20-4238-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARCIA MELENDEZ, JARICAN REALTY INC., 1025 PACIFIC LLC, LING YANG, TOP EAST REALTY LLC, HAIGHT TRADE LLC, ELIAS BOCHNER, 287 7TH AVENUE REALTY LLC,

Plaintiffs-Appellants,

–against–

CITY OF NEW YORK, a municipal entity, MAYOR BILL DE BLASIO, as Mayor of the City of New York, COMMISSIONER LOUISE CARROLL, Commissioner of New York City Department of Housing Preservation & Development, COMMISSIONER JONNEL DORRIS, Commissioner of New York City Department of Small Business Services,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMICI CURIAE CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF DEFENDANTS-APPELLEES

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Amici curiae are distinguished scholars of constitutional law. They have substantial academic, pedagogical, and professional experience bearing on the legal questions presented in this appeal, as well as a professional interest in the proper development of the law. *Amici* submit this brief to explain why New York City Local Laws No. 55-2020 and No. 98-2020 (together, the "Guaranty Law") do not violate the Contracts Clause of the U.S. Constitution. Based on their expertise and their assessment of the relevant facts and governing law, *amici* support affirmance of the district court's dismissal of Appellants' Contracts Clause challenge to the Guaranty Law.

A full list of *amici* is attached in the Appendix.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* affirm that no counsel for any party authored this brief in whole or in part, that no party's counsel contributed money to fund preparation and submission of this brief, and that no person other than *amici curiae*, its members, or counsel contributed money to fund preparation and submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

In May 2020, New York City officials passed several ordinances to protect tenants from the devastating economic effects of the COVID-19 pandemic. One of these laws—known as the "Guaranty Law"—prohibits commercial landlords from enforcing personal guaranties for payments due between March 2020 and March 2021. *See* Local Law No. 55-2020; Local Law No. 98-2020. Appellants contend that the Guaranty Law violates the Contracts Clause. They are mistaken. In this brief, we highlight the fundamental errors of constitutional law shot through their arguments.

More particularly, we demonstrate that Appellants urge the application of heightened scrutiny on grounds foreclosed by Supreme Court and Second Circuit precedent. According to Appellants, this Court should subject the Guaranty Law to more intense review based on three considerations: (1) the alleged severity of the impairment of their contractual relationship; (2) the law's distribution of benefits and burdens; and (3) the availability of alternative (and supposedly less disruptive) policies. None of these considerations, however, supports Appellants' position. It is well settled that state and local governments may pass laws that substantially impair private contracts, so long as those laws seek to advance a legitimate public purpose and are a reasonable means of doing so. It is equally well settled that courts are highly deferential to elected officials in the application of this legal standard—particularly when elected officials are engaged in a response to an emergency. None

of the contentions Appellants put forth justifies a different approach to review of the Guaranty Law, which easily satisfies all applicable constitutional requirements. This Court should therefore affirm the judgment below and reject Appellants' efforts to reorder both the City's economic policy and binding Supreme Court precedent.[2]

ARGUMENT

I. This Court's Review of the Guaranty Law Is Highly Deferential

The Contracts Clause provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. Although facially absolute, the Contracts Clause's prohibition is not "the Draconian provision that its words might seem to imply." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987) ("[T]he prohibition against impairing the obligation of contracts is not to be read literally."). As this Court has explained—invoking a long line of Supreme Court precedent—the Contracts Clause "does not trump the police

[2] In this appeal, Appellants separately challenge Local Laws No. 53-2020 and 56-2020 (the "Harassment Laws"). We do not address the Harassment Laws because the district court correctly concluded that they do not in fact restrict Appellants from engaging in lawful rent demands—and thus do not burden Appellants' constitutional rights. *See* SPA-22. To be sure, Appellants worry that the Harassment Laws may chill commercial speech because "landlords will not know what constitutes a lawful rent demand until they go to court." Appellants' Br. 49. But the solution to that concern is not to undertake unnecessary, speculative constitutional adjudication. Instead, as the district court explained, SPA-20–22, state courts should be trusted to delineate the boundaries of the Harassment Laws, particularly given the as-applied posture of this case and the weakness of Appellants' First Amendment arguments.

power of a state to protect the general welfare of its citizens." *Buffalo Tchrs. Fed'n v. Tobe*, 464 F.3d 362, 367-68 (2d Cir. 2006); *see also Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). Thus, even when a law substantially impairs private contractual obligations, it is constitutional if it is a reasonable and appropriate measure to pursue a significant, legitimate public purpose. *See Energy Rsrvs. Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-13 (1983).

The Supreme Court most influentially articulated this understanding of the Contracts Clause in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934). *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 15 (1977) (noting that *Blaisdell* is "the leading case in the modern era of Contract Clause interpretation"). There, the Court upheld a Minnesota law that suspended creditors' ability to foreclose on homes. *See* 290 U.S. at 415-16, 447-48. The statute had been enacted as an emergency measure at the height of the Great Depression—a consideration that the Court regarded as significant. *See id.* at 439 (emphasizing that the Contracts Clause "cannot . . . be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake"). The statute also concerned contracts relating to real estate—another consideration that the Court viewed as important for historical reasons. *See id.* at 440 (citing precedents authorizing "temporary and conditional restraint" on "the enforcement of provisions of leases" where "vital

public interests would otherwise suffer"). In upholding Minnesota's law, however, the Court framed a more general rule: "The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Id.* at 438; *see also id.* at 444-46 (applying that rule).

The Supreme Court has since reaffirmed these principles many times—and has fashioned a three-part test to implement the *Blaisdell* standard. *See Energy Rsrvs. Grp.*, 459 U.S. at 411-13; *see also Sveen v. Melin*, 138 S. Ct. 1815, 1821-22 (2018). Under this test, courts first ask "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Rsrvs. Grp.*, 459 U.S. at 411. If that requirement is met, courts next ask whether the government can show a "significant and legitimate purpose behind the regulation." *Id.* at 411-12. Finally, if a "legitimate public purpose has been identified," courts assess whether the law is a "reasonable" and "appropriate" way to advance that purpose. *Id.* at 412; *see also Donohue v. Cuomo*, 980 F.3d 53, 82 (2d Cir. 2020) (recognizing that a state law impairing contractual obligations is unconstitutional only if the impairment "was substantial and was not reasonable and necessary to a legitimate public purpose").

Under *Blaisdell* and its progeny, courts engage in decidedly deferential review of laws that impair private contracts. Starting with the requirement of a "significant and legitimate public purpose," it is settled that "the remedying of a broad and

general social or economic problem" is sufficient. *Energy Rsrvs. Grp.*, 459 U.S. at 412. So long as a state or local government seeks to advance some conception of the public good—and not merely to benefit "special interests"—its purpose satisfies the Contracts Clause. *Id.* Similarly, where the government does not impair its own contracts (a circumstance presenting unique concerns), courts accord legislators broad latitude in deciding how best to advance their own legitimate public purposes. *See id.* at 412-13 ("[C]ourts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." (quoting *U.S. Trust Co.*, 431 U.S. at 22-23)); *see also Keystone Bituminous Coal Ass'n*, 480 U.S. at 506. Many scholars have treated such deference as closely analogous to rational basis review. *See, e.g.*, Erwin Chemerinsky, *Constitutional Law: Principles & Policies* 689 (6th ed. 2019). And this Court has itself framed Contracts Clause analysis in those terms. *See Ass'n of Surrogates & Sup. Ct. Reps. within N.Y.C. v. New York*, 940 F.2d 766, 771 (2d Cir. 1991) ("[L]egislation which impairs the obligations of *private* contracts is tested under the contract clause by reference to a rational-basis test . . . .").

The Judiciary's deferential approach in this field has encompassed a special solicitude for state authority to respond to emergency situations. That principle expressly influenced the Court's analysis in *Blaisdell*. *See* 290 U.S. at 426 (agreeing that "emergency may furnish the occasion for the exercise of power"). And many courts have since held that fiscal and public health crises can give rise to exercises

of government power warranting deference under the Contracts Clause. *See, e.g.*, *Buffalo Tchrs.*, 464 F.3d at 368-69 (evaluating the state's public purpose against the background of an ongoing "fiscal crisis"); *see also* Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DePaul L. Rev. 539, 567 (2007) ("[R]ather than envisioning the rule of law as abrogated at [times of crisis], the Court has suggested that a flexible view of economic rights can coexist harmoniously with the rule of law."); *Constitutionality of Mortgage Relief Legislation:* Home Building & Loan Ass'n v. Blaisdell, 47 Harv. L. Rev. 660, 663 (1934) ("[E]mergency does not justify the suspension of constitutional restrictions, but it is a factor to be considered in determining whether or not they have been violated.").

Adhering to these principles and precedents, courts across the country have rejected Contracts Clause challenges to measures enacted in response to the COVID-19 pandemic and its accompanying economic crisis. *See, e.g.*, *Johnson v. Murphy*, No. 20 Civ. 6750, 2021 WL 1085744 (D.N.J. Mar. 22, 2021) (upholding an executive order allowing tenants to use their security deposits to fund rents due and owing); *Nw. Grocery Ass'n v. Seattle*, No. 21 Civ. 142, 2021 WL 1055994 (W.D. Wash. Mar. 18, 2021) (upholding ordinance requiring hazard pay for grocery workers); *Peterson v. Kunkel*, No. 20 Civ. 898, 2020 WL 5878407 (D.N.M. Oct. 2, 2020) (upholding school closures); *Xponential Fitness v. Arizona*, No. 20 Civ. 1310, 2020 WL 3971908 (D. Ariz. July 14, 2020) (upholding gym closures); *Elmsford*

Apartment Assocs., LLC v. Cuomo, 469 F. Supp. 3d 148 (S.D.N.Y. 2020) (upholding eviction moratorium and other landlord-tenant orders); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199 (D. Conn. 2020) (same); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337 (E.D. Pa. 2020) (same); *Heights Apartments, LLC v. Walz*, No. 20 Civ. 2051, 2020 WL 7828818 (D. Minn. Dec. 31, 2020) (same); *El Papel, LLC v. Inslee*, No. 20 Civ. 1323, 2020 WL 8024348 (W.D. Wash. Dec. 2, 2020) (same); *Baptiste v. Kennealy*, No. 20 Civ. 11335, 2020 WL 5751572 (D. Mass. Sept. 25, 2020) (same); *Apartment Ass'n of L.A. Cnty., Inc. v. City of Los Angeles*, No. 20 Civ. 5193, 2020 WL 6700568 (C.D. Cal. Nov. 13, 2020) (same).

These cases reflect a recognition that cities and states have broad latitude under the Contracts Clause. They also confirm the limited scope of the judicial role in evaluating whether a state has substantially impaired private contracts without any legitimate purpose or in a manner not reasonably likely to advance such a purpose. Following that path, this Court should uphold the Guaranty Law, which easily satisfies the standards set forth in Supreme Court and Second Circuit precedent.

II. Appellants' Arguments Reflect an Improper Level of Scrutiny

Appellants contend that the Guaranty Law is subject to, and fails, a "more searching review." Appellants' Br. 34. They base this assertion on three arguments. First, Appellants insist that more exacting scrutiny is warranted because the level of impairment on landlords' contractual rights is "severe." *Id.* at 24-26. Second, they

maintain that the Guaranty Law does not advance a legitimate public interest because it "directly benefits only commercial tenants." *Id.* at 29. Finally, they argue that the City must adopt the least restrictive means to justify any substantial impairment of contractual obligations. *Id.* at 33-34. Each of these arguments fails.

A. The Nature and Supposed Severity of the Alleged Contractual Impairment Does Not Trigger Any Heightened Scrutiny

Appellants contend that the Guaranty Law is subject to more exacting scrutiny because it "operates as a severe impairment of contract." Appellants' Br. 25. But that sliding-scale approach mischaracterizes the law. The Supreme Court has held that the severity of the alleged impairment is relevant only to the first prong of the analysis: namely, whether a law "has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Rsrvs. Grp.*, 459 U.S. at 411 (quoting *Allied Structural Steel*, 438 U.S. at 244). If a regulation is merely a "[m]inimal alteration of contractual obligations," a court "may end the inquiry at its first stage." *Allied Structural Steel*, 438 U.S. at 245. In contrast, if a regulation "constitutes a substantial impairment," courts proceed to the second and third prongs and undertake those analyses on their own terms. *Energy Rsrvs. Grp.*, 459 U.S. at 411. There is simply no authority for the proposition that laws alleged to impose an extra-substantial impairment receive extra-demanding scrutiny under the Contracts Clause.

To be sure, there are Contracts Clause cases where courts properly accord less deference to legislative choices—but this is not one of them. Rather, courts intensify

their review only when laws substantially impair *public* contracts. *See U.S. Trust Co.*, 431 U.S. at 26 ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate [when] the State's self-interest is at stake."); Chemerinsky, *supra*, at 692 ("[I]t is clear that laws impairing the government's obligations under its own contracts will be subjected to much more careful review than will laws interfering with private contracts."). In those circumstances, it is the presence of the government as a contracting party—not the severity of the contractual impairment—that triggers heightened scrutiny. *See Buffalo Tchrs.*, 464 F.3d at 369; *see also Sullivan v. Nassau Cnty. Interim Fin. Auth.*, 959 F.3d 54, 65 (2d Cir. 2020) (holding that courts may apply the "'less deference' standard" only when "the state in breaching a contract is acting like a private party who reneges to get out of a bad deal"). To the extent Appellants seek to apply this public-contract standard of review here, they have committed a category error.

Regardless, this would be a peculiar context in which to apply any form of heightened scrutiny. The Supreme Court "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular[.]" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946) (fire regulation); *Bowles v. Willingham*, 321

U.S. 503 (1944) (rent control)). Indeed, *Blaisdell* itself highlighted that contracts in the real estate sector have historically been subject to ongoing state impairment and control. *See* 290 U.S. at 440. Against that background, participants in this heavily regulated market are effectively "on notice that they may face further government intervention in the future." *Elmsford*, 469 F. Supp. 3d at 169. Thus, to the extent the Guaranty Law in fact substantially impairs Appellants' contracts, *but see* Appellees' Br. 17-19, there is no reason to vary from the deferential standard of review that ordinarily governs Contracts Clause analysis.

B. The Guaranty Law Advances a Legitimate Public Purpose

Appellants contend that the Guaranty Law lacks a significant and legitimate public purpose because it advantages commercial tenants while disadvantaging commercial landlords. *See* Appellants' Br. 30-33. In their view, the New York City Council erred in concluding that this reallocation of benefits and burdens would serve the greater good of the City. On this basis—and deploying a handful of statistics and economic policy arguments—Appellants ask this Court to find that the City lacked any significant and legitimate public purpose for the Guaranty Law.

This framing of the issue is mistaken. Virtually all legislation may benefit some interests in society and hinder other interests. Ultimately, elected officials—not unelected federal judges—must decide how to balance competing interests in formulating public policy. *See Energy Rsrvs. Grp.*, 459 U.S. at 411-13; *Sanitation*

& Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 994 (2d Cir. 1997) ("When reviewing a law that purports to remedy a pervasive economic or social problem, our analysis is carried out with a healthy degree of deference to the legislative body that enacted the measure."). The role of courts under the Contracts Clause is therefore a narrow one: they ask only whether "[t]he legislation was addressed to a legitimate end." *Blaisdell*, 290 U.S. at 445. In other words, courts ask only whether "the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society." *Id.*; *see also Donohue*, 980 F.3d at 81-84; *Buffalo Tchrs.*, 464 F.3d at 369.

Here, that standard is easily met. "Courts, including this one, 'have often held that the legislative interest in addressing a fiscal emergency is a legitimate public interest.'" *Donohue*, 980 F.3d at 82 (collecting cases). It cannot be denied that the COVID-19 pandemic has caused an emergency in the City. And in light of that crisis, the City passed the Guaranty Law with the purpose of "prevent[ing] the bankruptcies of small business owners, the firing of their employees, and the inability of residents to benefit from their services when most needed—all in the midst of a public health emergency causing social and economic trauma." Appellees' Br. 20. The record does not suggest that the City enacted the Guaranty Law to advantage itself as a market participant, or as a corrupt favor to commercial tenants without due regard for the general welfare and overall economic health of the City. Instead, the record plainly

confirms that the City acted with the legitimate purpose of protecting commercial tenants as part of a broader, urgent effort to restore socioeconomic stability. *See, e.g.*, *HAPCO*, 482 F. Supp. 3d at 353; *Apartment Ass'n of L.A. Cnty.*, 2020 WL 6700568, at *5; *Baptiste*, 2020 WL 5751572, at *17; *Heights Apartments*, 2020 WL 7828818, at *12; *El Papel*, 2020 WL 8024348, at *9.

That is the end of the analysis. The City sought to achieve a significant and legitimate public purpose, and it acted with concern for the public welfare. Under the Contracts Clause, it is not for the Judiciary to probe more deeply and to decide whether the Guaranty Law reflects sound public policy, an optimal distribution of benefits and burdens, or a convincing solution to the City's economic woes. *See Blaisdell*, 290 U.S. at 447-48 ("Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned."); *contra* Appellants' Br. 29-33 (urging the Court to undertake an economic analysis of the Guaranty Law).

C. The Guaranty Law is an Appropriate and Reasonable Measure to Advance the City's Legitimate Public Purpose

Appellants' final argument is that the Guaranty Law is not "narrowly tailored" to further the City's goal of protecting its commercial tenants from economic disaster because the City could have imposed other "less draconian measures." Appellants' Br. 6, 40, 41, 45. Here, too, Appellants misunderstand the applicable legal standard.

"If the legislative purposes behind the law or regulation are valid, the final inquiry is whether the means chosen to achieve those purposes are reasonable and

necessary." *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 54 (2d Cir. 1998) (citing *Energy Rsrvs. Grp.*, 459 U.S. at 412-13). Courts accord "substantial deference" to a government's conclusion "that its approach reasonably promotes the public purposes" it seeks to achieve. *See id.*; *see also Energy Rsrvs. Grp.*, 459 U.S. at 412-13 ("[C]ourts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."); *Sanitation & Recycling*, 107 F.3d at 994 ("When reviewing a law that purports to remedy a pervasive economic or social problem, our analysis is carried out with a healthy degree of deference to the legislative body that enacted the measure.").

Appellants' argument more closely resembles the narrow tailoring prong of strict scrutiny analysis than the highly deferential standard applicable here under longstanding Supreme Court and Second Circuit precedent. This Court should deny Appellants' invitation to subject the Guaranty Law to such intense examination.

In any event, Appellants offer no basis to disturb the City's legislative choices. The legislative record contains ample evidence establishing the critical role that small businesses play in sustaining the City's economic health. *See* A1355-62. And as Appellees persuasively explain, the Guaranty Law is carefully tailored to provide limited relief to those small businesses who most need it: it is a temporary measure; it affects only guaranties signed by a "natural person" (thus excluding corporate guarantors); it would not deprive landlords of several other legal remedies (including

recovery of unpaid rent); and it applies only to commercial tenants adversely affected by COVID-19. *See* Appellees' Br. 27-28. "Given th[e] mandated deference" owed to the City's judgment, SPA-28, this Court should affirm the district court's straightforward conclusion that the Guaranty Law is reasonable and appropriate.

* * *

Analysis under the Contracts Clause is most closely analogous to deferential rational basis review. The Guaranty Law readily satisfies that standard. Appellants' efforts to rewrite constitutional precedent should be rejected and the judgment below upholding the constitutionality of the Guaranty Law should be sustained.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below dismissing Appellants' Contracts Clause challenge to the Guaranty Law.

Dated: March 25, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3475 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in Times New Roman 14-point font.

Dated: March 25, 2021

/s/ Joshua Matz

Joshua Matz
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2021, I electronically filed the foregoing *amicus* brief with the Clerk for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Joshua Matz

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