022, he refused to complete any paperwork to apply for any government rental assistance. But shortly before the March 2022 deadline for applying for rental assistance, the tenant finally applied, again cutting off—automatically—Ms. Montano's right to evict for nonpayment of the $57,600 in arrears. *Id.*, ¶ 5. To Ms. Montano's knowledge, he has not yet received rental assistance. *Id.* So, now, Ms. Montano must sit idly by as she houses a tenant with almost $60,000 in rent arrears.

Thanks to the State's eviction moratorium, Ms. Montano is struggling to make ends meet. *Id.*, ¶ 6. The other half of the duplex is paying rent. *Id*. However, that is only enough to cover the mortgage on the duplex. *Id.* Because of the nonpaying tenant, she has had to take out a substantial loan to pay the property taxes on the duplex. *Id.* Her monthly income consists only of $1,838 in Social Security, as well as the limited income from one of the units in the duplex which covers the property's mortgage. *Id.* It's been difficult for Ms. Montano to even cover the costs of her prescription medications. *Id.* The emotional strain and distress this has caused her cannot be overstated. *Id.*

Ms. Montano's lease with the tenant gives her the right to evict for nonpayment of rent, but the State's eviction moratorium eliminated that right. *Id.*, ¶ 7. When she entered the rental market and leased the duplex, she could never have imagined that her rights as a rental housing owner would be eliminated the way they have been by the State's eviction moratorium. *Id.* She could never have imagined being stripped of the right to repossess her own property, while being compelled to house a nonpaying tenant—at a loss of $57,600—as she lives off of Social Security. *Id.*

Ms. Montano has no reason to believe that her tenant will pay off his rent arrears, even if she pursues the arrears in court. *Id.*, ¶ 8. As noted above, he submitted a COVID-19 declaration of financial distress, which the State itself automatically accepts as proof that he cannot pay. In other words, the tenant is, by operation of the moratorium's provisions, assumed to be judgment-proof. To Ms. Montano, it would not be worth the time and expense of pursuing a judgment-proof tenant in court for substantial rent arrears, where she has a low-to-no chance of actually securing payment at the end of that court process. *Id.* Thus,

the moratorium has left her without the right to evict, and without any recovery or compensation to make her financially whole. The harm the moratorium has directly caused her is irreparable. *Id.*

(b) Ms. Trang Ho

Ms. Ho owns a rental unit in the City of Los Angeles, California. Declaration of Trang Ho ("Ho Decl."), ¶ 2. Her tenant began his tenancy in January 2020, before the State first imposed the eviction moratorium that is the subject of this lawsuit. *Id.* The lease with her tenant allowed her to evict for nonpayment of rent.

Ms. Ho's tenant paid rent in February and March 2020, but has paid nothing since. *Id.*, ¶ 3. He timely provided a sworn declaration of COVID-19-related financial distress when his rent default began. *Id.* Although otherwise ready, willing, and able to do so, Ms. Ho was unable to evict him through 2020 and most of 2021 because of the State moratorium on evictions for nonpayment of rent. *Id.*

Like Ms. Montano, when Ms. Ho entered the rental market and signed the lease with her tenant, there was no reason for her to think she would be compelled to indefinitely house tenants for free. *Id.*, ¶ 4.

The State moratorium has caused Ms. Ho great emotional and mental distress, as she has lost an important stream of income that ordinarily would help her to pay the mortgage, taxes, and maintenance costs of her rental units. *Id.*, ¶ 5. Given her tenant's declaration of financial distress, one can reasonably assume he is judgment-proof. She has no reasonable expectation of being able to recover past-due rents now or in the future. *Id.* That means the moratorium has required Ms. Ho to house a tenant in her property for free—with no realistic prospect of recovery and no mechanism for compensation by the State. *Id.* The harm the moratorium has directly caused her is irreparable.

(c) CalRHA

An associational plaintiff may bring suit on its members' behalf when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Plaintiff CalRHA easily meets the requirements for associational standing.

CalRHA is a statewide association that represents the rights and interests of dues-paying members

who own rental housing units in the State. Declaration of Christine La Marca ("La Marca Decl."), ¶ 4. The association is made up of small, medium, and large rental housing owners throughout California. *Id.* Its mission is to advocate for and protect the interests and rights of members, including rental housing owners. *Id.* As part of its mission, CalRHA files litigation like this one on behalf of member-owners when government enacts burdensome laws and regulations. *Id.*

Robert F. Kevane is one such member. Declaration of Robert F. Kevane ("Kevane Decl.") ¶ 2. He owns rental property in the County of San Diego. *Id.* Throughout 2021, he had a tenant in one of his units in San Diego County who paid only a fraction of the rent due under the lease (more than 25%, but less than 100%). *Id,* ¶ 3. The tenant also timely submitted to me a signed declaration of COVID-19 financial distress, thereby eliminating Mr. Kevane's right to evict for nonpayment of rent. *Id.*

His tenant signed the lease and took possession in October 2019. *Id.* ¶ 4 As the lease permits, Mr. Kevane was ready, willing, and able to evict the tenant for nonpayment of rent. But he has been barred from doing so under the State's moratorium. *Id.* Before March 30, 2022, the tenant applied for and received some rental assistance. *Id.*, ¶ 5. Total payments, including rental assistance, have only covered a fraction of the rent owed. *Id.* At present, the tenant owes $7,832.50 in rent arrears. *Id.* But, again, under these circumstances, Mr. Kevane is barred from exercising his right to repossess the unit. *Id.*

Further, given her submission of a declaration of COVID-19 financial distress, the tenant is deemed judgment-proof. Mr. Kevane has no reasonable expectation of being able to recover past-due rents now or in the future. That means the moratorium has required Mr. Kevane to house a tenant in his property at a fraction of the rent agreed to—with no realistic prospect of recovery and no mechanism for compensation.

Mr. Kevane and other CalRHA members would otherwise have standing to sue in their own right, and the interests CalRHA seeks to protect in this lawsuit are germane to the association's purpose. La Marca Decl., ¶¶ 4-5; Kevane Decl., ¶ 2. Neither the claims asserted, nor the relief requested, requires the individual participation of either Mr. Kevane or other CalRHA members harmed by the State moratorium.

2. The Claims Are Both Ripe and Live

"Ripeness is an Article III doctrine designed to ensure that courts adjudicate live cases or controversies and do not issue advisory opinions [or] declare rights in hypothetical cases." *Bishop Paiute*

Tribe v. Inyo Cty., 863 F.3d 1144, 1153 (9th Cir. 2017) (internal quotation marks omitted). There is nothing hypothetical about this case, and Plaintiffs' claims are certainly ripe for review. As described in great detail through the declarations of the various Plaintiffs, since 2001 when the moratorium was first enacted, it has caused severe and continuing harm to Plaintiffs. For nearly two years and counting, it has eliminated their right to evict for nonpayment of rent, on the basis of a tenant's "declaration" that he or she cannot pay. With no realistic prospect of recovering the unpaid rents, that harm is irreparable and justifies relief—today. Plaintiffs' claims are ripe.

Plaintiffs' claims also continue to be live. "A case is moot where no actual or live controversy exists." *Id.* at 1155 (internal quotation marks omitted). As of today, there is an ongoing moratorium that has prevented Plaintiffs from exercising their rights to evict for nonpayment of rent. With the most recent extension pursuant to AB 2179, an owner is barred from evicting a tenant for nonpayment of rent as long as the tenant made an application for rental assistance by March 31, 2022. *See* RJN, Exh. 4; Kevane Decl., ¶ 5; Montano Decl., ¶ 6. The extended moratorium—*the fourth iteration*—lasts through June 30, 2022. *Id.* Given this history, there is no reason to believe the moratorium won't be extended yet again.

In any event, Plaintiffs are pursuing section 1983 claims for violation of their constitutional rights, and request nominal damages for said violations. "A live claim for nominal damages will prevent dismissal for mootness." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *see also Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008) (holding that students' claims for constitutional violations were not moot, although they no longer attended the violating high schools and had no evidence of actual damages, because the students alleged injuries in the form of deprivation of constitutional rights).

3. The Attorney General Is a Proper Defendant

"Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). However, in *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), the Supreme Court "recognized a narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Woman's Health*, 142 S. Ct. at 532. If a state executive official has "enforcement authority"—if he "*may* . . . take enforcement actions" for the violation of state law—then suit can be

brought against the official in federal court for equitable relief. *Id.* at 534, 535 (emphasis added); *see also Ex Parte Young*, 209 U.S. at 161 ("It would seem to be clear that the Attorney General, under his power existing at common law and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the State, including, of course, the act in question, if it were constitutional. His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States Circuit Court.").

Plaintiffs do not contest that the Governor may be immune from this suit, but the Attorney General clearly is not. The Attorney General is "the chief law officer of the State." Cal. Const. art. V, § 13. As such, he has the constitutional "duty . . . to see that the laws of the State are uniformly and adequately enforced." *Id.* The State moratorium at issue here is a state law that the Attorney General has the duty to see is uniformly and adequately enforced—including through California's Unfair Competition Law, which specifically authorizes the Attorney General to prosecute a private party (like a landlord) for violation of any statute (like the moratorium provisions of sections 1179.03 and 1179.03.5). *See* Bus. & Prof. Code § 17200, *et seq.*; *see also id.* § 17204 ("Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General . . . ."); *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996) ("Under the Unfair Competition Act (UCA) . . . any unlawful, unfair or fraudulent business act or practice is deemed to be unfair competition . . . Injunctive relief and restitution are the remedies provided by the UCA. . . Virtually any state, federal or local law can serve as the predicate for an action under Business and Professions Code section 17200.").

The State of California has publicly—and very recently—expressed its view of the limited scope of the sovereign immunity doctrine as a misused tool for shielding state officials from private suits seeking to vindicate federal constitutional rights. In October 2021, Attorney General Rob Bonta signed onto an amicus brief on behalf of California and other states in the Supreme Court case of *Whole Woman's Health*, 142 S. Ct. 522. *See* RJN, Exh. 5.

Whole Woman's Health involved a federal-court, pre-enforcement challenge to a Texas law (SB 8) banning most abortions within its borders. *Whole Woman's Health*, 142 S. Ct. at 530. In an obvious effort to evade judicial review, SB 8 specifically prohibited state officials, including the Texas Attorney

General, from bringing criminal prosecutions and civil enforcement actions; instead, the law directed enforcement through *private* civil actions that would culminate in injunctions and damages awards against those performing or assisting prohibited abortions. *Id.*

After SB 8 was enacted, various abortion providers filed a pre-enforcement lawsuit in federal court, alleging violation of the Federal Constitution and seeking equitable relief. *Id.* The suit named various state officials, including the Texas Attorney General. *Id.* When the district court denied state officials' motion to dismiss on sovereign-immunity grounds, the issue made its way up to the Supreme Court on an emergency request. The question was whether the state officials were immune from suit. Ultimately, the Court held that most of the named officials—including the Texas Attorney General—*were* immune because SB 8 specifically precluded them from enforcing the law. *Id.* at 539.

California and its Attorney General (correctly) argued that Texas was "attempt[ing] to thwart judicial review and insulate the State from accountability for its unconstitutional ban by purporting to create only a private enforcement scheme." RJN, Exh. 5, p. 5. California urged the Court to reject that effort and offered its broad view of the *Ex Parte Young* exception, which liberally allows federal suits against state officials for equitable relief:

> Texas cannot evade compliance with binding precedent simply by delegating to private individuals the task of enforcing a patently unconstitutional law. This Court has not hesitated to recognize state action for Fourteenth Amendment purposes when faced with similar "evasive schemes" for trampling constitutional rights under color of state law, including where—as here—a State enlists its courts to deprive people of their constitutional rights. The Court has likewise repeatedly acknowledged that the doctrine of sovereign immunity does not bar private suits against state officials, including judicial officials, for equitable and declaratory relief to stop states from violating the Constitution. . . . S.B. 8's private enforcement mechanism does not permit Texas to avoid injunctive relief.

Id. at 6, 12 (citing *Ex Parte Young*, 209 U.S. at 159-60).

Plaintiffs agree with the California Attorney General's analysis, which applies with equal force in this case. Although the State moratorium was designed to be enforced primarily by tenants, the "regime hinges upon the coercive power of the State"—including California's Attorney General, who is charged specifically with ensuring enforcement of the State's laws. The Attorney General is properly named as a defendant in this action.

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/ / /

B. The Moratorium Is Unconstitutional

1. The Moratorium Violates Due Process

The Due Process Clause prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. At its core, due process requires that a person deprived of a property right or interest be given "some form of hearing" and "the opportunity to be heard." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Further, "no man can be a judge in his own case consistent with the Due Process Clause." *Chrysafis*, 141 S. Ct. at 2482 (internal citation and quotation marks omitted).

Under the State's moratorium, a tenant's self-certification of financial distress, without more, terminated a rental housing owner's right to repossess his property for nonpayment of rent. Importantly, an owner who received such a self-certification could not meaningfully challenge it in order to restore his right to evict. Said owner was afforded no hearing or opportunity to be heard as to the veracity, legitimacy, or adequacy of a tenant's self-certification that said tenant cannot pay rent. The same is true of the moratorium's current trigger: a tenant's submission of an application for rental assistance by March 30, 2022. That act, by itself, terminates an owner's right to evict for nonpayment of rent—at least through June 30, 2022. Like the COVID-19 declaration, the application for rental assistance is premised on the tenant's unchallenged—and unchallengeable—self-certification of financial distress.

This self-certification scheme, which automatically acts to eliminate landlords' eviction rights, mirrors the one at issue in *Chrysafis*. That case involved a New York law similar to California's COVID-19 Tenant Relief Act, called the "COVID Emergency Eviction and Foreclosure Prevention Act" ("CEEFPA"). "If a tenant self-certifies financial hardship," CEEFPA "precludes a landlord from contesting that certification and denies the landlord a hearing." As the dissent described the effect of self-certification:

> CEEFPA simplifies the process for tenants to invoke financial hardship during the pandemic as a defense to eviction. Tenants who wish to assert the defense must provide a sworn attestation stating that they are experiencing financial hardship or health impacts as a result of the pandemic. 2020 N. Y. Laws ch. 381, pt. A, §4. The attestation pauses eviction proceedings until the time that CEEFPA expires, namely the end of August 2021. Pending eviction proceedings are stayed, new eviction proceedings cannot be filed, and outstanding eviction warrants cannot be executed until that date. 2 Eviction proceedings may resume after August 31, 2021.

Id. at 2483 (Breyer, J., dissenting) (internal citations omitted).

The Court enjoined the CEEFPA, holding: "This scheme violates the Court's longstanding teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause." *Id.* at 2482 (quoting *In re Murchison*, 349 U. S. 133, 136 (1955) and *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (due process generally requires a hearing).

The same constitutional infirmity identified by the Supreme Court in *Chrysafis* plagues California's moratorium in this case, with its allowance for tenant declarations and applications that automatically halt evictions. It permits a tenant's self-certification to defeat a landlord's right to evict for nonpayment of rent, with no opportunity for the landlord to be heard or to contest the self-certification. For the same reason as in *Chrysafis*, the self-certification scheme violates the Due Process Clause; and like in *Chrysafis*, the moratorium—which hinges on that scheme—should be declared and enjoined as unconstitutional. *Chrysafis*, 141 S. Ct. at 2482; *see also* 28 U.S.C. § 2201(a) (authorizing declaratory relief); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("An injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable. The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." (internal citations and quotation marks omitted)).

2. The Moratorium Violates the Takings Clause

(d) Takings Framework

The Takings Clause of the Fifth Amendment to the United States Constitution prohibits the government from taking private property unless (a) it is for a "public use" and (b) "just compensation" is paid. U.S. Const. amends. V, XIV (making Takings Clause applicable to state and local governments); *see also Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003) (underscoring the Takings Clause's two separate requirements). The Takings Clause was enshrined in the Constitution so that the government would not "force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

If the government "fails to meet the 'public use' requirement," then "that is the end of the inquiry," and "[n]o amount of compensation can authorize such action." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S.

528, 543 (2005). A government taking of property for a private use or purpose is barred. As the United States Supreme Court has explained: "it has long been accepted that the sovereign" (i.e., the government) "may not take the property of A for the sole purpose of transferring it to B." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005); *Calder v. Bull*, 3 U.S. 386 (1798). (holding that "[i]t is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A and gives it to B")). "Nor would the [government] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, 545 U.S. at 478. If a taking is designed simply "to benefit a particular class of identifiable individuals," then the taking is not for a "public use" consistent with the Public Use Clause and is therefore unconstitutional. *Id.* Significantly, takings with only an "incidental" public benefit "are forbidden by the Public Use Clause." *Id.* at 490 (Kennedy, J., concurring); *see also Loretto v. Teleprompter Manhattan Catv Corp.,* 458 U.S. 419 (1982) (holding that a "taking" under the Takings Clause occurs even when, under the authority of law, "a stranger directly invades and occupies the owner's property" and does not pass to or through the government's hands).

(e) The State Moratorium Has Resulted in an Unconstitutional Taking

Eviction moratoria, like the one at issue here, constitute a taking of property because they interfere with the fundamental right to exclude protected under the Fifth Amendment's Takings Clause. *Bounds v. Superior Court*, 229 Cal. App. 4th 468, 479 (2014) (describing the "bundle of rights" possessed by an owner in his property, including the right "to exclude others"). As the United States Supreme Court recently put it in a challenge to a moratorium imposed by the Centers for Disease Control and Prevention: "[P]reventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021). For that proposition, the Supreme Court cited its prior decision in *Loretto,* 458 U.S. at 435.

In *Loretto*, the Court declared a New York law requiring landlords to permit a cable television company to install its cable facilities upon the their property to be a compensable taking. *Id.* at 441-42. The Court held that, under that law, "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Id.* at 435. That, the

Court concluded, unconstitutionally interfered with "[t]he power to exclude," which "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.*

In another recent takings case aligned with the aforementioned precedents, the Supreme Court reaffirmed that whether a law effectuates a taking doesn't turn on whether the law is temporary in duration. In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021), private property owners (growers) challenged a state regulation granting union organizers access to their properties for organizing purposes three hours a day, 120 days a year. *Id.* at 2074. The Court held that the growers had stated a claim for a *per se* taking, reasoning: "The regulation appropriates a right to physically invade the growers' property—to literally 'take access,' as the regulation provides. It is therefore a *per se* physical taking under our precedents." *Id.* The Court reiterated that, "[g]iven the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation." *Id.* at 2073. Importantly, the Court held that "a physical appropriation is a taking whether it is permanent or temporary." *Id.* at 2074; *see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (holding that "compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary"). "The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation," not on whether there is a taking in the first place. *Cedar Point*, 141 S. Ct. at 2074 (internal citation omitted).

Like the regulations in those cases, the Act's moratorium in this case has stripped rental housing owners of their right to exclude—specifically, the right to repossess their properties from nonpaying tenants who (by not paying rent) have breached their leases. To emphasize, as the Supreme Court held in *Alabama Association of Realtors*, "preventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. The moratorium has resulted in a *per se* taking.

The *per se* taking that the State moratorium has produced violates both the Just Compensation and the Public Use requirements of the Takings Clause. The Act contains no mechanism for compensating owners for deprivation of their property rights; owners are simply expected to submit to rent-free tenancies, with no legal recourse to evictions for the nonpayment of rent and with no compensation for

the injury. Further, the taking effectuated by the moratorium serves no public use or purpose. To the contrary, the moratorium's express purpose and effect are to benefit "a particular class of identifiable individuals"—nonpaying tenants—in violation of the Public Use requirement. *Kelo*, 545 U.S. at 478. The State may seek cover behind the pretext of a public purpose, but the Public Use requirement is not met "when [the taking's] actual purpose was to bestow a private benefit." *Id*. Importantly, a taking with only an "incidental" public benefit is "forbidden by the Public Use Clause." *Id.* at 490 (Kennedy, J., concurring); *see also Loretto,* 458 U.S. 419 (holding that a "taking" under the Takings Clause occurs even when, under the authority of law, "a stranger directly invades and occupies the owner's property" and does not pass to or through the government's hands).

For the foregoing reasons, the Court should declare the moratorium has effected an unlawful taking, and enjoin enforcement of the moratorium and further extensions thereof. An injunction is appropriate because the Plaintiffs have suffered irreparable harm.[4] "The moratorium has put" rental housing owners "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery." *Ala. Ass'n*, 141 S. Ct. at 2489.

The State may argue that owners have ability to pursue tenants—who by self-certification are in financial distress and presumably judgment-proof—for unpaid rents that accrued in 2020 and 2021. But that is an utterly illusory remedy. As the Eighth Circuit Court of Appeals recently observed in a similar challenge to an eviction moratorium out of Minnesota: "While landlords may bring an action against delinquent tenants for past-due rent, monetary relief obtained against a judgment-proof individual is an

[4] Declaratory relief from a taking is proper "whether or not further relief"—such as just compensation—"is or could be sought." 28 U.S.C. § 2201(a). The same holds true for injunctive relief when the plaintiff claims irreparable harm and the government's "pledge of reasonably prompt ascertainment and payment" of compensation. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177 (2019) (holding "there is no basis to enjoin the government's action effecting a taking" only if "adequate provision for obtaining just compensation" does not "exist"). The Supreme Court has had no issue with granting equitable relief as to takings claims (as opposed to just compensation). *See, e.g., Loretto*, 458 U.S. at 426 (declaring statute authorizing cable company to install cable box on private property effected "a permanent physical occupation" that was "taking" requiring compensation); *Cedar Point Nursery*, 141 S. Ct. at 2080 (holding, in challenge for equitable relief only, that state law requiring agricultural employers to grant access to their properties to union organizers violated employers' fundamental right to exclude and "constitute[d] a *per se* physical taking); *id.* 2089 (Breyer, J., dissenting) (acknowledging that takings claimants "seek only injunctive and declaratory relief.").

illusory remedy, as has been recognized by the Supreme Court" in *Alabama Association of Realtors*. *Heights Apts., LLC v. Walz*, 30 F.4th 720, 729 n.7 (8th Cir. 2022). "Despite the [State's] determination that landlords should bear a significant financial cost of the pandemic, many landlords"—like Plaintiffs here—"have modest means" and lack the wherewithal to futilely pursue judgment-proof tenants for owed rent. *Ala. Ass'n*, 141 S. Ct. at 2489. Certainly, that is the case for the Plaintiffs here. Montano Decl., ¶ 8; Kevane Decl., ¶ 6; Ho Decl., ¶ 5. The harm from the moratorium is irreparable and cries out for equitable relief.

3. The Moratorium Violates the Contracts Clause

The Contracts Clause of the United States Constitution prohibits local governments from passing "any . . . Law impairing the Obligation of Contracts." U.S. Const., Art. I, §10, cl. 1. Contracts Clause violations are actionable under 42 U.S.C. § 1983. *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003) ("The right of a party not to have a State, or a political subdivision thereof, impair its obligations of contract is a right secured by the first article of the United States Constitution. A deprivation of that right may therefore give rise to a cause of action under section 1983.").

Whether a law substantially impairs a contractual relationship depends upon "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018). The analysis involves two steps. First, the court will determine whether the law "operate[s] as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). "In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S. Ct. at 1822. Second, the court will consider "whether the [challenged] law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id.* at 1822 (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983)).

Here, the Act substantially impairs the contractual relations between rental housing owners and their tenants. Individual plaintiffs and members of CalRHA have leases entitling owners to repossess units when rent is not paid. The Act has rewritten those leases to eliminate that right, as well as the fundamental

right to exclude. "The right to exclude is not a creature of statute and is instead fundamental and inherent in the ownership of real property." *Heights Apts.*, 30 F.4th at 728 (upholding adequacy of Contracts Clause claim against similar moratorium in Minnesota). While the initial moratorium that AB 3088 put in place was intended to be a temporary measure, subsequent statutory extensions of the moratorium make clear that the elimination of the eviction right will persist for an indefinite period of time, with the latest iteration enacted in March 2022. The Act undermines the contractual bargain that is the key hallmark of all leases, including those of Plaintiffs. "It is axiomatic that a landlord's bargain of receiving rent in exchange for a tenant's possession of the property is greatly diminished if the landlord's right to exclude the tenant is minimal or non-existent." *Heights Apts.*, 30 F.4th at 729.

In addition, the Act has significantly interfered with rental housing owners' reasonable expectations. No rental housing owner, including individual plaintiffs and CalRHA's members, could ever have foreseen or expected the COVID-19 pandemic (the State's purported justification for the moratorium) and or the extent to which governments (like the State) would use those extraordinary circumstances to justify crippling restrictions on their livelihoods as owners, and violations of their rights under existing rental agreements and the United States Constitution. Montano Decl., ¶ 7; Ho Decl., ¶ 4. Even with existing regulation of the rental housing industry, nothing in California law or Supreme Court precedent could have alerted landlords that they would be forced to indefinitely house tenants for free (or close to it). *Heights Apts.*, 30 F.4th at 729 ("Notwithstanding the regulations in the residential housing industry, nothing in Minnesota law or Supreme Court precedent would have made the extent and reach of the [executive orders imposing a moratorium] foreseeable to Heights.").

Because the State moratorium has substantially impaired contracts, the next question is whether it is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose. It is not. "'[A]t the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules' set by officials navigating unprecedented situations." *Heights Apts.*, 30 F.4th at 730 (quoting *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting from the denial of application for injunctive relief)). "Even so, a state's authority to impose restrictions is not unlimited and judicial deference, even in an emergency or a crisis like the COVID-19 pandemic, 'does not mean wholesale judicial abdication.'" *Heights Apts.*, 30 F.4th at 730 (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*,

141 S. Ct. 63, 74 (2020) (Kavanaugh, J., concurring)).

The Act cites the COVID-19 pandemic as its justification. *See, e.g.*, Exh. A (AB 3088). But, as the State knows, the spread and effects of COVID-19 have dramatically waned, as evidenced by the Governor's lifting of the stay-at-home and work-from-home orders and other restrictions on June 11, 2021. *See* RJN, Exh. 6 (finding "it is appropriate to reevaluate existing public health directives to allow for a full reopening of California while maintaining caution and vigilance"). Still, the moratorium was continuously extended beyond that date. *See* RJN, Exhs. 1-4. There being no bone fide emergency to sustain the entirety of the moratorium, the State cannot establish that the substantial impairment of contractual relations was appropriate and reasonable under the circumstances.

The State likely will cite *Apartment Association of Greater Los Angeles v. City of Los Angeles*, 10 F.4th 905 (9th Cir. 2021) in an effort to defeat Plaintiffs' Contracts Clause claim. There, the Ninth Circuit considered whether the district court had abused its discretion in denying preliminary relief from a city's eviction moratorium based on the claim that it violated the Contracts Clause. *Id.* at 908. The Court concluded the district court had not abused its discretion. *Id.* Significantly, the Court did ***not*** consider whether the moratorium substantially impaired contractual relations between landlord and tenant. *Id.* at 913. The Court "assum[ed] without deciding" that it did, then went on to conclude—at the second step of the Contracts Clause analysis—that the moratorium could be upheld because it was "likely 'reasonable' and 'appropriate'" *Id.* at 908, 913. At this step, the Court made assumptions that are in tension with the Supreme Court's subsequent decision in *Alabama Association of Realtors*. For example, the fact that the city moratorium *deferred* rental payments—so that landlords theoretically could recover rent arrears from tenants in the future—was sufficient to render the moratorium reasonable. *Id.* at 916. Yet in *Alabama Association of Realtors*, the Supreme Court seemed to reject that conclusion, observing:

> The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery. Despite the CDC's determination that landlords should bear a significant financial cost of the pandemic, many landlords have modest means. And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.
>
> As harm to the applicants has increased, the Government's interests have decreased. Since the District Court entered its stay, the Government has had three additional months to distribute rental-assistance funds to help ease the transition away from the moratorium. Whatever interest the Government had in maintaining the moratorium's original end date

> to ensure the orderly administration of those programs has since diminished. And Congress was on notice that a further extension would almost surely require new legislation, yet it failed to act in the several weeks leading up to the moratorium's expiration.
>
> It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.

Ala. Ass'n, 141 S. Ct. at 2489-90.

Given that language, as well as the standard of review in *Apartment Association*, the Eighth Circuit Court of Appeals in *Heights Apartments* concluded that *Apartment Association* is "unpersuasive." *Heights Apts.*, 30 F.4th at 729 n.7. As the Eighth Circuit explained, "we find unpersuasive the Ninth Circuit's decision in [*Apartment Association*], which concluded that the eviction moratorium there was likely reasonable and appropriate under the Contract Clause, because (1) that case pre-dated the Supreme Court's decision in *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490, and (2) it was decided on a preliminary injunction motion rather than on a motion to dismiss." *Heights Apts.*, 30 F.4th at 729 n.7 (internal citation and quotation marks omitted).

V. CONCLUSION

There are no material facts in dispute, and Plaintiffs are entitled to judgment as a matter of law. Therefore, the Court should: (1) grant Plaintiffs' motion, (2) declare the Act's moratorium to be unconstitutional under the Due Process, Takings, and/or Contracts Clauses, and (3) enjoin enforcement of the moratorium and any eventual extension of the same.

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