SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-001584-20T4

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| CHARLES KRAVITZ, *et al.*, *Petitioners* | : | CIVIL ACTION |
| v. | : | On Petition to Review Executive Order 128 |
| PHILIP D. MURPHY, *et al.*, *Respondents.* | : | |

# APPELLANTS' OPENING BRIEF


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## PRELIMINARY STATEMENT

Governor Murphy has responded to the COVID-19 pandemic by issuing close to 100 executive orders. This action challenges one of them: Executive Order 128 ("EO-128"), which waived long-standing state law governing security deposits for residential leasehold contracts. In addition to unlawfully suspending duly enacted state law, Governor Murphy unilaterally modified the rights and obligations of residential home providers and tenants who had mutually and voluntarily entered into contracts that required deposits to secure rental properties against the risk of damage. To make matters worse, EO-128 criminalized adhering to the terms of home providers' then-existing leases and the statutes governing such contracts when formed.

Appellants own residential rental properties in South Jersey. When leasing their properties these Appellants negotiated with their tenants to maintain a security deposit that would protect their properties against damage during the tenancies. EO-128 interferes with these agreements and nullifies the Appellants' rights and entitlements under the leases that they fairly negotiated with their tenants.

This case is about abuse of power and destruction of property rights. Far exceeding any authority granted by New Jersey's citizens, its Legislature, or its Constitution, Governor Murphy has interfered with the contractual rights and obligations of

private citizens. The question is not whether one agrees with the Governor's policies or whether they have been effective in addressing some of the impacts of COVID-19. The focus in this case must instead be on our constitutional form of government and the separation of powers. The fundamental question is whether the New Jersey Governor can first declare a public-health emergency, and then assume essentially unlimited authority (granted by neither the New Jersey Constitution nor statute) to nullify and criminalize provisions in private contracts and to suspend statutes.

In a time of nationwide economic insecurity, Governor Murphy unilaterally singled out residential home providers and canceled what is essentially the only tool they have to protect their property. Adherence to the rule of law, however, is what provides the ultimate security to all New Jerseyans, including home providers, especially during a crisis. EO-128 undermines property and contract rights as well as faith in the duly enacted laws. It is now up to this Court to restore and vindicate the rule of law on which all New Jerseyans depend.

**PROCEDURAL HISTORY**

Appellants initially filed these claims against Respondents in the U.S. District Court for the District of New Jersey. Johnson

v. Murphy, No. 1:20-cv-6750-NLH (filed on June 2, 2020).[1] Respondents moved to dismiss on September 30, 2020, declining to waive sovereign immunity over these state-law claims. (ECF No. 27, 27-1). Appellants voluntarily dismissed these claims without prejudice on December 9, (ECF No. 39) and refiled them on December 15 in the Cumberland County Law Division of the Superior Court. Kravitz v. Murphy, No. CUM-L-000774-20. (Pa1).

The parties transferred the case to this Court by consent order, entered on January 26, 2021. (Pa2). Two days after the Appellants formally docketed their appeal, this Court set an accelerated briefing schedule "in light of the importance of the issues and the compelling need for prompt resolution." (Pa4).

## STATEMENT OF FACTS

### A. Appellants Are Small-Scale Home Providers

Appellants Charles Kravitz and Dawn Johanson-Kravitz are residents of Mullica Hill, New Jersey. They own and operate Appellant Little Harry's LLC, which leases a residential property that the Kravitzes own in Glassboro, near Rowan University (the "Glassboro Property"). (Pa6). On August 3, 2019, the Kravitzes rented the Glassboro Property to four Rowan students (the "Rowan

[1] On March 22, 2021, the federal district court issued an order dismissing the remaining federal question claims. (ECF No. 40).

Tenants") pursuant to a residential lease agreement (the "Glassboro Lease"). (Pa7). The Rowan Tenants agreed to lease the Glassboro Property from August 15, 2019 through June 1, 2020, for $2,000 per month in rent. (Pa8).

The parties agreed that the Rowan Tenants would pay a security deposit of $2,000, and the Kravitzes would "hold the Security Deposit in an interest bearing account." (Pa9). The lease specified that the Kravitzes could "make deductions from the Security Deposit" to cover ten enumerated costs, (Pa10-11), and that the Rowan Tenants "may not use the Security Deposit as payment for Rent." (Pa11). The Kravitzes would return the Security Deposit "less any proper deductions" "[w]ithin the time period required by law and after termination" of the lease. (Pa11).

Appellants Margarita Johnson and John Johnson are residents of Vineland, New Jersey. They own and operate Two Bears Property Management and are co-trustees of the Johnson Trust, which owns a residential duplex in Vineland (the "Sixth Street Property"). (Pa21). The Johnsons rent the property pursuant to the terms of a written lease (the "Sixth Street Lease") entered into on July 31, 2017. (Pa27). According to the lease, the tenant agreed to lease the Sixth Street Property from August 1, 2017, through July 31, 2019, for $820 per month. (Pa27). The Johnsons and the Sixth Street Tenant continue to operate under the terms of the Sixth Street Lease on a month-to-month tenancy.

The lease required the Sixth Street Tenant to pay a security deposit of $1,230 on the execution of the lease. (Pa27). The Johnsons could charge their tenant for "[t]he cost of all damages; to include materials, labor and any applicable taxes." (Pa27). The Sixth Street Lease also set out the terms governing the parties' rights and obligations with respect to the security deposit due under the lease:

> **SECURITY DEPOSIT.** On execution of this lease, Lessee deposits with Lessor One Thousand Two Hundred Thirty Dollars ($1230.00), the sum equal to one and one-half (1.5) months rent, receipt of which is acknowledged by Lessor, as security for the faithful performance by Lessee of the terms hereof, to be returned to Lessee, with interest except where required by law, on the full and faithful performance by them of the provisions hereof.

(Pa27).

Appellant Andrew Van Hook is a resident of Millville, New Jersey. He is the managing member of Union Lake Enterprises, LLC, which owns a residential property in Millville (the "Millville Property"). (Pa34-37). Union Lake Enterprises rents the property to the "Millville Tenant" pursuant to a "New Jersey Realtors® Standard Form of Residential Lease" agreement (the "Millville Lease"), which the parties executed on June 22, 2020. (Pa38).

The Millville Tenant initially agreed to lease the Millville Property from August 1, 2018, through June 30, 2020, for $1,450 per month. (Pa38). The lease required a security deposit of $2,175 "to assure that the Tenant performs all of the Tenant's obligations

under [the] Lease." (Pa39. Among other things, the Millville Lease obligated the tenant to "conduct ordinary maintenance;" pay "for all repairs, replacements and damages caused by the act or neglect of the Tenant;" "repair any damage prior to vacating;" and return the property "in the same condition as it was at the beginning of the Term, except for normal wear and tear." (Pa39).

The Millville Lease also set out the terms governing the parties' rights and obligations with respect to the security deposit:

> The Landlord shall inspect the Property after the Tenant vacates at the end of the Term. **Within 30 days of the termination of this Lease, the Landlord shall return the Security Deposit plus the undistributed interest to the Tenant, less any charges expended by the Landlord for damages to the Property resulting from the Tenant's occupancy.** The interest and deductions shall be itemized in a statement by the Landlord, and shall be forwarded to the Tenant with the balance of the Security Deposit by personal delivery, or registered or certified mail. **The Security Deposit may not be used by the Tenant for the payment of rent without the written consent of the Landlord.**

(Pa39)(emphasis added).

The Millville Lease prohibited modification to the lease except "in writing by an agreement signed" by both parties. (Pa42).

**B. COVID-19**

The novel coronavirus COVID-19 is a serious and contagious viral disease spread mainly through close contact from person to person. How to Protect Yourself & Others, Ctrs. for Disease Ctrl.

and Prevention (Apr. 24, 2020), available at https://bit.ly/31JxOI6. The first case of COVID-19 in New Jersey was confirmed on March 4, 2020. COVID-19 Confirmed Case Summary, N.J. Dep't of Health 5 (May 27, 2020), available at https://bit.ly/39K28qf. As of April 5, 2021, New Jersey has had 815,007 lab-confirmed cases of COVID-19. NJ COVID-19 Data Dashboard, Official Site of the State of New Jersey (Apr. 5, 2021), available at https://bit.ly/3sWympW.

Vaccinations began early in 2021. By April 5, 2021, New Jersey had administered at least one dose of the vaccine to over 3.2 million people. New Jersey COVID-19 Vaccine Tracker (Apr. 5, 2021), available at https://bit.ly/3cOpe0Q.

**C. Governor Murphy Declares a State of Emergency**

On March 9, 2020, Governor Murphy issued Executive Order No. 103, declaring a public health emergency and state of emergency in New Jersey. The purpose of EO-103 was "to protect the health, safety and welfare of the people of the State of New Jersey[.]" EO-128 at 1. As authority to declare a state of emergency, Governor Murphy relied on "the Constitution and statutes of the State of New Jersey, particularly the provisions of N.J.S.A. 26:13-1 et seq., N.J.S.A. 38A:3-6.1, and N.J.S.A. 38A:2-4 and all amendments and supplements thereto[.]" Id.

The first statutory scheme on which Governor Murphy relied was the "Emergency Health Powers Act," which permits the Governor,

"in consultation with the [Commissioner of Health] and the Director of the State Office of Emergency Management" to "declare a public health emergency." N.J.S.A. 26:13-3. A "public health emergency" is "an occurrence or imminent threat of an occurrence" that "is caused or is reasonably believed to be caused by" several biological threats, including "the appearance of a novel or previously controlled or eradicated biological agent[,]" and "poses a high probability of … a large number of deaths, illness, or injury" or "a large number of serious or long-term impairments" or that "poses a significant risk of substantial future harm to a large number of people[.]" N.J.S.A. 26:13-2.

Once the Governor has declared a public health emergency under 26:13-1 et seq., the Act grants the Governor and the Department of Health certain specific, health-related authority, see N.J.S.A. 26:13-2, including the authority to: investigate the health event, N.J.S.A. 26:13-4, 13-5; establish a registry of available health-care workers, N.J.S.A. 26:13-6; provide for the safe disposition of human remains, N.J.S.A. 26:13-7; "close, compel the evacuation of, or denominate" facilities that "may endanger the public health," N.J.S.A. 26:13-8; dispose of infectious waste, N.J.S.A. 26:13-10; control the supply and distribution of pharmaceutical agents, N.J.S.A. 26:13-11; prevent transmission of the disease, N.J.S.A. 26:13-12; require persons to submit to testing, N.J.S.A. 26:13-13; require the vaccination, treatment, decontamination,

isolation, or quarantine of persons, N.J.S.A. 26:13-14, -15; educate the public about the efficacy of vaccines, N.J.S.A. 26:13-23; reinstate the employment of persons who were isolated or quarantined, N.J.S.A. 26:13-16; access and disclose medical records in certain circumstances, N.J.S.A. 26:13-17; disseminate information about food-access programs, N.J.S.A. 26:13-17.1; require the assistance of health-care workers, N.J.S.A. 26:13-18; provide for potassium iodine in case of a radiological emergency, N.J.S.A. 26:13-20; and administer a Biological Agent registry, N.J.S.A. 26:13-22.

In addition to certain powers to control healthcare facilities, the Governor or the Commissioner may also "procure, by condemnation or otherwise, subject to the payment of reasonable costs" to "construct, lease, transport, store, maintain, renovate or distribute property and facilities as may be reasonable and necessary to respond to the public health emergency[.]" N.J.S.A. 26:13-9.

The Governor or the Commissioner may also "inspect, control, restrict, and regulate by rationing and using quotas, prohibitions on shipments, allocation or other means, the use, sale, dispensing, distribution or transportation of food, clothing and other commodities[.]" Id. And they can restrict the movement of persons "if such action is reasonable and necessary to respond to the public health emergency." Id.

**D. Governor Murphy Uses the State of Emergency to Suspend Law**

Despite the New Jersey legislature being in session, on April 24, 2020, Governor Murphy issued EO-128, purporting to "waive[] provisions of statutory law that prohibit the use of security deposits for rental payments, enabling tenants to instruct landlords to use their security deposits to offset rent or back rent." Press Release, Governor Murphy Signs Executive Order Providing Critical Short-Term Support for Renters, Official Site of the State of New Jersey (Apr. 24, 2020), available at https://bit.ly/3sTpUaT.

EO-128 mandates that home providers, upon a tenant's written request, must credit a security deposit "towards rent payments due or to become due from the tenant during the Public Health Emergency established in [EO-103] or up to 60 days after the Public Health Emergency terminates." Id. at 3-4 ¶ 1. "When a tenant applies or credits such deposit, interest, or earnings to pay rent," the home provider cannot recoup that money and "[t]he tenant shall otherwise be without obligation to make any further security deposit" for the duration of the lease. Id. at 4 ¶ 2. Even if the parties then extend or renew the lease, the tenant does not have to replenish the security deposit until six months after Governor Murphy declares an end to the public health emergency. Id. Under EO-128's terms, a tenant's "[u]se of a security deposit for the purposes

outlined in [EO-128] shall not be considered a violation of N.J.S.A. 46:8-19 et seq." Id. at 5 ¶ 3.

Remarkably, Governor Murphy declared that any provision of N.J.S.A. 46:8-19 et seq. that is inconsistent with EO-128 is no longer in force and effect until 60 days after the end of the Public Health Emergency. Id. at 5 ¶ 3. Parties to residential leases in New Jersey necessarily account for and rely on these now-suspended statutory provisions when crafting their contracts.

Notably, two of those statutes treat as void and unenforceable any attempt by a landlord or tenant to voluntarily agree to a contract that waives the applicability of any statutory provisions that govern leasehold security deposits. See N.J.S.A. 46:8-24, -36. Governor Murphy, however, has attempted to do precisely what the New Jersey Statutes prohibit: waive the applicability of these unwaivable statutory provisions that govern leasehold security deposits.

Even more troubling, Governor Murphy created his own criminal penalties for any violations of Executive Order 128: "Penalties for violations of [Executive Order 128] may be imposed under, among other statutes, N.J.S.A. App. A:9-49 and -50." Id. at 5 ¶ 4.

Rationalizing EO-128, Governor Murphy explained that "many New Jerseyans [are] experiencing substantial loss of income as a result of business closures, reduction in hours, or layoffs related to COVID-19," and that "tenants may be suffering from one or more

financial hardships that are caused by or related to the COVID-19 pandemic, including but not limited to a substantial loss of or drop in income, and additional expenses such as those relating to necessary health care[.]" Id. at 2. He reasoned that it was "plainly in the public interest" to "enabl[e] individuals to pay portions of their rent with the security deposit they own" to "allow those individuals to mitigate the consequences regarding evictions and accumulation of interest and late fees upon termination of Executive Order No. 106 (2020)" because tenants may face "consequences from a late payment of rent, including interest and late fees, which they may be unable to satisfy in light of their substantial loss of income[.]" Id. at 3.

In addition to asserting authority under the Health Powers Act, Governor Murphy also claimed authority for EO-128 based on N.J.S.A. 38A:3-6.1, which governs "[a]id to localities in circumstances which threaten or endanger public health, safety, or welfare." This provision authorizes the Governor "to order active duty, with or without pay, in State service, such members of the New Jersey National Guard … to provide aid to localities in circumstances which threaten or are a danger to public health, safety or welfare." Id.

His third justification was N.J.S.A. 38A:2-4, which authorizes the Governor, "in case of insurrection, invasion, tumult, riot, breach of peace, natural disaster, or imminent danger

to public safety," to "order to active duty all or any part of the militia that he may deem necessary."

Finally, Governor Murphy claimed power for EO-128 pursuant to the Civilian Defense and Disaster Control Act, N.J.S.A. App. A:9-33 ("Disaster Control Act"). Enacted during World War II, the purpose of the Disaster Control Act is

> to provide for the health, safety and welfare of the people of the State of New Jersey and **to aid in the prevention of damage to and the destruction of property** during any emergency herein defined by prescribing a course of conduct for the civilian population of this State during such emergency and by centralizing control of all civilian activities having to do with such emergency under the Governor and for that purpose to give the Governor control over such resources of the State Government and of each and every political subdivision thereof as may be necessary to cope with any condition that shall arise out of such emergency and to invest the Governor with all other power convenient or necessary to effectuate such purpose.

Id. (emphasis added).

Appendix A:9-34 authorizes the Governor "to utilize and employ all the available resources of the State Government and of each and every political subdivision of [New Jersey], whether of men, properties or instrumentalities, and to commandeer and utilize any personal services and any privately owned property necessary to avoid or protect against any emergency subject to the future repayment of the reasonable value of such services and privately owned property" as provided in the subsequent provisions of the Act. N.J.S.A. App. A:9-34.

And Appendix A:9-51(a), which Governor Murphy explicitly referenced in Executive Order 128, authorizes the Governor, whenever the Governor believes that control of a disaster "is beyond the capabilities of local authorities":

a. to "assume control of all emergency management operations;"

b. to "proclaim an emergency;" and

c. to temporarily "employ, take or use the personal services, or real or personal property, of any citizen or resident of [New Jersey], or of any firm, partnership or unincorporated association doing business or domiciled in this State, or of any corporation incorporated in or doing business in this State, or the real property of a nonresident located in this State, for the purpose of securing the defense of the State or of protecting or promoting the public health, safety or welfare; provided, that such personal services or property shall not be employed or used beyond the borders of this State unless otherwise authorized by law."

N.J.S.A. App. A:9-51(a). If the Governor takes private property or demands personal services pursuant to N.J.S.A. App. A:9-51(a), the State must pay compensation at the prevailing rate. N.J.S.A. App. A:9-51(b)-(d).

Consistent with the subject matter of the Civilian Defense and Disaster Control Act, the other powers that the Act vests in

the Governor relate to military defense and coordinating disaster response between the State and Federal government and between the State and local municipal governments. See, e.g., N.J.S.A. App. A:9-35, -40 through -43.6, -51.6, -51.7, -59, -62.

These powers permit the Governor to issue rules associated with blackouts, air raids, recruiting and training emergency response crews, the conduct of civilians "during the threat of an imminence of danger," counteracting sabotage and subversive activities, evacuating residents of threatened districts, and any other matter "that may be necessary to protect the health, safety and welfare of the people or that will aid in the prevention of loss to and destruction of property." N.J.S.A. App. A:9-45. The Governor may also "require any public official, citizen or resident … to furnish him any information reasonably necessary to enable [the Governor] to carry out the purposes of this act[,]" N.J.S.A. App. A:9-36; issue rules regulating vehicles and traffic relating to "any black-out, air raid, threatened air raid, preparations for emergencies or during the threat or imminences of danger or emergency," N.J.S.A. App. A:9-47; and appoint deputies or other persons to assist with the purposes of the act. N.J.S.A. App. A:9-38, -54.

With Governor Murphy's Public Health Emergency (EO-103) in place for over a year, he continues to claim all these statutory powers. See Murphy Exec. Order No. 231 (Mar. 17, 2021).

**E. EO-128 Interfered with Appellants' Contracts**

On June 1, 2020, three of the Rowan Tenants handed Mr. Kravitz letters requesting to use their portions of the security deposit ($500 each) to pay rent owed under the Glassboro Lease. (Pa50-52). Mr. Kravitz would later discover, however, that the Rowan Tenants caused $1,854.94 in damage to his Glassboro Property. The very purpose of the $2,000 security deposit that the Rowan Tenants agreed to pay was to protect the Kravitzes' property in this exact circumstance, and to permit them to repair any damage to the property without personally incurring the time and expense necessary to recover those costs.

Had Governor Murphy not unilaterally and unlawfully changed the terms of the Glassboro Lease, the $2,000 security deposit would have covered the $1,854.94 in damage that the Rowan Tenants caused to the Glassboro Property. As a direct result of Governor Murphy's unlawful order, the Kravitzes are still struggling ten months later to track down their former tenants to recover funds needed to repair their damaged property.

The Johnsons negotiated the Sixth Street Lease to include a provision requiring a deposit "as security for the faithful performance by Lessee of the terms" of the Sixth Street Lease. (Pa27). Despite the terms of the Johnsons' lease, EO-128 allows the Sixth Street Tenant, at any time, to choose to apply her security deposit to the rent owed on the Sixth Street Lease. If

the Sixth Street Tenant chooses to use the security deposit to pay rent owed on the Sixth Street Lease, the security deposit will necessarily be unavailable "as security for the faithful performance of the terms" of the lease.

The Sixth Street Tenant has made only one partial rent payment since April 2020. As of April 1, 2021, she owes $13,999.50. (Pa53). Without a security deposit the Johnsons will be forced to cover the cost of any damage out of their own pocket, or bring a futile and time-consuming small-claims action against the tenant. The purpose of the security deposit that the Johnsons bargained for and that the Sixth Street Tenant contractually agreed to provide was to enable the Johnsons to avoid those costs.

Mr. Van Hook negotiated the Millville Lease to include a provision requiring a security deposit that would cover "damages to the Property resulting from the Tenant's occupancy." (Pa39). The Millville Lease, which the parties freely entered, also specified that "[t]he Security Deposit may not be used by the Tenant for the payment of rent without the written consent of the Landlord." (Pa39). Despite these explicit contractual terms, EO-128 allows the Millville Tenant, at any time, to choose to apply her security deposit to the rent owed on the Millville Lease. Such security deposit then becomes unavailable to cover "damages to the Property," as the lease requires. (Pa39). Contrary to EO-128, the terms of the Millville Lease expressly forbid the Millville Tenant

from using the security deposit "for the payment of rent without the written consent" of Mr. Van Hook. (Pa39). EO-128 thus imposes criminal consequences should Mr. Van Hook seek to enforce the terms of his lease. Such criminal charges would jeopardize Mr. Van Hook's professional licenses as a Certified Public Accountant and Real Estate Broker.

When Appellants leased their property, they had every reason to rely upon these legally valid security deposits and expect that they would remain in place. EO-128 has unlawfully stripped Appellants of their right to security deposits and substantially altered the terms of the leases and the parties' rights and obligations thereunder. Governor Murphy diminished Appellants' rights without lawful process, without compensating them, and without a lawful grant of authority. EO-128 is nothing short of brazenly unlawful executive overreach.

## LEGAL ARGUMENT

### I. Governor Murphy Exceeded His Emergency Statutory Powers

The Emergency Health Powers Act, N.J.S.A. 26:13-1 et seq. ("EHPA"), grants the Governor authority to "declare a public health emergency," N.J.S.A. 26:13-3, and to adopt specified measures to address the emergency. N.J.S.A. 26:13-14. The Disaster Control Act, N.J.S.A. App.A.:9-30 et seq., grants the Governor certain additional powers during an emergency. But the actions of the Governor challenged in this case are not among the measures

authorized by either the EHPA or the Disaster Control Act. Having no legislative authorization to issue EO-128, Governor Murphy exceeded his statutory powers when he purported to "waiv[e] provisions of statutory law that prohibit the use of security deposits for rental payments."[2]

### A. The Emergency Health Powers Act Authorizes Only Those Actions Specified in the Statute

By adopting the EHPA, the legislature recognized that the Governor (and the Commissioner of Health, one of his subordinates) might need additional powers to address public health emergencies. Those additional powers are enumerated in considerable detail in the EHPA—particularly N.J.S.A. 26:13-14, entitled, "Commissioner's powers to address public health during public health emergency." None of the enumerated powers is even remotely akin to the power exercised under EO-128: subversion of the statute prohibiting the use of security payments for rental payments. Because the actions taken under EO-128 cannot plausibly be deemed included within the powers conferred by the EPHA, the statute does not authorize the Governor's actions.

[2] As mentioned above, Governor Murphy has cited two other statutes in connection with his response to the COVID-19 pandemic, but neither is relevant to the legal issues raised herein—and the Governor does not assert otherwise. N.J.S.A. 38A:2-4 authorizes the Governor to "order to active duty all or any part of the militia that he may deem necessary." N.J.S.A. 38A:3-6.1 authorizes calling members of the National Guard to active duty. Activation of the militia or the National Guard are not at issue in this case.

Section 26:13-14 lists three powers that the Commissioner of Health may exercise to address public health during a public-health emergency:

- Require the vaccination of persons as protection against infectious disease and to prevent the spread of a contagious or possibly contagious disease (with one limited exception).

- Require and specify in consultation with and upon the concurrence of the Department of Environmental Protection and the State Office of Emergency Management, the procedures for the decontamination of persons, personal property, property and facilities exposed to or contaminated with biological agents, chemical weapons or release of nuclear or radiological devices.

- Require, direct, provide, specify or arrange for the treatment of persons exposed to or infected with disease.

Other, similar powers delegated to the Governor and Commissioner by the EHPA are detailed in N.J.S.A. 26:13-4, -5, -6, -7, -8, -9, -10, -11, -12, -13, -15, -16, -17, -17.1, -18, -20, and -22. A common focus of all these enumerated powers is the application of health-care measures (e.g., vaccination, decontamination, and medical treatment) directly to individuals or property. The fact that it is the Commissioner of Health who is the Executive Branch official authorized to take these steps also confirms that the legislature limited its statutory authorization to actions closely related to application of health care. Authorizing tenants to use their security deposits to pay rent does not entail the application of health care and thus cannot plausibly be deemed authorized by the EHPA.

That conclusion comes from the maxim expressio unius est exclusio alterius (the expression of one thing excludes others), a well-accepted statutory-construction tool. See, e.g., DiProspero v. Penn, 183 N.J. 477, 495 (2005) ("An affirmative expression ordinarily implies a negation of any other.") (citation omitted); Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 112 (2004) ("The canon of statutory construction, expressio unius est exclusio alterius — expression of one thing suggests the exclusion of another left unmentioned——sheds some light on the interpretive analysis."). By carefully specifying in detail the powers conferred on the Executive Branch in the event of a declaration of a public health emergency, the EHPA makes clear that it does not confer any other powers, including the power claimed by the Governor under EO-128.

### B. EO-128 Exceeds the Bounds of the Authority Conferred on the Governor by the Disaster Control Act

Nor is EO-128 authorized by the Disaster Control Act. While that statute grants the Governor some additional authority to address public emergencies, the New Jersey Supreme Court has repeatedly stressed that the Disaster Control Act imposes definite limits on the Governor's authority to take actions in the name of emergency response. See, e.g., Worthington v. Fauver, 88 N.J. 183, 203 (1982). EO-128 far exceeds those limits.

Under the Disaster Control Act

> The Governor is authorized to utilize and employ all the available resources of the State Government and of each and every political subdivision of this State, whether of men, properties or instrumentalities, and to commandeer and utilize any personal services and any privately owned property necessary to avoid or protect against any emergency subject to the future payment of the reasonable value of such services and privately owned property as herein in this act provided.

N.J.S.A. App.A:9-34.

The New Jersey Supreme Court has adopted a two-pronged approach to determining whether an action taken by the Governor in response to an emergency is authorized by the Act. First, is the action "rationally related to the legislative purpose of protecting the public?" County of Gloucester v. State, 132 N.J. 141, 147 (1993). Second, is the action "closely tailored to the magnitude of the emergency?" Id. It is unlikely that EO-128 satisfies even the rational-relationship test, and it clearly is not "closely tailored" to the current pandemic.

The "purpose" of the Disaster Control Act is "to provide for the health, safety and welfare of the people of the State of New Jersey and to aid in the prevention of damage to and the destruction of property during an emergency." N.J.S.A. App.A:9-33. The Governor has failed to demonstrate how EO-128, by abrogating New Jersey law governing application of security

deposits for payment of rent,[3] rationally protects the public from COVID-19.

EO-128 states that it is intended to protect tenants from "the continued risk of eviction." But as EO-128 notes, a prior executive order already barred all residential-housing evictions until two months after the Governor lifts the pandemic-related state of emergency. See EO-106. So EO-128 does nothing to protect tenants from any ill health that might arise from eviction and homelessness during the pandemic. And while EO-128 might (as the Governor claims) protect tenants from "other consequences from a late payment of rent, including interest and late fees," and thus from an increased possibility of post-pandemic eviction if they are unable to pay those fees, such post-pandemic consequences are not rationally related to the purposes of the Disaster Control Act.

The Act is designed to "provide for the health, safety and welfare of the people of the State of New Jersey and to aid in the prevention of damage to and the destruction of property during any

[3] In 1967, New Jersey adopted the Rent Security Deposit Act, N.J.S.A. 46:8-19 et seq., to regulate the use of security deposits in residential leases. Among other things, the Act limits security deposits to no more than 1 ½ times the monthly rent. N.J.S.A. 46:8-21.2. Under New Jersey courts' consistent interpretation of the statute, a home provider who complies with the Act's provisions is entitled to enforce lease terms that bar tenants from applying the security deposit toward the payment of rent. See, e.g., Brownstone Arms v. Asher, 121 N.J. Super. 401, 404 (Cty. Ct. 1972); Dira Management v. Banks, 2005 WL 2860499 at *4 (App Div. 2005) (unpublished).

emergency." N.J.S.A. App.A:9-33 (emphasis added). EO-128 does just the opposite. The Security Deposit Act imposes a set of incentives to protect private property as well as tenants' rights, created by over a century of common law and legislative judgment. By removing the tenants' incentive to keep the properties in good repair, EO-128 is directly contrary to the purpose of the Act. His executive order will make "damage to and the destruction of property" more likely, not less.

Moreover, an executive order designed to assist tenants during the post-pandemic period is, by definition, not rationally related to the Act's purposes because it does not promote the public health, safety, and welfare "during" the pandemic. The ill effects of homelessness in the post-pandemic world are a legitimate basis for concern by the State, and may at some point prompt the legislature to re-examine the Rent Security Deposit Act, which seeks to balance the conflicting claims of tenants and landlords. But the Disaster Control Act does not authorize the Governor to change that balance outside the confines of an on-going state of emergency.

Even if EO-128 were somehow deemed rationally related to the COVID-19 pandemic, it still would not be authorized by the Disaster Control Act because it is not "closely tailored" to the emergency. If EO-128 were deemed "closely tailored," it is difficult to imagine any action by the Governor that could not be similarly

defended as being authorized by the Act during a declared emergency. Authorizing tenants (in contravention of New Jersey law) to apply security deposits toward their rent may place them in a stronger economic position; but so would a decree by the Governor excusing all rent payments for the duration of the pandemic or thereafter.[4] If EO-128 can be defended because it improves the economic status of tenants, then so can a rent holiday. The Governor's apparent assertion that his anything-that-helps-the-tenant approach qualifies as a "closely tailored" response to the pandemic simply is not plausible.

EO-128 completely ignores an obvious truth: any tinkering with landlord-tenant relations for the purpose of increasing tenants' rights simultaneously decreases landlords' rights. Permitting tenants to apply their security deposits to rental payments may help them to avoid late-rental-payment fees. But it does so by reducing home providers' rights by eliminating their assurance (protected under New Jersey statutory law) that funds will be available to cover repair costs necessitated by tenants' damage to the property.

[4] At a press conference on April 11, 2020, Governor Murphy stated such a rental freeze was "impractical as a legal matter" given that "[t]here are thousands, maybe hundreds of thousands, if not millions of contracts between landlords and renters." NJ.com, Corona Virus in New Jersey: Update April 11, 2020, YouTube, at 47:54, available at https://bit.ly/3wt9UyF(emphasis added). It is unclear how Governor Murphy recognized this limitation on his emergency statutory powers but believed EO-128 was within his authority.

Temporarily improving the economic situation of one group of New Jersey citizens at the expense of the rights of another group of citizens——especially when (as here) the rights at issue are unrelated to the COVID-19 pandemic's effects on public health——is not the sort of "closely tailored" Executive Order authorized by the Disaster Control Act. The Governor's authority under the Act "is not boundless." Communications Workers of America, AFL-CIO v. Christie, 413 N.J. Super. 229, 259 (2010) (citing Worthington, 88 N.J. at 203-04). The Act is intended to "provide for the health, safety and welfare of the people of the State," (emphasis added), not to simply declare winners and losers among different segments of the population.

Governor Murphy seeks to justify EO-128 by noting that "tenants may be suffering from one or more financial hardships that are caused by or related to the COVID-19 pandemic, including but not limited to a substantial loss of or drop in income, and additional expenses such as those relating to necessary health care." EO-128 at 2. But the same can be said of many home providers as well, including Appellants – especially in light of the eviction moratorium that has been in place. Their financial difficulties are spelled out in detail in the petition. For example, Appellants Charles Kravitz and Dawn Johanson-Kravitz lost a $2,000 security deposit when the Rowan Tenants, invoking EO-128, applied the security deposit to their rental obligation, and the Johnsons are

owed more than $13,000 in back rent (which they will likely never receive). COVID-19 has caused economic distress among wide segments of the New Jersey citizenry. But nothing in the Disaster Control Act suggests that the New Jersey legislature empowered the Governor to abrogate the statutorily created economic rights of one group of citizens in order to provide economic advantage to another group.

N.J.S.A. App.A:9-45 lists 10 potential "subjects" that may be addressed by executive orders issued under the Disaster Control Act. Most of the listed "subjects" are quite specific; indeed, most of them relate to actions that the Governor might undertake during wartime (e.g., black outs and air raid warnings). One of the provisions uses more general language: it authorizes the Governor to issue Executive Orders "on any matter that may be necessary to protect the health, safety and welfare of the people or that will aid in the prevention of loss to or destruction of property." N.J.S.A. App.A:9-45(i).

Two well-accepted canons of statutory construction, ejusdem generis (Latin for "of the same kind") and noscitur a sociis (words are interpreted based on the company they keep) apply here and dictate that reasonable limits be placed on the arguably broad scope of subdivision (i)'s language ("any matter that may be necessary to protect"). See, e.g., State v. Hoffman, 149 N.J. 564, 584 (1997) (under the ejusdem generis principle, "when general

words follow specific words in a statutory enumeration, the general words are construed to embrace only the objects similar in nature to those objects enumerated by the preceding specific words"); Germann v. Matriss, 55 N.J. 193, 220-21 (1970) ("It is an ancient maxim of statutory construction that the meaning of words may be indicated or controlled by those with which they are associated. … The rule is not absolute, but it does serve as a helpful guide in ascertaining the intended scope of associated words or phrases in a statute where a particular word is followed by more general words, and the legislative purpose is unclear in such situations.").

In Germann, the New Jersey Supreme Court explained that "it is wise to employ the maxim to avoid giving a breadth to the more general words which logic, reason and the subject matter of the statute do not show was clearly intended." Id. at 221. Such wisdom is needed here.

The application of those two canons to subdivision (i) is warranted by the subject matter and structure of the remainder of N.J.S.A. App.A:9-45. The first eight subdivisions of the statute describe very specific steps that the Governor is entitled to take in response to an emergency. Each of the enumerated steps involves a direct response to one of the dangers created by an emergency. For example, the Governor can prescribe rules governing "the conduct of the civilian population during the alert period of an

air raid or of a threatened or impending air raid and during and following any air raid (subdivision (b)) and governing "the method of evacuating residents of threatened districts and the course of conduct of the civilian population during any necessary evacuation" (subdivision (h)).

The two maxims strongly suggest that when, in subdivision (i), the legislature authorized the Governor to issue rules "on any matter that may be necessary to protect the health, safety and welfare of the people," it intended to limit its delegation of authority to actions directly responding to dangers created by the emergency. It did not authorize the Governor to act on "any" matter that might protect the health, safety, and welfare of a discrete portion of the citizenry, without regard to the degree of connection between that matter and the danger created by the declared emergency.

The appropriateness of reading a limitation into the scope of subdivision (i) is reinforced by subdivision (j), which explicitly requires that executive orders issued under the Act be "fair" and "impartial." EO-128 directly conflicts with the "fair" and "impartial" requirements by altering statutory law and private contracts to increase tenants' rights at the expense of landlords' rights.

In light of the statutory text, the New Jersey Supreme Court has quite appropriately construed the scope of the Governor's

powers under the Disaster Control Act as being limited to steps "closely tailored" to the emergency. County of Gloucester, 132 N.J. at 147. EO-128 is not "closely tailored" to the emergency because residential security deposits have nothing to do with the spread of a virus. Moreover, the order itself is overly broad and not tailored to meet its stated purposed. Governor Murphy did not tailor the order to ensure that only those tenants who could prove their financial need could take advantage of the order. Because EO-128 does not satisfy the "closlely tailored" standard, it is not authorized by the Disaster Control Act.

The New Jersey Constitution reposes all law-making authority in the state legislature. N.J. Const. art. IV, § I, ¶1. Neither the EHPA nor the Disaster Control Act authorizes the Governor to re-write the statutorily mandated relationship between home providers and tenants. Nor is it appropriate to infer legislative approval from the legislature's silence following the Governor's actions. County of Gloucester, 132 N.J. at 152. Accordingly, EO-128 must be enjoined as an invalid exercise of power by Governor Murphy. Worthington, 88 N.J. at 207.

### C. The Disaster Control Act Would Violate the Nondelegation Doctrine If It Were Interpreted to Authorize EO-128

Reading the Disaster Control Act broadly enough to authorize EO-128 would render the Act constitutionally invalid under the nondelegation doctrine. The Court should avoid any need to address

that constitutional issue by construing the Act as it was written, which does not grant the Governor the wholesale authority to rewrite landlord-tenant law during a public emergency.

The nondelegation doctrine is premised on a fundamental principle of the New Jersey Constitution that all power to legislate resides with the state legislature and that the legislature's authority to delegate that power to others is strictly limited. Legislation violates the nondelegation doctrine if it fails to provide sufficient standards to guide the exercise of delegated power. Roe v. Kervick, 42 N.J. 191, 232 (1964). Such standards may be "general," but they must be "as precise and revealing as the subject reasonably permits." Worthington, 88 N.J. at 209.

Under the most plausible interpretation of the Disaster Control Act, the statute readily meets that relatively undemanding standard. By authorizing the Governor to "provide for the health, safety and welfare of the people of the State of New Jersey and to aid in the prevention of damage to and destruction of property during any emergency," the Act grants the Governor broad discretion to tailor his response to the specific demands of the emergency at issue. But at the same time, the Act explicitly requires the Governor to focus solely on public health, safety, and welfare at the time of the emergency, and it bars adoption of measures that are unrelated to problems created by the pandemic.

By issuing EO-128, the Governor is espousing a much broader (seemingly boundless) interpretation of the Disaster Control Act. He argues that the Act authorizes him to adopt measures designed to address longer-term economic issues, such as the ability of tenants to afford their lease obligations two months or more after he declares an end to the COVID-19 pandemic. It is enough, he alleges, that he deems such measures "necessary" for the long-term health, safety, and welfare of tenants. If that were the proper interpretation of the Act, then it could not survive scrutiny under the nondelegation doctrine. Under that interpretation, it would provide no standards that would limit the Governor's absolute discretion to adopt measures during an emergency under the banner of promoting the general welfare. It would, for example, allow the Governor to declare that no rent shall accrue on residential leases for the duration of the emergency, or to take other steps to pick economic winners and losers——say, order an increase in the minimum wage to $20 per hour.

Rather than adopt a construction of the Disaster Control Act that would render it unconstitutional under the nondelegation doctrine, the Court should adopt the narrower construction of the Act espoused by the Supreme Court in Worthington and County of Gloucester. Under that interpretation, EO-128 is not authorized under the Act because it is not "closely tailored" to the threats

to public health, safety, and welfare created by the COVID-19 pandemic.

## II. EO-128 Violates the Separation of Powers

Governor Murphy does not rely on statutory authority as his sole justification for issuing EO-128. He also contends that authority to issue EO-128 springs from the powers vested in the Governor by the New Jersey Constitution. EO-128 at 3.

That contention is unpersuasive. Governor Murphy's effort to alter the relationship of landlords and tenants without a legislative mandate is an unwarranted assault on legislative prerogatives that violates fundamental separation-of-power requirements——particularly because his rule directly conflicts with current statutory law.

In Communications Workers, this Court was faced with a challenge to an executive order justified by the Governor as an assertion of his own constitutional powers. The order would have extended existing campaign-contribution restrictions to cover contributions by labor unions (a group not covered under the campaign finance statute at issue). The Court struck down the Executive Order (known as "EO-7") as a separation-of-powers violation. 413 N.J. Super. at 274 (holding that EO-7 "impair[ed] the 'essential integrity' of the constitutional powers of the

Legislature") (quoting Massett Bldg. Co. v. Bennett, 4 N.J. 53, 59 (1950)).

The Court noted that under Article IV, § 1, ¶ 1 of the New Jersey Constitution, "the people vested full sovereign authority in the Legislature" and that the legislature "is entrusted with the general authority to make laws at discretion." 413 N.J. Super. at 255 (quoting Gamgemi v. Berry, 25 N.J. 1, 8-9 (1950)).

The legislature likewise has the sole power to suspend laws (and even then, only in specific circumstances). The New Jersey Constitution authorizes the limited suspension of duly enacted laws only in the context of habeas corpus: "The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety may require it." N.J. Const. art. I, ¶ 14. When a constitution provides for the suspension of habeas corpus in emergencies, it vests that authority in the legislature unless the provision explicitly states otherwise. See Philip Hamburger, Beyond Protection, 109 COLUM. L. REV. 1823, 1919 (2009); see also Amanda L. Tyler, Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay (2017) (chronicling the original meaning of the federal Habeas Corpus Suspension Clause). In contrast to the legislature, the executive "could not, even during an emergency, seize property" or "constrain the natural liberty of persons who were within the protection of the law, unless [the executive] had legislative authorization."

Hamburger, 109 COLUM. L. REV. at 1919. This explicit exception for the legislative suspension of habeas corpus means that the Governor possesses no implicit constitutional authority to suspend other laws – let alone institute a new law that orders exact opposite of what duly enacted legislation required.

The Constitution's principal objective in dividing the powers of government among three distinct branches, and strictly prohibiting the Governor from exercising legislative powers properly belonging to the state legislature, is "to prevent the concentration of unchecked power in one branch of the government." Communications Workers, 413 N.J. Super. at 257 (citation omitted).

The Court concluded that EO-7 violated the separation of powers not simply because it had not been directly sanctioned by a statute adopted by the legislature, but also because it was inconsistent with existing legislation governing campaign contributions. Id. at 271-72. The Court explained:

> **An executive order cannot bypass the Legislature and carry out what would be, in effect, an implied repealer of existing legislation.** "A repeal by implication requires clear and compelling evidence of legislative intent, and such intent must be free from reasonable doubt." A strong presumption against an implied repealer exists, and "[e]very reasonable statutory construction should be applied to avoid finding [it]." To the extent that it aims to dramatically alter the existing and comprehensive statutory scheme for collective bargaining, [EO-7] cannot substitute for an appropriate repealing statute duly enacted by the Legislature and signed into law (absent a veto override) by the Governor.

Id. at 272 (quoting Twp. of Mahwah v. Bergen County Bd. of Taxation, 98 N.J. 268, 280-81 (1985)) (emphasis added).

So too in this case. EO-128 not only lacks any legislative mandate, it also directly conflicts with the Rent Security Deposit Act, N.J.S.A. 46-:8-19 et seq. That Act authorizes landlords to contract for security deposits of up to 1 ½ times monthly rent and has been consistently interpreted as permitting landlords to enforce lease terms that bar tenants from applying security deposits toward the payment of rent. See, e.g., Dira Management v. Banks, 2005 WL 2860499 at *4 (Sup. Ct., App. Div. 2005) (unpublished). EO-128 not only purports to authorize tenants to apply security deposits toward the payment of rents, it threatens landlords with criminal penalties if they attempt to enforce their statutory right. EO-128 at 5 (citing N.J.S.A. App. A:9-49 and -50, providing for up to six months imprisonment for interfering with enforcement of the Executive Order).

EO-128 also violates the separation of powers by creating new crimes and imposing criminal sanctions, a purely legislative function that is dangerous in the hands of the State's chief law-enforcement officer. Governor Murphy has unilaterally criminalized home providers who simply wish to enforce the terms of contracts that they freely negotiated under the terms of duly enacted state law.

"[N]o deviation from … the doctrine of the separation of powers will be tolerated which impairs the essential integrity of one of the great branches of government." Massett Bldg., 4 N.J. at 57. By attempting to override statutory law without any legislative authorization, EO-128 impairs the essential integrity of legislative process and thus violates the Constitution's separation-of-powers requirements.

**III. EO-128 Violates the Contracts Clause**

A contract is only as good as a party's ability to enforce its obligations. The New Jersey Constitution forbids the State from passing any "law impairing the obligation of contract[] or depriving a party of any remedy for enforcing a contract which existed when the contract was made." N.J. Const. art. IV, § VII, ¶ 3. The Contracts Clause protects "against retroactive legislation impairing contractual relations." Nobergg v. Edison Glen Assoc., 167 N.J. 520, 537 (1999).

Contracts being fundamental to the health of the economy, "[t]he power of changing the relative situation of debtor and creditor, of interfering with contracts, … touches the interest of all[.]" Ogden v. Saunders, 25 U.S. 213, 354-55 (1827). State legislatures under the Articles of Confederation interfered with private contracts to such an extent "that the confidence essential to prosperous trade had been undermined and the utter destruction

of credit was threatened." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1936). They frequently "yielded to the necessities of their constituents, and passed laws" that relieved favored constituents of their contractual obligations. Edwards v. Kearzey, 96 U.S. 595, 605 (1877). Paternalistic state legislatures offered short-term relief to favored constituents while "destroy[ing] public credit and confidence" in the process. Id. This intereference with contracts "insured and aggravated the ruin of the unfortunate debtors for whose temporary relief they were brought forward." Id.

Consequently, the U.S. Constitution included a Contracts Clause "[t]o guard against the continuance of the evil" of state interference with contracts. Ogden, 25 U.S. at 355. In drafting the clause, "the framers were absolute." Id. at 1827 (Gorsuch, J. dissenting). James Madison reasoned that any "'inconvenience' of a categorical rule would, on the whole, 'be overbalanced by the utility of it.'" Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L. Q. 525, 560 & n.24 (1987) (quoting Max Farrand, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 439 (1911)). Anything less absolute would be prone to "[e]vasions … devised by the ingenuity of Legislatures." Farrand, at 440.

"The treatment of the malady was severe, but the cure was complete." Edwards, 96 U.S. at 606. After the Contracts Clause

curtailed state interference with contracts and restored confidence in government, "[c]ommerce and industry awoke," and "[p]ublic credit was reanimated. The owners of property and holders of money freely parted with both, well knowing that no future law could impair the obligation of the contract." Id. at 606-07 (citation omitted).

The Supreme Court recognized early on that the original meaning of the federal Contracts Clause was "to establish a great principle, that contracts should be inviolable[.]" Sturges v. Crowninshield, 17 U.S. 122, 205 (1819) (Marshall, C.J.). Chief Justice John Marshall wrote that the Court should give the Clause its "full and obvious meaning" because the Constitution's plain text should give way to "extrinsic circumstances" only if "the absurdity and injustice of applying the provision to the case[] would be so monstrous[] that all mankind would, without hesitation, unite in rejecting the application." Id. at 202-03, 205-06; see also Bronson v. Kinzie, 42 U.S. 311, 318 (1843) (declining "to depart from the plain meaning" of the Contracts Clause).[5]

[5] The Court seemed to depart from this original meaning based on the facts before it in Blaisdell, 290 U.S. at 434. But that case concerned "the measure of control which the state retains over *remedial* processes[.]" Id. at 434 (emphasis added). And at that time, dating back to Sturges, 17 U.S. at 206-07, the Court had always distinguished between laws affecting contractual obligations and laws affecting the remedies that states provide for breach of contract. While the Contracts Clause prohibited regulations that retroactively impaired contractual rights or obligations, see, e.g., McCracken v. Hayward, 43 U.S. (2 How.)

New Jersey typically interprets its own Contracts Clause similarly to its federal counterpart, In re Recycling & Salvage Corp., 246 N.J. Super. 79, 100 (App. Div. 1991), however, New Jersey's provisions include more specific prohibitions, leaving room for this Court to interpret its protections more broadly. Cf. Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985) (applying "an independent analysis" to New Jersey Constitution when it has different text than U.S. Constitution).

**A. EO-128 Does Not Survive the Supreme Court's Two-Step Test**

The Supreme Court now applies a two-step approach to Contracts Clause challenges, asking: (1) "whether the state law has 'operated as a substantial impairment of a contractual relationship'" and

608, 612 (1844), states typically remain "free to regulate the procedure in its courts even with reference to contracts already made … , and moderate extensions of time for pleading or for trial will ordinarily fall within the power so reserved." W.B. Worthen Co. ex rel. Bd. of Comm'rs of Sch. Imp. Dist. No. 513 of Little Rock, Ark. v. Kavanaugh, 295 U.S. 56, 60 (1935).

Unlike Blaisdell, this case involves obligations – not remedies. And, as explained below, EO-128 does not satisfy the three criteria for Blaisdell's exception for "limited and temporary interpositions" on contractual remedies. 290 U.S. at 439-40. Anything further in Blaisdell that could be read as a rejection of the Contracts Clause's original understanding diverges from both the Court's historical precedent and modern understanding of constitutional interpretation. The idea that a strong Contracts Clause is no longer necessary because a strong Contracts Clause successfully restored public trust in contracts is "like throwing away your umbrella in a rainstorm because you are not getting wet." Shelby Cty. v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

(2) "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" Sveen v. Melin, 138 S. Ct. 1815, 1821-22 (2018) (citations omitted). The first step informs the state's burden at the second step. A severe impairment "will push the inquiry to a careful examination of the nature and purpose of the state legislation." Allied Structural Steel Co. v. Village of Schaumburg, 438 U.S. 234, 245 (1978). But even when the impairment is less severe, a court will not sustain an unreasonable regulation "simply because the [creditors'] rights were not totally destroyed." U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 27 (1977).

**1. EO-128 Substantially Impairs Appellants' Contracts**

The first "inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992). The first two components are typically resolved easily, with the court focusing on the severity of the impairment. Id. The same is true here. Appellants' leases are contracts and EO-128 impaired them. The "severity of the impairment" is the only remaining question under the first step.

To determine whether an impairment is substantial, courts consider "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, 128 S. Ct. at 1822. The Court "look[s] to 'the legitimate expectations of the contracting parties,'" to assess whether, "at the time the parties entered into the contract and relied on its terms," they would have expected the modification that the State has imposed on the parties' obligations under the contract. Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff, 669 F.3d 359, 369 (3d Cir. 2012) (quoting U.S. Trust, 431 U.S. at 19 n.17). "Total destruction of contractual expectations is not necessary[.]" Energy Reserves Grp. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983). It is enough that the law "lessen[s] the value of the contract." Edwards, 96 U.S. at 607; Green v. Biddle, 21 U.S. 1, 75-76 (1823) ("[C]onditions and restrictions tending to diminish the value and amount of the thing recovered, impairs [the plaintiff's] right to, and interest in, the property."). An impairment is "more evident" if the contract has "an express covenant" permitting the action the law now prohibits. Bronson, 42 U.S. at 320-21. Or, as in this case, mandating action that the contract has an express covenant prohibiting.

Appellants and the tenants explicitly contracted for the payment and maintenance of security deposits as a condition of

their leases. The Millville Lease specified that the security deposit was "to assure that the Tenant performs all of the Tenant's obligations under [the] Lease," (Pa39), and prohibited any attempt to change the terms of the lease or to waive the requirements of applicable statutory law. (Pa42). The Glassboro and Millville Leases both prohibited the tenants from using their security deposit for rent. (Pa 9, 39). The Sixth Street Lease required the Johnsons to return the security deposit only "on the full and faithful performance of the lease." (Pa27). By negating the effect — and criminalizing the enforcement — of these express covenants, EO-128 substantially impaired Appellants' contracts. See Bronson, 42 U.S. at 320-21.

Whether a law impacts contractual obligations or only the available remedies is another way to approximate "the legitimate expectations of the contracting parties." U.S. Trust, 431 U.S. at 19 n.17. Reasonable modification of contractual remedies "is much less likely to upset expectations than a law adjusting the express terms of an agreement." Id. Many of the cases that have upheld changes to contracts were addressing laws that merely altered the means of enforcing a contract — not the outright interference with the contractual obligations themselves, which is what EO-128 has done. See Sveen, 138 S. Ct. at 1830 (Gorsuch, J., dissenting) (observing that Blaisdell and the cases on which the Court relied "involved statutes involving contractual remedies").

Here, the State did not place a temporary limit on the availability of contractual remedies. EO-128 instead fundamentally altered the parties' obligations under their leases, nullifying their ex ante expectations in the process.

Although courts have found that a party is less likely to have relied on contractual provisions in an industry with "a naturally fluid regulatory scheme, subject to change any time[,]" Farmers Mut. Fire Ins. Co. v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 547 (2013) (cleaned up), security deposit regulations have remained mostly static since the 1960s. Cf. Energy Reserves Grp., 459 U.S. at 416 (reasoning that price controls for natural gas were always subject to change).

Home providers in New Jersey have freely contracted for security deposits for well over a century. See Hecklau v. Hauser, 71 N.J.L. 478 (Sup. Ct. 1904). The legislature passed the Security Deposit Act in 1968 "to protect tenants from overreaching landlords who require[d] rent security deposits from tenants and then divert[ed] such deposits to their personal use." Watson v. Jaffe, 121 N.J. Super. 213, 213 (App. Div. 1972). Since then, the law regulating security deposits has remained quite stable, with statutory amendments largely focusing on the type of bank account the deposit must be kept in, the interest it must bear, and what happens to the deposit in case of foreclosure or sale. See, e.g., L.1971, c.233 (requiring, inter alia, deposit to be held in an

interest-bearing account and applying statute to providers with only two rental units); L.1973, c.195 (increasing escrow requirements and adding penalties for non-compliance); L.1985, c.42 (further specifying escrow requirements and simplifying the process in case of foreclosure).

In short, there have been seven relatively modest amendments to the law in over 50 years. This state of affairs could not conceivably have put Appellants on notice that the Governor might unilaterally and retroactively nullify and criminalize their ability to maintain a deposit to secure their real property during a tenancy. Cf. Farmers Mutual, 215 N.J. at 547; see also Elliott v. Bd. of Sch. Trs. of Madison Consol. Schs., 876 F.3d 926, 936 (7th Cir. 2017) (a law that retroactively "impair[s] existing contract rights and reliance interests is another question"). EO-128 did not merely subject Appellants to a tad bit more regulation; it unwound years of legislation, reliance interests, and contractual expectations with one lawless stroke of the pen. No home provider in New Jersey could have reasonably expected such a sweeping change. In fact, considering the importance of certainty in the property rights context, it was highly surprising that the Governor might ever claim such power.

By contrast, Sveen upheld a change to the presumption under Minnesota law regarding whether an insurance-policy holder intended to retain their ex-spouse as a beneficiary because three

aspects, taken together, demonstrated the law was consistent with the claimants' expectations: (1) "the statute [wa]s designed to reflect a policyholder's intent—and so to support, rather than impair the contractual scheme"; (2) "the law [wa]s unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done"; and (3) "the statute supplie[d] a mere default rule, which the policyholder c[ould] undo in a moment." 128 S. Ct. at 1822. The law was "unlikely to upset a policyholder's expectations at the time of contracting … because an insured cannot reasonably rely on a beneficiary designation remaining in place after a divorce." Id. at 1823. The reason the policyholder lacked any real reliance interest, the Court concluded, was that the equitable "power of divorce courts over insurance policies … affects whether a party can reasonably expect a beneficiary designation to survive a marital breakdown." Id.

The reasoning in Sveen echoed that from Blaisdell, in which the Court empahsized that the legislature did no more than "courts of equity have exercised jurisdiction" to do. 290 U.S. at 446. Unlike in Sveen and Blaisdell, a court in equity could not simply rewrite the express terms of a contract to reapportion security deposits toward rent owed under a residential lease—especially absent even the slightest showing of need or inability to pay. See Kavanaugh, 295 U.S. at 63 (distinguishing Blaisdell because

"[t]here has been not even an attempt to assimilate what was done by this decree to the discretionary action of a chancellor in subjecting an equitable remedy to an equitable condition"). Appellants had no reason to ever expect that the Governor would criminalize their ability to assert their contractual rights to maintain their security deposits.

EO-128 also diminished the value of Appellants' contracts and impaired their rights thereunder. See Green v. Biddle, 21 U.S. 1, 75-76 (1823). Appellants' leases included provisions for security deposits to help secure the value of their real property and to ensure the tenants would comply with their contractual obligations. By allowing a home provider to insure against risk and avoid small-claims litigation to seek reimbursement for property damage or other minor breaches, a security deposit facilitates the making of contracts. The deposit can decrease the rent that the home provider requires because the home provider assumes less risk. *See* Am. Compl. ¶ 170. Without a security deposit, Appellants lose the right to protect their property interests that they contracted for ex ante, thereby diminishing the value of their contracts. Green, 21 U.S. at 75-76 (diminishing the value of what the plaintiff contracted for substantially impairs the contract).

The lack of a security deposit also changes the parties' incentives. In Kavanaugh, the Supreme Court struck down state laws

that declared an emergency and effectively created a 6-½ year period during which the mortgagee could not recover possession of a property from a delinquent owner. 295 U.S. at 59-61. The Court reasoned, "Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self-interest to pay his assessments if he could, and to pay them without delay." Id. at 60. But under the statute at issue, the property owner "ha[d] every incentive to refuse to pay a dollar, either for interest or for principal." Id. at 60-61.

Here, the security deposits for which Appellants contracted created an incentive for the tenants to comply with the terms of their leases and maintain the condition of Appellants' properties. But EO-128 created "every incentive" for the tenants to move their deposit toward their rent and defeat the leverage and security for which Appellants had contracted. See id.

Because EO-128 has altered express terms of Appellants' contracts, changed the incentive structure that those contracts put in place, lessened the value of the contracts, and diminished Appellants' rights thereunder, the impairment is substantial.

**2. EO-128 Is Not Tailored to Meet Its Stated Justification**

Given the substantial impairment of Appellants' contracts, Respondents must clear an even higher hurdle to survive scrutiny. Allied Structural, 438 U.S. at 245. To make that showing, Respondents must prove that the impairment EO-128 inflicted on

Appellants' contracts was "both necessary and reasonable to meet the purpose advanced by the [state] in justification." U.S. Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union v. Gov't of V.I., 842 F.3d 201, 211 (3d Cir. 2016). The Court's review is "more exacting than the rational basis standard applied in the due process analysis." Am. Exp., 669 F.3d at 369; see also Alarm Detection Sys., Inc. v. Village of Schaumburg, 930 F.3d 812, 823 (7th Cir. 2019) ("There is no presumption of legislative validity under the Contracts Clause, and it demands more than a legitimate end and a rational means."); Ass'n of Equip. Mfrs. v. Burgum, 932 F.3d 727, 735 (8th Cir. 2019) (same). The Governor must "demonstrate more than a conceivable or incidental public purpose for impairing the obligation of contracts." Burgum, 932 F.3d at 734. An impairment is unreasonable when "an evident and more moderate course would serve [the state's] purposes equally well." U.S. Trust, 431 U.S. at 21; see also Allied Structural, 438 U.S. at 247 (analyzing whether an impairment "was necessary to meet an important general social problem").

**a. Governor Murphy's Unilateral Judgment Deserves No Deference**

Typically, Contracts Clause claims challenge state laws adopted through the proper legislative channels consistent with the republican form of government that the U.S. Constitution guarantees. EO-128, however, lacks even the imprimatur of legislative action, being implemented by executive fiat. Without

statutory authority, Governor Murphy unilaterally waived laws that were duly adopted through the legislative process, and adopted criminal penalties that had never been approved by the New Jersey Legislature. The lawlessness of Governor Murphy's action is thus even more obvious under this Court's Contracts Clause analysis.

Although "courts may 'defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" Am. Exp., 669 F.3d at 368-69 (quoting U.S. Trust, 431 U.S. at 19 n.17) (emphasis added), such deference flows from the courts' trust in the decisions reached through the considered judgment of the legislative process. Keystone Bituminous Coal Ass'n v. DeBendicitis, 480 U.S. 470, 486 & n.14 (1987) (upholding a contractual impairment where "the legislative purposes set forth in the statute were genuine, substantial, and legitimate"); Burgum, 932 F.3d at 732 (Deference in Blaisdell "did not rest on a mere assertion of conceivable public purpose; the Court cited legislative findings, supported by an adequate factual basis, that documented the existence of an economic emergency.").

In East New York Savings Bank v. Hahn, for instance, the Court deferred to the New York legislature, which "show[ed] the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what ha[d] been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts." 326 U.S. 230, 234 (1945).

The legislature "was not even acting merely upon the pooled general knowledge of its members" but also "was advised by those having special responsibility to inform it[.]" Id. By contrast, the Court in Kavanaugh refused to defer to the legislature over a law that demonstrated "studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor." 295 U.S. at 60; see also Baptiste v. Kennealy, 2020 WL 5751572, at *19 (D. Mass. Sept. 25, 2020) ("[T]he degree of deference" should "be influenced by the extent to which" the legislative process met the standard recognized in East New York Savings Bank).

Deference is inappropriate here because there was no studied legislative judgment. There was just one person, "legislating" unilaterally through executive orders, thereby taking from the legislature its right to make laws. Cf. Commc'ns Workers, 413 N.J. Super. at 265-66, 272 ("We cannot accord deference to EO 7's unilateral attempt to exercise the Legislature's powers, where the Legislature has not ceded those powers to the Executive."). New Jersey law does not authorize the Governor to make legislative judgments when he issues executive orders. Id. In usurping the legislative process, Governor Murphy showed a "studied indifference" to home providers, see Kavanaugh, 295 U.S. at 60, who had been depending on their security deposits to protect their

property and contractual rights as they began suffering under the crush of the pandemic. His unauthorized unilateral judgment deserves no deference.

**b. Governor Murphy Targeted a Single Group for Relief**

EO-128 does not promote a legitimate public purpose because a law impairing contractual rights must benefit the public generally rather than just a discrete group. Energy Reserves Grp., 459 U.S. at 412. "Since Blaisdell, the Court has reaffirmed that the Contract[s] Clause prohibits special-interest redistributive laws, even if the legislation might have a conceivable or incidental public purpose." Burgum, 932 F.3d at 732 (citation omitted). Laws with incidental public benefits violate the Contracts Clause if the benefit is targeted at a specific constituency. See, e.g., Burgum, 932 F.3d at 733 ("The law primarily benefits a particular economic actor in the farm economy—farm equipment dealers. Even if the law indirectly might benefit farmers and rural communities, the Contract Clause demands more than incidental public benefits."); Equip. Mfrs. Inst. v. Janklow, 300 F.3d 842, 859-61 (8th Cir. 2002) (same).

In Allied Structural, for instance, the Court struck down a law altering pensions, which despite seeming generally applicable on its face, could "hardly be characterized … as one enacted to protect a broad societal interest rather than a narrow class." Id.

at 238, 248-49. The law "applie[d] only to private employers who" met certain extremely specific requirements. Id. at 248. This targeted relief failed to satisfy the broad public purpose required by the Contracts Clause.

EO-128 benefits only residential tenants – not a general public purpose. Despite home providers and tenants alike suffering during the pandemic, Governor Murphy singled out a favored group for a benefit at the expense of a disfavored group. That the public happens to include more tenants than home providers is no excuse. Political favoritism at the expense of a disfavored group is the exact behavior the Framers drafted the Contracts Clause to prevent. See Laurence Tribe, American Constitutional Law, § 9-8, p. 613 (2d ed. 1988) (The Contracts Clause serves to protect minority rights "from improvident majoritarian impairment.").

Nor does an ongoing emergency transform EO-128's discrete benefits into a general public purpose. "Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." Blaisdell, 290 U.S. at 425. The Framers were acutely aware of crises of "unprecedented pecuniary distress" when they drafted the Contracts Clause. Edwards, 96 U.S. at 604. Many Contracts Clause cases have struck down legislation enacted in the face of crises. See, e.g., Kavanaugh, 295 U.S. at 60; Bronson, 42 U.S. 311. This Court must not hesitate to do so here.

**c. EO-128 Is Not Tailored to Its Public Purpose**

The Blaisdell decision is instructive on how narrowly tailored a law must be to survive scrutiny. The Court identified three ways the law was tailored to a narrow state interest: the law (1) provided only "temporary and conditional" relief, (2) was "sustained because of an emergency," and (3) provided for reasonable compensation while the law impaired creditor's rights. 290 U.S. at 441-42. Although the foreclosure moratorium in Blaisdell diminished the mortgagees' contractual remedies, the impairment was for a finite period, and the law compensated mortgagees until they could eventually enforce their rights. Id. at 416, 445-46.

There is no similar tailoring here. For one, EO-128 has no temporal limit. The order is set to remain in effect until 60 days beyond the conclusion of the current state of emergency. But history has shown that the duration of the emergency is not fixed in time and could extend indefinitely.[6] A law that applies for 18 months is not "temporary" in relation to a residential lease with a one-year term; instead, the law is a permanent change to the contract.

Nor is EO-128 tailored to specific needs it purports to serve. Considering there was no legislative judgment, it is unsurprising

[6] The Governor has extended the emergency every 30 days for over a year now. See EO-231.

that EO-128 is not tailored to "an evident and more moderate course [that] would serve [the state's] purposes equally well." See U.S. Trust, 431 U.S. at 21.

It is not difficult to conceive of ways to tailor a law more closely to EO-128's stated purpose.[7] The order contains no means test or mechanism by which the relief it offers is limited to tenants who "may be suffering from one or more financial hardships that are caused by or related to the COVID-19 pandemic[.]" EO-128 (emphasis added). Nor does the order disperse its costs across the populace; instead, it forces home providers to bear the costs. Unlike in Blaisdell, Appellants are not "predominantly corporations, such as insurance companies, banks, and investment and mortgage companies" whose "chief concern" is protecting a financial investment. Id. at 445-46. Appellants are local property owners who rent only a handful of units combined. They depend on

[7] For instance, the Brookings Institute has argued that "emergency rental assistance resources should prioritize those facing the most severe housing insecurity, including those at high risk of homelessness" and also include rental assistance, which "is critical to protect the long-term housing of tenants—and smaller landlords, too." Kristen E. Broady, Wendy Edelberg, & Emily Moss, An Eviction Moratorium Without Rental Assistance Hurts Smaller Landlords, Too, Brookings Institute (September 21, 2020), available at https://brook.gs/3uoJWKN. And California has tailored its tenant-assistance legislation by requiring tenants to return a declaration under penalty of perjury swearing that they have suffered a hardship because of COVID-19, and the law also includes protections for housing providers with four or fewer units. State of California, Tenant, Homeowner, and Small Landlord Relief and Stabilization Act of 2020, available at https://bit.ly/3wv1VBe.

the security deposit to protect against physical damage likely to occur when they lease their property. EO-128 criminalized their ability to assert the rights for which they freely contracted and which had been secured by statute.

Nothing in EO-128 compensates Appellants for the diminished value of their contracts. See Blaisdell, 290 U.S. at 442 ("[P]rovision was made for reasonable compensation to the landlord during the period he was prevented from regaining possession."). Instead, Appellants must now incur additional costs of litigating small-claims actions to seek reimbursement for property damage that their security deposits should have covered. By imposing such costs, EO-128 has diminished the value of Appellants' contracts. See Green, 21 U.S. at 75-76.

Through EO-128, Governor Murphy unilaterally reapportioned the value of residential leases in the tenants' favor. He interfered with contracts on behalf of a favored constituency, which is precisely what the Contracts Clause prohibits. Because EO-128 substantially impairs Appellants' contracts, it must fail.

## IV. EO-128 Violates Due Process

The first paragraph of the first article of the New Jersey Constitution guarantees that all persons "have certain natural and unalienable rights" including the fundamental right of "acquiring, possessing, and protecting property[.]" N.J. Const. art. I, ¶ 1.

In analyzing due-process violations, New Jersey courts consider "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg, 99 N.J at 567.

EO-128 deprives Appellants of the substantive right to protect their real property, which the Constitution explicitly protects. Montville Twp. v. Block 69, Lot 10, 74 N.J. 1, 7 (1977). And although there is no absolute right to contract, cf. Fried v. Kervick, 34 N.J. 68, 83 (1961), retroactive laws that impair the right to contract are suspect, especially when those contracts vest one's "natural and unalienable" right to protect one's property. Cf. Twiss v. Dep't of Treasury, 124 N.J. 461, 470 (1991) (retroactive laws are disfavored when they impair a vested right); see also New Brunswick Sav. Bank v. Markouski, 123 N.J. 402, 414 (1991) (collecting cases of other instruments related to property for which there is a "property interest" protected by the due-process clause). The right to contract for a security deposit has existed for over a century and "its dimensions are defined by state law." J.E. v. Dep't of Hum. Servs., 131 N.J. 552, 563-64 (1993).

The order deprives Appellants of their fundamental rights and imposes criminal penalties through executive order without following established legislative procedures, which is itself a violation of procedural due process. "Established procedures lie at the heart of due process and are as important to the attainment

of ultimate justice as the factual merits of a cause." Band's Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522, 553 (App. Div. 1960), supplemented, 64 N.J. Super. 1 (App. Div. 1960).

The intrusion in this case is severe. Appellants are left without the means for which they contracted to protect their property and, if they so try, they are subject to criminal penalties. Appellants do not dispute that the State may have an interest in protecting its residents from certain types of harm during an economic crisis. But the means of accomplishing that goal must be properly tailored. Just as EO-128 was not sufficiently tailored to satisfy a Contracts Clause analysis, the State's failure to craft relief in a constitutional manner compounds the fact that it has used an unconstitutional means. While EO-128 may put some money in the pockets of some tenants, there is no means testing or criteria to qualify for protection under the order. There can also be no justification for providing such cash assistance at the expense of Appellants' fundamental rights. The Governor's order also applies to home providers of all sizes, even though larger companies could more easily shoulder the cost, especially considering they are eligible for grant programs from the State while "[o]ne- and two-family rental properties … are ineligible[.]" David M. Zimmer, Second Round of Grants Will Help

NJ Landlords Who Forgave Rent Payments Due to Covid-19 (Oct. 2, 2020), available at https://njersy.co/3mlUNlN.

Moreover, as explained above, the Governor's "legislative" judgment deserves no deference. Without following New Jersey's established procedures, the Governor issued EO-128 *ultra vires* and deprived Appellants of their rights without due process of law. Typically, a citizen is heard during the lawmaking process through his or her elected representatives. Governor Murphy circumvented the established (and constitutionally guaranteed) legislative process and created law outside the democratic process. He denied Appellants due process of law in taking that action.

EO-128 purports to penalize non-compliance pursuant to the Civilian Defense and Disaster Control Act. That Act, however, does not authorize the Governor to issue EO-128. Without a lawful source of authority to issue the order, the Governor cannot assume the legislature's authority to criminalize conduct – especially when such conduct is the failure to comply with what is clearly an unlawful order. Any prosecution based on the failure to abide by an unlawful order would also violate due process.

**CONCLUSION**

Governor Murphy has abandoned the legislative process and the rule of law to relieve a discrete constituency of its contractual and legal obligations at the expense of Appellants' contractual and constitutional rights. No statute adopted by the legislature

authorizes the Governor to take these actions. Moreover, the Founders considered this exact eventuality and adopted a robust constitutional prohibition on executive actions such as EO-128. This court should restore the rule of law and vindicate the separation of powers that the Constitution guarantees.

Dated: April 5, 2021

Respectfully submitted,

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