CHARLES KRAVITZ, DAWN JOHANSON-KRAVITZ, and LITTLE HARRY'S LLC; MARGARITA JOHNSON, JOHN JOHNSON, and TWO BEARS PROPERTY MANAGEMENT,

Petitioners,

v.

PHILIP D. MURPHY, in his official capacity as Governor of New Jersey; ANDREW J. BRUCK, in his official capacity as Acting New Jersey Attorney General; and JUDITH M. PERSICHILLI, in her official capacity as Commissioner of the New Jersey Department of Health,

Respondents.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 086160

CIVIL ACTION

On Petition for Certification from the July 20, 2021 Judgment of the Superior Court of New Jersey, Appellate Division Docket No. A-1584-20

SAT BELOW:
Hon. Carmen Messano, P.J.A.D.
Hon. Richard S. Hoffman, J.A.D.
Hon. Morris G. Smith, J.A.D.

# BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIFICATION


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## PRELIMINARY STATEMENT

In the earliest days of the pandemic, amid unprecedented and escalating public health and economic crises, Governor Murphy took a temporary step to protect struggling residents facing difficulty paying their rent. The Governor recognized that, under state law, there was a source of money that remained the property of a tenant: the security deposit. And he recognized that altering the legally-permitted uses of that security deposit so that it could go toward paying rent during the emergency would bring myriad benefits: it would provide relief to struggling tenants; help them avoid choosing between paying rent or essential health care costs during a pandemic; and minimize the economic and public-health consequences associated with a wave of evictions that might otherwise follow the expiration of the State's temporary eviction moratorium. It would also achieve those goals without affecting landlords' rights, because landlords would still be entitled to collect the same money for rent and damage to property as before. So, from April 2020 until its termination on July 4, 2021, Executive Order 128 ("EO 128") authorized New Jersey's tenants to use their security deposits to pay rent.

In a thorough and considered decision, the Appellate Division rejected Petitioners' challenge to EO 128, and review of that decision is not warranted. Most importantly, EO 128 has ended. On June 4, 2021, the public health emergency (PHE) ended and the

Legislature terminated the vast majority of executive orders that had relied on the existence of the PHE, including EO 128, effective July 4. See L. 2021, c. 103, § 1. Since July 4, no landlord has had to allow a tenant to use a deposit to pay rent. Because Petitioners seek prospective relief against a law that has no continued effect on Petitioners, this case is moot. In any event, this Court does not exercise discretionary review to adjudicate expired laws, let alone expired laws arising from an unprecedented disaster that is unlikely to recur.

Certification would still not be warranted even absent this threshold problem because the Appellate Division here did no more than apply long-settled state law to the facts of this case. The court below properly applied the deferential standard set out by this Court when it concluded that EO 128 reflected a lawful exercise of the Governor's emergency powers. And the Appellate Division's rejection of the claim that EO 128 violates the Contracts Clause is consistent with every other court to consider the question. The petition for certification should be denied.

## PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Since the first case of COVID-19 was reported in New Jersey in March of 2020, the virus has had devastating effects across the

[1] Because they are closely related, the procedural and factual histories are combined.

state. See Db4.[2] At the start of the pandemic, Governor Murphy declared both a state of emergency and a public health emergency under the New Jersey Civilian Defense and Disaster Control Act (DCA), N.J.S.A. App. A:9-33 to -63, and Emergency Health Powers Act (EHPA), N.J.S.A. 26:13-1 to -31, respectively. See N.J. Exec. Order 103 (Mar. 9, 2020). And in the emergency's earliest days, Governor Murphy issued a series of executive orders to manage the outbreak and curb the spread of COVID-19. Among other things, he mandated the closure of non-essential businesses to the public, including retail, personal care, and recreational businesses. See N.J. Exec. Order 107 (Mar. 21, 2020). At the same time, he directed residents, with limited exceptions, to stay home. Ibid.

The need for social distancing and associated closure orders had an immediate impact on the economy that summer. New Jersey's unemployment rate rose dramatically, resulting in record numbers of unemployment claims. See Db6-7. Many residents, in turn, faced severe difficulty paying rent. See Db7-8.

New Jersey responded to the rise in housing insecurity with a series of emergency programs. These measures included targeted financial relief for landlords and homeowners, including a grant

[2] "Pc" refers to Petitioners' Petition for Certification; "PCa" refers to the appendix accompanying the Petition; "Pa" refers to Petitioners' Appellate Division appendix; "Pb" refers to Petitioner's Appellate Division brief; and "Db" refers to the State's Appellate Division brief.

program to reimburse landlords for lost rent revenue as well as a residential mortgage relief program. PCa5-6. The Governor also issued two executive orders to aid renters. The first, Executive Order 106, placed a temporary emergency moratorium on evictions, set to expire after the end of the public-health emergency. See PCa7; N.J. Exec. Order No. 106 (Mar. 19, 2020) ("EO 106"). Notably, however, EO 106 did "not affect any schedule of rent that is due," and by its plain terms paused only removals, meaning that eviction proceedings could still be initiated. PCa8.

The second, Executive Order 128, is at issue in this appeal. N.J. Exec. Order No. 128 (Apr. 24, 2020) ("EO 128") (Pa54). The Governor explained that, notwithstanding EO 106, there remained a need to help renters. While these tenants would be protected from removal during the crisis, they "may face other 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, as well as negative credit reports that may affect their ability to find housing options in the future." Pa56. Moreover, there remained an "increased risk" of mass evictions when EO 106's temporary moratorium lapses. Pa55.

Thankfully, a temporary way existed to help tenants continue to make rent payments while still protecting landlords. As the Governor explained, under state law, "a security deposit and the accumulated interest and earnings on the investment of such deposit

remain the property of the tenant." (Pa56) (citing N.J.S.A. 46:8-19). And temporarily allowing tenants to use their security deposits to pay rent at the height of the COVID-19 pandemic would have multiple salutary benefits: it would give tenants facing a loss of income immediate relief; help them avoid choosing between paying rent or essential health care costs during a pandemic; and minimize both the economic and health consequences associated with a wave of evictions that could otherwise follow expiration of the State's temporary eviction moratorium. See PCa8-9 (citing EO 128). So EO 128 temporarily amended the state law governing security deposits to allow tenants to apply "a security deposit governed by the provisions of N.J.S.A. 46:8-19 et seq. . . . towards rent payments due." Pa56-57.

At the same time, EO 128 included a series of protections to ensure that landlords would not be made financially worse off by this temporary change. In particular, it provided that if a tenant used a deposit to unpaid rent, "[t]he landlord may recoup from the tenant any monies the landlord expended that would have been reimbursable by the security deposit and interest or earnings thereon, at the time that such reimbursement from the deposit and interest or earnings thereon would have taken place." Pa57, ¶ 2(a). Thus, the landlord remained legally entitled to precisely the same money from the tenant as before, both for rent and for any damage. The order also provided that if a tenant renewed or

extended a lease, they had to "replenish the security deposit in full" on the date of renewal or six months after the end of the public-health emergency, whichever was later. Id. ¶ 2(b).

Petitioners filed this challenge to EO 128 on December 15, 2020, alleging that it exceeded the Governor's emergency powers, violated the Contracts Clause and Due Process Clause, and offended the separation of powers. PCa10. On July 20, 2021, the Appellate Division affirmed EO 128 and rejected all of Petitioners' claims. PCa1. The court held that the Legislature authorized the Governor to issue EO 128 pursuant to his emergency powers under the DCA and that the DCA's delegation of emergency authority is consistent with the Constitution. PCa18-35. And it rejected Petitioners' separate constitutional arguments, including the claim that EO 128 violated the Contracts Clause. PCa3.[3]

Due to the development of COVID-19 vaccines and decreased case numbers across the state, New Jersey's public-health emergency has formally ended. See N.J. Exec. Order 244 (June 4, 2021). On June 4, 2021, the Legislature terminated, with limited exceptions, all orders issued by the Governor that relied on the existence of the public-health emergency, effective July 4, 2021.

[3] Petitioners also filed a parallel federal action challenging EO 128 on federal Contracts Clause grounds, which the district court dismissed. Johnson v. Murphy, 527 F. Supp. 3d 703 (D.N.J. 2021), appeal filed, No. 21-1795 (3d Cir.).

L. 2021, c. 103, § 1. EO 128 therefore expired on July 4, 2021. Petitioners filed this Petition on August 19, 2021.

## ARGUMENT

### POINT I

**THE COURT SHOULD DENY CERTIFICATION BECAUSE EXECUTIVE ORDER 128 WAS TERMINATED BEFORE THIS PETITION WAS FILED.**

This Court can deny review for one simple, threshold reason: EO 128 was terminated on July 4, 2021, well before this Petition was filed. Although Petitioners acknowledge that the Legislature terminated the public health emergency declared in Executive Order 103, Pc6, they fail to mention that the same legislation terminated EO 128, see L. 2021, c. 103, § 1 (specifying that EO 128 and other orders "shall expire 30 days following the effective date of this act"); N.J. Exec. Order No. 244 at 5 (June 4, 2021). Since July 4, no landlord in New Jersey has been required to grant a tenant's request to apply a security deposit toward rent. The termination of EO 128 has two consequences for the instant petition: the case is moot, and even if the case were not moot, it is not of sufficient importance to justify this Court's attention.

As to mootness, this Court has stressed that certification is inappropriate where, as here, "the appeal is moot as to the parties to the litigation and does not therefore present a matter required to be adjudicated by this Court in the interest of justice." In re Route 280 Contract, 89 N.J. 1 (1982). That is because once an

order expires, a decision from this Court on its validity has "no practical effect on the existing controversy." Redd v. Bowman, 223 N.J. 87, 104 (2015); see also, e.g., In re Plan for Abolition of Council on Affordable Hous., 214 N.J. 444, 451 n.1 (2013) (challenge to order mooted by its rescission); Cty. of Butler v. Gov. of Pa., 8 F.4th 226 (3d Cir. 2021) (dismissing as moot challenge to COVID-19 executive orders that expired).

That is dispositive here. Petitioners seek only prospective declaratory and injunctive relief against an emergency order that has ended. Petitioners' complaint — that EO 128 allowed a tenant to use a security deposit to pay rent over the landlord's objection — was remedied by its termination. And any suggestion that this Court should nevertheless adjudicate the merits of EO 128 just in case the Governor or Legislature one day hypothetically reinstates the order is unsubstantiated conjecture. The Legislature ended EO 128 based on the dramatically improved public health outlook after a successful vaccination campaign. There is no need for this Court to evaluate the validity of an order that has expired.

While the Appellate Division "declined to dismiss this appeal on mootness grounds" because EO 128 has a narrow residual effect, PCa3 n.1, that does not save the instant petition from mootness. The expiration of EO 128 means no tenant has been able to invoke its terms since July 4, 2021. If, however, a tenant had already applied a deposit to rent before EO 128 expired and subsequently

renewed the lease, the tenant is not required to replenish the deposit in full until six months after the end of the public health emergency — December 4, 2021 — or the date of renewal, whichever is later. EO 128, ¶ 2(b). But those temporary residual effects do not help Petitioners avoid mootness, for two reasons. First, the Appellate Division failed to consider that the residual impact of EO 128 does not affect Petitioners. Indeed, Petitioners have never contended that their tenants invoked EO 128 and renewed a lease. Petitioners have cited only one of their leases where EO 128 was ever used to pay rent, and that lease was not renewed. See Pb16-18. And Petitioners conceded in their federal challenge that "none of [Petitioners'] current tenants are among th[e] group" that "still enjoy the order's protection." Dkt. 42, Appellants' Reply Br. at 2 n.1, Johnson v. Governor of N.J., 3d Cir. No. 21-1795 (filed Oct. 6, 2021). Second, because it is highly unlikely that this Court would issue a decision prior to December 4, 2021, the date on which even this residual effect begins to sunset, the ever-smaller number of tenants still benefiting from the order will sharply diminish during the pendency of this Court's review.

More fundamentally, however, this Court need not conclusively determine whether the case is moot because — at the very least — no compelling reason exists for this Court to grant discretionary review to pass upon the propriety of an executive order that has been terminated. This Court has long reserved its limited

resources for appeals that present a significant issue of "public importance." R. 2:12-4. A suit that questions whether an expired EO was valid under the DCA and the Contracts Clause no longer qualifies. Nor is there reason to think that EO 128 will be reinstated, as the unique public-health and economic crises that inspired its issuance in April 2020 are now in the State's rear-view mirror. Whether because the case is moot, unimportant at this time, or both, there is no compelling need for this Court to review the validity of a law that has been terminated by the Legislature and which can have no continued effect on Petitioners.

## POINT II

### THE COURT SHOULD DENY CERTIFICATION BECAUSE THE APPELLATE DIVISION CORRECTLY APPLIED WELL ESTABLISHED LAW.

Petitioners' attempt to challenge an already-terminated order aside, the decision upholding EO 128 as a valid exercise of the Governor's authority under the DCA and under the state Constitution does not warrant review. This Court generally denies certification unless an appeal presents "an unsettled question of general public importance." Bandel v. Friedrich, 122 N.J. 235, 237 (1991); see also R. 2:12-4. If the decision "is essentially an application of settled principles to the facts of th[e] case," Fox v. Woodbridge Tp. Bd. of Educ., 98 N.J. 513, 516 (1985) (O'Hern, J., concurring), and "is not palpably wrong, unfair or unjust," Bandel, 122 N.J. at

237, certification is not appropriate. The decision below reflects settled principles and is plainly correct.

### A. The Governor Acted Within His Authority Under the Disaster Control Act.

The Appellate Division's decision upholding EO 128 involved a straightforward application of well-settled law. In Worthington v. Fauver, 88 N.J. 183 (1982), this Court established the familiar standard for determining whether an emergency executive order is authorized by the DCA. Under that standard, "the court must first determine whether the governor's action is 'rationally related' to the legislative goal of protecting the public, and second, whether it is 'closely tailored to the magnitude of the emergency.'" PCa21 (quoting Worthington, 88 N.J. at 197-98; Cty. of Gloucester v. State, 132 N.J. 141, 147 (1993)). The Appellate Division concluded that EO 128 easily satisfied that test. See PCa21-22, 26, 31. As the Appellate Division reasoned, EO 128 was rationally related to addressing "the health and economic crises created by COVID-19"; among other things, the order would help ensure that tenants had "access to additional funds to pay for health care during the pandemic" and reduce the risk of "additional homelessness" due to nonpayment of rent. PCa26. EO 128 was also "closely tailored to meet the needs of the public health and economic emergency," since the order only allowed tenants to pay rent using their own property (the security deposit), it preserved landlords' rights to the money

they are otherwise owed, and it was limited to an unprecedented emergency and its immediate aftermath. PCa31.

Petitioners fail to identify any error, let alone one warranting certification. First, Petitioners erroneously contend that EO 128 was not rationally related or tailored to an emergency because it only protected against "theoretical future harms that occur after the emergency," i.e., additional homelessness after termination of the eviction moratorium. Pc9-10. But that view runs into a number of problems. For one, EO 128 was a direct response to the multi-faceted crisis New Jerseyans faced; as this Court has emphasized, the COVID-19 pandemic did not just cause "a health emergency," but "a broad based economic one that has devastated many individuals and families." N.J. Republican State Comm. (NJRSC) v. Murphy, 243 N.J. 574, 580-81 (2020). And EO 128 directly responded to both the economic and public-health crises as those emergencies unfolded. The order helped tenants pay rent, freeing up money that could be used on other needs — like "health care during the pandemic." PCa26 (emphasis added); see also Db18-20. It also gave tenants the immediate benefit of avoiding the interest, late fees, and negative marks on a credit report that come from falling behind on rent. For another, the order helped "prevent homelessness" even during the time EO 106 was in effect, PCa26, as tenants who cannot pay rent frequently vacate prior to consummation of a formal eviction. See Db20; PCa26 (noting EO 106

and EO 128 were "intended to prevent homelessness," albeit using "different strateg[ies]").

Second, Petitioners argue EO 128 was not "closely tailored" to the emergency because it lacked any means-testing requirement. Pc13. But the State could hardly have delivered the swift relief afforded by EO 128 if it had to erect an administrative enforcement scheme to separate "worthy" and "unworthy" tenants — even setting aside the implementation burdens this would have imposed during a pandemic. Nor is there any reason to believe tenants who faced no economic difficulties availed themselves of EO 128. After all, using a deposit to pay rent did not relieve tenants of the obligation to pay rent or to compensate a landlord for any property damage. Instead, EO 128 was a modest measure that allowed tenants "to pay rent using their own funds" held as a security deposit, and it did "not hinder landlords' ability to obtain judgments for unpaid rent or damages." PCa31; see also Db21-24.

Third, Petitioners suggest that EO 128 was invalid because it did not pertain to one of the "subjects" enumerated in N.J.S.A. App. A:9-45. Pc11-12. But as the Appellate Division explained, N.J.S.A. App. A:9-45(i) grants the Governor expansive authority to issue executive orders "[o]n 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 and destruction of property." PCa21, 27; see also N.J.S.A. App. A:9-45(i). And, as this Court

confirmed in Worthington, "the Governor's power under the Disaster Control Act must be liberally construed to accomplish its critical legislative purpose." 88 N.J. at 199. So long as the challenged action "bears a rational relationship to the legislative goal of protecting the public" and is "closely tailored" to addressing an emergency, it is "authorized by the statute." Ibid.

Fourth, Petitioners contend that EO 128 somehow violated the separation of powers and nondelegation doctrines. But Worthington explained that neither doctrine is offended where, as here, "the Governor acted pursuant to the legislative power granted to him by the Disaster Control Act." Id. at 207. Nor did this particular order impermissibly "suspend[]" provisions of the Security Deposit Act (SDA). Pc15-16; PCa33. Worthington stated that the Governor may "suspend[] the normal operation of . . . statutes . . . pursuant to the emergency powers of the Governor explicitly delegated to him by the Legislature." 88 N.J. at 200. And "[s]uch a result is not surprising"; after all, "[i]f every law applicable to tranquil times were required to be followed in emergencies, there would be no point in delegating emergency powers and no adequate and prompt means for dealing with emergencies." Ibid.

Fifth, Petitioners suggest that EO 128 was invalid because a violation of the order was a criminal offense. Pc16-17. But the DCA expressly states that the "violat[ion]" of "any order, rule or regulation adopted by the Governor" under the Act is a disorderly

person offense subject to "fine and imprisonment." N.J.S.A. App. A:9-49, -50; see also Db25-26. Thus, "the Disaster Control Act permits the Governor to criminalize actions that contravene the Governor's emergency orders." PCa47. If EO 128 were invalid for imposing criminal penalties for a violation, then no gubernatorial order could be enacted under the DCA. That is the opposite of the regime the Legislature set up to protect the public.

### B. The Governor's Emergency Action Did Not Contravene The Contracts Clause.

Petitioners' claim that EO 128 violated the Contracts Clause is no more deserving of review. The Appellate Division's opinion again follows from well-settled precedent and principles.

The first sign that the decision demands no further review is that every single court to face an analogous challenge has rejected it. Not only did the Appellate Division deny Petitioners' state Contracts Clause claim, but a federal district court rejected Petitioners' federal Contracts Clause challenge to the same order. See PCa35-44; Johnson, 527 F. Supp. 3d at 715-18 (dismissing these challengers' federal claim); In re Recycling & Salvage Corp., 246 N.J. Super. 79, 100-01 (App. Div. 1991) (noting state Contracts Clause parallels the federal Contracts Clause). And multiple other federal courts have rejected challenges to other states' orders allowing a tenant to use a security deposit to pay outstanding rent. See Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 224

(D. Conn. 2020); Elmsford Apartment Assocs. v. Cuomo, 469 F. Supp. 3d 148, 169 (S.D.N.Y. 2020), app. dismissed as moot, 2021 U.S. App. LEXIS 21072 (2d Cir. July 16, 2021). In light of that broad consensus, review is unnecessary.

The other reason review is not warranted is that the decision below follows directly from United States Supreme Court precedent on the scope of the Contracts Clause. As these decisions explain, the Clause rarely prevents a State's exercise of its police powers to protect the public — especially in a once-in-a century pandemic. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 240 (1978). Instead, to decide whether a law violates the Clause, courts apply a two-step test. Sveen v. Melin, 138 S. Ct. 1815, 1821-22 (2018); Berg v. Christie, 225 N.J. 245, 259 (2016); PCa36-37. First, they consider whether a state law works a "substantial impairment" to a preexisting contract. Sveen, 138 S. Ct. at 1822; Berg, 225 N.J. at 259. If not, the inquiry is over and the law is upheld. Second, even if the law imposes such impairment, courts must nevertheless uphold the provision so long as it "is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." Sveen, 138 S. Ct. at 1822.

The Appellate Division's conclusion (like the federal court's conclusion) that EO 128 did not substantially impair Petitioners' rights is correct. See PCa44; Johnson, 527 F. Supp. 3d at 717-18. In conducting this inquiry, courts assess "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 [its] rights." Sveen, 138 S. Ct. at 1822; see also Pc18, 37 (admitting that "[w]hether the parties were operating in a regulated industry is '[a]n important factor in determining the substantiality of any contractual impairment'") (quoting Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff, 669 F.3d 359, 367 (3d Cir. 2012)). On this score, New Jersey has a "long history of regulating the residential rental industry," and rental deposits in particular are "heavily regulated" under the Security Deposit Act, N.J.S.A. 46:8-19 to -26. PCa38-43. It follows that Petitioners were on notice of the possibility of added regulation, greatly diminishing the strength of their claims. See Johnson, 527 F. Supp. 3d at 716-17 (citing Elmsford, 469 F. Supp. at 169).

The order also allowed Petitioners to maintain the benefit of their bargains, and to safeguard and reinstate their rights, because "EO 128 did not alter the tenants' obligations to pay rent or compensate landlords for damages they caused." PCa39. EO 128 provided that any "landlord may recoup from the tenant any monies the landlord expended that would have been reimbursable by the security deposit." So Petitioners were "able to enforce their rights by obtaining a judgment against any tenants who default[ed] on rent or cause[d] damages; tenants' rental obligations [were]

not diminished by 'even a nickel.'" PCa43 (quoting Johnson, 527 F. Supp. 3d at 718). While Petitioners may not have wished to go through litigation, "[t]he whole scheme is no different than what actually happens in the real world, where tenants routinely forfeit their security deposit by allowing it to 'cover the last month's rent' on a lease." Elmsford, 469 F. Supp. at 171.

Petitioners' responses fall short. First, they disagree with the application of the "substantial impairment" test, complaining that their rights were impaired because EO 128 "lessened the value" of their contracts. Pc19. It is hornbook law, however, that "past regulation puts industry participants on notice that they may face further government intervention in the future," meaning the risk of future regulatory activity gets priced into the contracting process. Johnson, 527 F. Supp. 3d at 716 (citing Elmsford, 469 F. Supp. at 169); see also PCa38-43; Elmsford, 469 F. Supp. 3d at 170 (agreeing "foreseeability of additional regulation allows states to interfere with both past and future contracts"); Auracle Homes, 478 F. Supp. 3d at 225 (same); cf. HAPCO v. City of Philadelphia, 482 F. Supp. 3d 337, 351 (E.D. Pa. 2020) (protecting local tenants from late fees is not substantial impairment because "residential leases have been heavily regulated for many years"). Moreover, Petitioners simply ignore the ways in which owners could reinstate their rights to rent and to damages. If every change to a contract term were "substantial," this prong would have no role.

And notably, even if this Court agreed with Petitioners' substantial-impairment analysis (though it should not), review would still not be warranted, because EO 128 is justified at the second step of the Contracts Clause test. Again, even if an order works a substantial impairment, a provision is still lawful if it is "an appropriate and reasonable way to advance a significant and legitimate public purpose." Sveen, 138 S. Ct. at 1822; see also PCa36 (noting that, for a century, courts have acknowledged that "the State may make laws for the common welfare even if those laws conflict with or affect individual contracts") (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435-36 (1934)). In this case, EO 128 advanced significant purposes in an appropriate way: in providing immediate relief to struggling tenants by granting access to their own property for a limited period, while ensuring landlords are entitled to all the same rent and damages as before, the order was a targeted and measured approach to reducing housing insecurity and its attendant public-health risks in the middle of an unprecedented public-health emergency. In other words, while the Appellate Division did not reach this second step, PCa44, EO 128 would plainly be valid on this basis too.

Second, likely because established Contracts Clause decisions are fatal to their claim, Petitioners urge this Court to instead rely on nineteenth-century cases applying an obsolete view of the Contracts Clause. See Pc19 (citing Edwards v. Kearzy, 96 U.S. 595

(1877); Bronson v. Kinzie, 42 U.S. 311, 320 (1843)). "Whatever force plaintiff's challenge may have had in a much earlier era of Contracts Clause jurisprudence," current "case law has severely limited the Contracts Clause's potency." Apt. Assoc. of Los Angeles Cty., Inc. v. Los Angeles, 10 F.4th 905, 909 (9th Cir. 2021) (COVID-19 eviction moratorium and rent freeze ordinance did not violate federal Contracts Clause). At bottom, "repeatedly in modern times, [courts] have upheld as reasonable various laws that nonetheless may have affected private contracts." Id. at 914. Certification is not warranted to adopt a radical reinterpretation of the Contracts Clause unsupported by any precedent.

## CONCLUSION

The petition for certification should be denied.

Respectfully submitted,

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Dated: November 5, 2021