No. 21-788

In the Supreme Court of the United States

APARTMENT ASSOCIATION OF LOS ANGELES COUNTY, INC., D/B/A APARTMENT ASSOCIATION OF GREATER LOS ANGELES,

Petitioner,

v.

CITY OF LOS ANGELES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy. NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state.

The "civil liberties" in NCLA's name include rights at least as old as the Constitution itself, such as jury trial, due process of law, and protection from states' impairing contracts. NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more people. Although we still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by the recent trend among the lower courts deferring to the states in their justifications for substantially impairing contractual obligations. Judicial review by an independent judiciary is necessary to protecting constitutional rights.

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[1] All parties consented to the filing of this brief. No one other than the *amici curiae* and its counsel authored or financed the preparation or the submission of this brief.

STATEMENT OF THE CASE

Many lower courts, like the Ninth Circuit below, have sensed this Court's indifference to protecting contractual obligations from state interference. Given how this Court has openly ignored the text and the original meaning and understanding of the Contracts Clause, it's really no surprise that the lower courts would constrain contractual rights even further. A course correction is long overdue.

The national emergency caused by Covid-19 has led states to interfere with private contracts, as they have during basically every emergency since they were colonies. While legal challenges to these emergency measures work their way through the lower courts, very few courts apply the Contracts Clause as if it imposes any restraint at all on the states. These courts have expanded the leeway this Court has allowed for state interference in at least one of two main ways: (1) holding that there is no reasonable expectation against state impairment of contractual obligations in regulated industries and (2) deferring to state justifications for impairing contracts. This Court's immediate intervention is needed to ensure that the Contracts Clause serves its purpose during the pandemic response and beyond.

DISCUSSION

I. THE ORIGINAL UNDERSTANDING OF THE CONTRACTS CLAUSE

A. State Responses to Emergencies Inspired the Contracts Clause

A contractual duty is worthless without an enforceable obligation requiring the parties to fulfill their

duties. The Founders recognized the importance of protecting contractual obligations in times of crisis.

The mid-1780s saw a debt crisis, as bad harvests left farmers unable to pay their mortgages and their taxes to states already saddled with vast war debts. See Principles of Government and Commerce (1788), in Noah Webster, A Collection of Essays and Fugitiv Writings 41 (Boston 1790). Unanswerable to the federal government under the Articles of Confederation, several states "yielded to the necessities of their constituents" and passed laws that impaired contractual obligations. See *Edwards v. Kearzey*, 96 U.S. (6 Otto) 595, 605 (1877). These states interfered so badly "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 (1934).

Rhode Island was among the worst offenders. It issued new paper tender and passed laws that required creditors to accept the new tender instead of the gold or silver coin that their contracts required. See, *e.g.*, An Act for Emitting One Hundred Thousand Pounds, in May 1786, At the General Assembly of the Governor and Company of the State of Rhode-Island and Providence-Plantation 13, 16 (Providence 1786). Such laws "destroyed public credit and confidence" and "insured and aggravated the ruin of the unfortunate debtors for whose temporary relief they were brought forward." *Edwards*, 96 U.S. at 605. In other words, short-sighted debt relief destroyed the future credit of the exact constituents who state legislatures tried to help, while also "threaten[ing] the existence of credit" and public faith in contracts more generally. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 354-55 (1827).

Legal commentators at the time recognized that states' impairing contractual obligations was "highly unjust and tyrannical." Webster, A Collection of Essays and Fugitiv Writings, 41. As Noah Webster wrote, "the state has no right to break its own promises, so it has no right to alter the promises of individuals. When one man had engaged to pay his debt in wheat, and his creditor expects the promise to be fulfilled, the legislature has no right to say, the debt shall be paid in flax or horses." *Ibid.*

When the delegates arrived at the federal convention of 1787, they were well acquainted with national emergencies. These emergencies taught them the need for a more robust social compact that would secure contractual obligations against state interference. See *Edwards*, 96 U.S. at 606; see also *Ogden*, 25 U.S. at 355 (guarding against state interference with contracts "was one of the important benefits expected from a reform of the government"). The framers drafted the new Constitution "[t]o meet these evils in their various phases." *Edwards*, 96 U.S. at 606.

Now known as the Contracts Clause, Article I, § 10 prohibits the states from passing "any … Law impairing the Obligation of Contracts." One of the Constitution's primary architects, Charles Pinckney of South Carolina,[2] called this provision the "soul of the Constitution." James W. Ely, The Contract Clause: A Constitutional History 15 (University Press of Kansas 2016).

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[2] See Jared McClain, An Analysis of Charles Pinckney's Contributions to the Constitutional Convention of 1787, 24 J. of S. Legal Hist. 1 (2016), for an empirical analysis of Pinckney's impact.

In choosing the terms of the clause, "the framers were absolute." *Sveen v. Melin*, 138 S. Ct. 1815, 1827 (2018) (Gorsuch, J., dissenting) ("[T]he framers knew how to impose more nuanced limits on state power and did so in other clauses of "[t]he very section of the Constitution where the Contracts Clause is found"). "The prohibition is plain and unequivocal—needs no comment, and is susceptible of no misinterpretation." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 133 (1819).

James Madison, another major architect of the Constitution, emphasized 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. Similarly, in his public advocacy, Madison argued that laws impairing contractual obligations "were not only forbidden by the Constitution," "but were 'contrary to the first principles of the social compact, and to every principle of sound legislation.'" *Edwards*, 96 U.S. at 606 (quoting Federalist 44). According to Madison, the Contracts Clause prevented legislation that displaced established contractual rights. Kmiec, 14 Hastings Const. L. Q. at 532; *see also Reynolds v. McArthur*, 27 U.S. (2 Pet.) 417, 434 (1829) ("[L]aws by which human action is to be regulated, look forwards, not backwards[.]"). The states "chose to ratify the Constitution—categorical Clause and all." *Sveen*, 138 S. Ct. at 1827 (Gorsuch, J., dissenting).

Although "[t]he treatment of the malady was severe, [] the cure was complete." *Edwards*, 96 U.S. at 606. The Contracts Clause restored public 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).

B. This Court Faithfully Applied the Original Understanding of the Contracts Clause for 150 Years

Soon after ratification, this Court recognized that the original meaning of the Contracts Clause was "to establish a great principle, that contracts should be inviolable[.]" *Crowninshield*, 17 U.S. at 205. Acknowledging the categorical prohibition against retroactive interference with contracts, 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. For the next 100 years or so, this Court continued to "carry out the intent of contracts and the intent of the Constitution[,]" *Edwards*, 96 U.S. at 607, recognizing that it would "ill become this court, under any circumstances, to depart from the plain meaning of the words used" in the Contracts Clause. *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 318 (1843).

C. *Blaisdell* and Its Limiting Principles

In the wake of the Great Depression, though, this Court balked at enforcing the plain meaning of the Contracts Clause. The Minnesota law at issue in *Blaisdell* authorized a court in equity, upon a showing of necessity, to extend the redemption period under a mortgage "for such additional time as the court may deem just and equitable," but only for the duration of the ongoing state of emergency. *Blaisdell*, 290 U.S. at 416. According to the Court, four main features worked in tandem to keep the law from impairing the obligation of mortgages in violation of the Contracts Clause: the law (1) provided only "temporary and conditional" relief, (2) was "sustained because of [an] emergency," (3) provided relief already available through courts in equity (*i.e.*, extending the redemption period); and (4) "provided reasonable compensation" to the creditors during the redemption period. 290 U.S. at 441-42, 444-47.

Given these factual limits on *Blaisdell*'s holding, the decision was relatively narrow, as the Court made clear just one term later in *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, 63 (1935); see also *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 432 (1934) (distinguishing *Blaisdell*). This Court has reiterated those narrow limits more recently too. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978) (recognizing that this Court would have invalidated the law in *Blaisdell* "had [it] not possessed the characteristics attributed to it by the Court").

Kavanaugh addressed three Arkansas laws that also responded to the Great Depression. The laws, which the legislature did not tie to the duration of the

emergency, changed how property assessments could be used as security for bonds and mortgages—extending the redemption period, lowering the interest available, and repealing the right of possession of a property during the redemption period. *Kavanaugh*, 295 U.S. at 58-59.

This Court rebuked the Arkansas legislature for "put[ting] restraint aside," "[w]ith studied indifference to the interests of the mortgagee or to his appropriate protection[.]" *Id.* at 60. The laws undermined the debtor's incentive "to pay his assessments if he could, and to pay them without delay," and instead gave him "every incentive to refuse to pay a dollar, either for interest or for principal." *Id.* at 60-61. By removing the contractual remedy of regaining possession (and charging rents) during the redemption period, the legislature destroyed the "enforceable obligation" of debtors to pay while the laws were in effect. *Id.* at 61.

Distinguishing *Blaisdell* (and reinforcing that decision's limitations), this Court highlighted that the Arkansas laws extended beyond the existing emergency, did not require a showing of necessity, and made no "attempt to assimilate what was done by [] decree to the discretionary action of a chancellor in subjecting an equitable remedy to an equitable condition." *Id.* at 63. These limitations still matter. In *Sveen*, the Court once again upheld a Minnesota law, in part, because a legislative change to the default life-insurance beneficiary in case of divorce did no more than divorce courts routinely do through their discretionary powers of equity. 128 S. Ct. at 1823. A law tied to a court's equitable power, *Sveen* reaffirmed, is less likely to upset a contracting party's *ex ante* expectations. *Ibid.*

Another limiting feature of *Blaisdell* was the ability of a state "to regulate the procedure in its courts even with reference to contracts already made, and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved." *Kavanaugh*, 295 U.S. at 62 (quoting *Bronson*, 42 U.S. at 311). *Blaisdell* claimed to extend only to "the measure of control which the state retains over *remedial processes*[.]" *Id.* at 434 (emphasis added). Dating back to *Crowninshield*, 17 U.S. at 206-07, this Court held that the Contracts Clause prohibited any law impairing contractual obligations, see, *e.g.*, *McCracken v. Hayward*, 43 U.S. (2 How.) 608, 612 (1844), but a state typically remained free to regulate its civil processes and remedies. See, *e.g.*, *In re Penniman*, 103 U.S. 714, 720 (1880) (holding that a state may abolish imprisonment for unpaid debts because "the right to imprison constitutes no part of the contract"). For instance, a state could moderately alter the statute of limitations for breaches of contract but not rule that mortgages providing for foreclosure as a contractual remedy are unenforceable. *See Kavanaugh*, 295 U.S. at 62. In the Court's view, the Minnesota law in *Blaisdell* fell into this former category, and its holding did not extend to laws impairing contractual obligations.

Today, however, this Court treats the remedy/obligation distinction raised in *Blaisdell* as little more than an indicator of the contracting parties' *ex ante* expectations. *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977). The thinking goes: a contracting party is more likely to expect (and therefore price in) that a state might alter its remedial processes than it might alter contractual obligations. *Ibid.* So, reasonable modification of remedial processes "is much less likely to upset

expectations than a law adjusting the express terms of an agreement." *Ibid*.

The true legacy of *Blaisdell*, it turns out, has little to do with the law at issue or the case's holding. Instead, the *Blaisdell* majority's atextual and anti-originalism language has inspired lower courts to abandon their enforcement of the Contracts Clause, despite that case's careful enunciation of limiting principles. According to *Blaisdell*, the Contract Clause's original meaning and understanding were outdated by the 1930s: "It is no answer to … insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time." 290 U.S. at 442-43. Lower courts took this attitude—a *laissez-faire* attitude toward the Contracts Clause to combat *laissez-faire* economics—as an invitation to blunt the Contracts Clause to the point of uselessness.

Blaisdell abandoned first principles in favor of leniency toward states' impairing private contractual obligations, but the Court did so in a limited manner. As this Court has emphasized, *Blaisdell* would have come out differently if not for the specific "characteristics attributed to [the law] by the Court." *Spannaus*, 438 U.S. at 242. So, the Contracts Clause "is not a dead letter." *Id.* at 241.

Many lower courts, however, have ignored *Blaisdell*'s limiting principles and disregarded this Court's insistence that the Contracts Clause is still in fact part of the Constitution. The Ninth Circuit is one of several lower courts that has elevated *Blaisdell*'s rhetoric over its holding when faced with the ongoing emergency. But *Blaisdell* maintained that "[e]mergency does not increase granted power or remove or diminish the restrictions imposed upon

power granted or reserved." 290 U.S. at 425; see also *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 76 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."). This Court needs to make that point again.

II. This Court's Current Approach to the Contracts Clause

Despite the text of the Contracts Clause prohibiting *any* impairment of contractual obligations, the Court now interprets that prohibition to apply to only *substantial* impairments. And even then, a state law that substantially impairs contractual obligations can still survive scrutiny if the law is an appropriate means of advancing a significant state interest. See *Sveen*, 128 S. Ct. at 1821-22. Worse, courts will then defer to the state's determination that the law is appropriate, deference which effectively allows states to impair *any* contract so long as they say the law was in the public interest.

The current Contracts Clause inquiry has two steps. The "threshold issue" is (1) "whether the state law has 'operated as a substantial impairment of a contractual relationship.'" *Id.* at 1821-22. If so, the court asks (2) "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Ibid.* The level of scrutiny a court applies at the second step depends on the level of impairment the court identifies at step one.

The Ninth Circuit below misunderstood the function of this inquiry and skipped the threshold question, so it's anyone's guess how the court decided

how strongly to scrutinize this case. That error alone calls for reversal.

A. There Are Many Ways a State Law Can Impair Contractual Obligations

The first step of the Contracts Clause analysis has three components of its own: "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). But the first two components often resolve easily, leaving the court to focus on the severity of the impairment. *Ibid.*

The substantiality of state interference turns on "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. "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Grp. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). Courts look 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 at issue. *U.S. Trust*, 431 U.S. at 19 n.17).

Over the years, this Court has identified several factors that tend to show when an impairment would upset the contracting parties' legitimate expectations:

- The law impairs a contractual right or obligation rather than the procedural remedies available, *U.S. Trust*, 431 U.S. at 19 n.17;
- The contract has "an express covenant" permitting the action that the law now

prohibits, *Bronson*, 42 U.S. at 320-21; *see also Spannaus*, 438 U.S. at 247 ("[T]he statute in question here nullifies express terms of the company's contractual obligations[.]"); *U.S. Trust*, 431 U.S. at 19 n.17 (reasoning that "a law adjusting the express terms of an agreement" is more likely to upset expectations);

- The law changes a contract in a way that a court could not have done through its equitable power, see *supra Sveen*, 138 S. Ct. at 1823; *Kavanaugh*, 295 U.S. at 63; *Blaisdell*, 290 U.S. at 446;
- The change in law "lessen[s] the value of the contract," *Edwards*, 96 U.S. at 601, 607 ("One of the tests that a contract has been impaired is[] that its value has by legislation been diminished."); *Green v. Biddle*, 21 U.S. (8 Wheat.) 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."); *see also U.S. Trust*, 431 U.S. at 19 ("[T]he State has made no effort to compensate the bondholders for any loss sustained by the repeal."); *Blaisdell*, 290 U.S. at 432-34 (relying on the fact that the law compensated creditors during the extended redemption period);
- The law changes the incentive structure created by the contract, *Kavanaugh*, 295 U.S. at 60-61, or undermines the parties' reliance interests, *Spannaus*, 438 U.S. at 246 ("Not only did the state law thus retroactively modify the [compensation scheme], but also it did so by changing the company's obligations in an area

where the element of reliance was vital[.]");

- The law does not provide the impaired party with an opportunity to restore its rights under the contract, *compare Sveen*, 138 S. Ct. at 1823 ("[A] policyholder can reverse the effect of the Minnesota statute with the stroke of a pen."); *with Spannaus*, 438 U.S. at 250 ("It did not effect simply a temporary alteration of the contractual relationships … but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively."); and
- Prior regulation in the industry would not have caused the contracting parties to expect the future change in regulation, *Energy Reserves Grp.*, 459 U.S. at 411 ("In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past."); *Veix v. Sixth Ward Building & Loan Ass'n of Newark*, 310 U.S. 32 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.").

Although many lower courts have ignored these indicators during the pandemic, see *supra* Section III.B., the trial court below rightly recognized that Los Angeles substantially impaired residential leases in the city. But the Ninth Circuit erred by skipping this threshold inquiry altogether.

B. Courts Must Ensure that a State Law Is Appropriately Tailored to a Significant and Legitimate Purpose

At the second stage of the inquiry, courts scrutinize the state law to ensure that it is adequately tailored to a legitimate purpose. The greater the impairment, the higher "the hurdle the state legislation must clear" at step two. *Spannaus*, 438 U.S. at 245. A severe impairment "will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Ibid.* 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*, 431 U.S. at 27.

Further, a law impairing contractual rights *must* help the public generally rather than just a discrete group. *Energy Reserves Grp.*, 459 U.S. at 412; see also *Spannaus*, 438 U.S. at 242 (explaining that the law in *Blaisdell* did not offend the Contracts Clause, in part, because it "was enacted to protect a basic societal interest, not a favored group"). "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." *Ass'n of Equip. Mfrs. v. Burgum*, 932 F.3d 727, 732 (8th Cir. 2019) (citation omitted). See also Laurence Tribe, American Constitutional Law, § 9-8, p. 613 (2d ed. 1988) (The Contracts Clause serves to protect minority rights "from improvident majoritarian impairment.").

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."). In *Spannaus*, for instance, this Court held unconstitutional 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 did not satisfy the broad public purpose required by the Contracts Clause.

Rather than conducting this review, however, many courts simply defer to the state's explanation of why the law should remain in place.

III. MANY LOWER COURTS TREAT THE CONTRACTS CLAUSE AS A DEAD LETTER

A. Deference to States Has Eviscerated the Contracts Clause

Lower courts are split on how to scrutinize state laws under the second step of this Court's modern Contracts Clause analysis. Courts like the Ninth Circuit will uphold a state law that substantially impairs contractual obligations because they claim they are bound to defer to a state's decision-making. App.21.

Faced with challenges to the ways the states' emergency responses have interfered with contracts, many courts have misapplied this Court's precedent and declared that courts "*must* accord *substantial* deference to the State's conclusion that its approach reasonably promotes the public purposes for which it was enacted." *Johnson v. Murphy*, 527 F. Supp. 3d 703, 716 (D.N.J. 2021) (emphasis added; cleaned up),

appeal pending No. 21-1795 (3d Cir.). See also *Willowbrook Apt. Assocs., LLC v. Mayor & City Council of Baltimore*, 2021 WL 4441192, at *13 (D. Md. Sept. 27, 2021) (applying "substantial deference" to the state's "justifications" analogous "to a rational basis inquiry" even when the law at issue substantially impaired a material term of residential leases); *El Papel LLC v. Durkan*, 2021 WL 4272323, at *8 (W.D. Wash. Sept. 15, 2021) ("[C]ourts *must* 'defer to legislative judgment[.]'") (emphasis added; citations omitted); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337, 355 (E.D. Pa. 2020) ("Considering the deference owed to this legislative judgment, the Court cannot conclude that the City's methods of alleviating the emergency were inappropriate or unreasonable."); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 169 (S.D.N.Y. 2020) (courts *must* defer); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 225 (D. Conn. 2020) (same).

Despite this Court's proclaiming that the second step of the Contracts Clause analysis should be more rigorous the more a state law impairs obligations, precious few courts have actually scrutinized the offending state laws at issue. The first court during the pandemic to consider the role deference plays in this Court's precedent was the U.S. District Court for the District of Massachusetts. See *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 374 (D. Mass. 2020). Rather than imposing a substantial-deference requirement on itself, that court recognized that the degree of deference owed to states is "influenced by the degree to which they manifest consideration of the requirements of the Constitution and also of the implications of changed relevant facts." *Ibid.*

More recently, the Second Circuit conducted an extensive analysis of the role that deference plays, in a section aptly called, "The Contract Clause's Continued Vitality." *Melendez v. City of New York*, 16 F.4th 992, 1026-32 (2d Cir. 2021). After untangling this Court's precedent on Contracts Clause deference, the Second Circuit applied an intermediate scrutiny to a law that impaired residential leases. *Id.* at 1032 ("Th[e] standard is more demanding than rational basis review … [b]ut it is more deferential to legislative judgment than strict scrutiny[.]").

The explanation in support of deferring to a state's legislative judgment "as to the necessity and reasonableness of a particular measure" that impairs contracts seems to trace back to *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); See also *U.S. Trust*, 431 U.S. at 22-23 (citing *Hahn*). The Second Circuit called *Hahn* the "high-water mark" for this Court's "contraction of Contracts Clause protection," *Melendez*, 16 F.4th at 1025; yet much like the lower courts' expansion of *Blaisdell*, the judicial eagerness to shrink protections even further has led to far more deference than *Hahn* would allow.

Based on *Hahn*, deference to a state's judgment is proper only if the legislative process justifies it. *Hahn* analyzed the "whole course" of New York's law-making process at issue, which the Court described as "the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts." 236 U.S. at 234. The legislature "was not even acting merely upon the pooled general knowledge of its members. … The New York Legislature was advised by those having special responsibility to inform it that 'the sudden

termination of the legislation which ha[d] dammed up normal liquidation of [] mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate.'" *Id.* at 234-35 (quoting the legislative record). Given all the evidence that New York's legislature acted with considered judgment to safeguard residents against a serious danger, the Court declined the plaintiffs' invitation to take judicial notice of conflicting economic data to "reject the judgment of the joint legislative committee, of the Governor, and of the Legislature." *Id.* at 234.

To illustrate the standard of legislative judgment deserving of deference, *Hahn* contrasted New York's legislative process against that of the Arkansas Legislature in *Kavanaugh*, 295 U.S. at 60, which had shown "studied indifference to the interests of the mortgagee or to his appropriate protection." *Hahn*, 326 U.S. at 234 (quoting *Kavanaugh*). The Court in *Kavanaugh* admonished the Arkansas Legislature for "put[ting] restraint aside" when impairing the contractual rights of mortgagees. 295 U.S. at 60. According to *Kavanaugh*, the law's overbreadth was evidence that the legislature acted without the considered judgment worthy of deference. *Id.* at 61. The Arkansas Legislature had not made any serious attempt to tailor its laws to their stated purposes, resulting in an unnecessarily broad impact on private contracts. *Id.* ("There is not even a requirement that the debtor shall satisfy the court of his inability to pay."). Given this ready-fire-aim legislative process, the Court refused to defer to such "an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to" the contracts at issue. *Id.* at 62.

Kavanaugh is not a relic of the past, nor did *Hahn* impose a substantial-deference regime under the Contracts Clause. This Court confirmed in *Spannaus* that deference is inappropriate when "there [wa]s no showing in the record … that th[e] severe disruption of contractual expectations was necessary to meet an important general social problem." 438 U.S. at 247.

To the extent deference has any role in the inquiry, a proposition with no basis in the text or history of the Contracts Clause, *Hahn* set the standard for deciding whether a state's legislation deserves deference. To justify deference from federal courts, courts must scrutinize the "whole course" of the law-making process to figure out whether the law at issue resulted from the sort of considered, empirical judgment that deserves deference. *Hahn*, 236 U.S. at 234. This inquiry is a critical one. The federal courts' duty to uphold and apply the Constitution demands far more than the rubber stamp that the Ninth Circuit applied in this case.

The decision below shows why this Court should reconsider when—if ever—deference is proper in Contracts Clause challenges. Many lower courts have seized on sentiment in this Court's opinions to turn the Contracts Clause into an obligatory deference regime under which federal courts no longer protect against state interference with any private contracts. But scrutinizing state interference with contracts is the precise role that the Contracts Clause imposes on the federal judiciary. By granting substantial deference to the states, lower courts abdicate the judicial office and bias the outcome of their deliberations in the state's favor.

Deference to the state is particularly inappropriate given the purpose of the Contracts

Clause, which exists to provide citizens with a federal venue that will protect their private contracts from undue state interference. See *Edwards*, 96 U.S. at 605. The Ninth Circuit's approach (App.21) of requiring deference renders that constitutional promise nugatory—skewing the resolution of Contracts Clause cases in the state's favor. Los Angeles is so confident that deference turned the Contracts Clause into a paper tiger that the City waived its right to respond to this petition.

As this Second Circuit's chronicling of this Court's precedent in *Melendez* illustrates, the confusion in the lower courts over the level of scrutiny in a Contracts Clause inquiry is this Court's own doing. 16 F.4th at 1026-32. This petition presents an opportunity for this Court to resolve the resultant circuit split and restore the federal judiciary to its proper role of protecting private contracts against undue state interference. Ignoring the problem "would seriously undermine the national government's role[.]" *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985).

B. Lower Courts Are also Split on How to Assess Substantial Impairment

This case also shows just how split the lower courts are on how to apply the first step of the Contracts Clause analysis. The district court below properly recognized that "it would be difficult to conclude" that Los Angeles "d[id] not, at a minimum substantially interfere with landlords' reasonable expectations." App.40. But remarkably, other lower courts have held that similar laws did not substantially impair residential leases.

The U.S. District Court for the District of Maryland recently identified a major reason for this

split: the over-emphasis some courts place on whether prior regulation in an industry defeats a contracting party's expectation that the state won't retroactively impair contracts in that industry. See *Willowbrook*, 2021 WL 4441192, at *6. "Some have found that 'the business area of renting residential property is heavily-regulated' and, therefore, landlords could have expected regulations that would interfere with their ability to raise and collect fees." *Id.* (citing *S. Cal. Rental Housing Ass'n v. Cty. of San Diego*, 2021 WL 3171919, at *9 (S.D. Cal. July 26, 2021); *Auracle Homes*, 478 F. Supp. 3d at 199, 222-23; *Elmsford*, 469 F. Supp. 3d at 171-72). "Others, by contrast, have noted that 'although landlords understood they were operating in a highly regulated area, they could not have expected the COVID-19 pandemic and its attendant regulations." *Id.* at *6 (citing *Baptiste*, 490 F. Supp. 3d at 390; *Heights Apts., LLC v. Walz*, 510 F. Supp. 3d 789, 813 (D. Minn. 2020); *Apt. Ass'n of L.A. Cty., Inc. v. Los Angeles*, 500 F. Supp. 3d 1088, 1096 (C.D. Cal. 2020) ("[N]o amount of prior regulation could have led landlords to expect anything like the blanket Moratorium.")); see also *Johnson*, 527 F. Supp. 3d at 717 ("[T]he foreseeability of additional regulation [of residential leases] allows states to interfere with both past and future contracts[.]") (quoting *Elmsford*).

Government regulation touches almost all aspects of modern life. To rule that a contracting party must reasonably expect the retroactive impairment of contractual obligations in all regulated industries is to write the Contracts Clause out of the Constitution.

CONCLUSION

This Court should grant the petition, reverse the Ninth Circuit's misapplication of the Contracts Clause, and restore that provision's original vitality.

Respectfully submitted,

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