

No. 20-56251

**In the United States Court of Appeals
For the Ninth Circuit**

**APARTMENT ASSOCIATION OF
LOS ANGELES COUNTY, INC.,**

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,

Defendant and Appellee,

**BRIEF OF THE CALIFORNIA APARTMENT
ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFF/APPELLANT AND REVERSAL**

On Appeal from the United States District Court
for the Central District of California
The Honorable Dean D. Pregerson, Presiding
District Court Case No. 2:20-cv-05193-DDP-JEM

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP
James R. Parrinello, SBN 63415
* Christopher E. Skinnell, SBN 227093
2350 Kerner Boulevard, Suite 250
San Rafael, California 94901
Tel: (415) 389-6800
Fax: (415) 388-6874

Attorneys for Amicus Curiae
CALIFORNIA APARTMENT ASSOCIATION

CORPORATE DISCLOSURE STATEMENT
FED. R. APP. PROC. 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned, counsel of record for *amicus curiae* CALIFORNIA APARTMENT ASSOCIATION (“CAA”), certifies that CAA does not have “any parent corporation [or] any publicly held corporation owning 10% or more of its stock.” Fed. R. App. Proc. 26.1(a).

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT.....	2
TABLE OF AUTHORITIES.....	4
INTEREST OF <i>AMICUS CURIAE</i>	11
BACKGROUND & SUMMARY OF ARGUMENT	12
ARGUMENT	18
A. The Los Angeles Moratorium Threatens Irreparable Harm to Property Owners in Los Angeles, Especially the Mom-and-Pop Landlords That Make Up the Majority of Landlords	18
B. Far from Supporting the Denial of a Preliminary Injunction, the Provisions of AB 3088 Show Why the Los Angeles Ordinance Is An Unconstitutional Impairment of Contracts	32
CONCLUSION.....	45
CERTIFICATE OF COMPLIANCE (FORM 8)	47

TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>Allied Structural Steel Co. v. Spannaus</i> , 438 U.S. 234 (1978).....	17, 34
<i>Baptiste v. Kennealy</i> , __ F. Supp. 3d __, 2020 U.S. Dist. LEXIS 176264 (D. Mass. Sep. 25, 2020)	29, 30
<i>Block v. Hirsch</i> , 256 U.S. 135 (1921).....	14
<i>Edward A. Levy Leasing Co., Inc., v. Siegel</i> , 258 U.S. 242 (1922).....	14
<i>Energy Reserves Grp. v. Kan. Power & Light Co.</i> , 459 U.S. 400 (1983).....	33, 45
<i>Green v. Superior Court</i> , 10 Cal. 3d 616 (1974)	16
<i>Home Bldg. & Loan Asso. v. Blaisdell</i> , 290 U.S. 398 (1934).....	14, 40, 41, 43
<i>In re Estate of Ferdinand Marcos</i> , 25 F.3d 1467 (9th Cir. 1994).....	31
<i>Marcus Brown Holding Co. v. Feldman</i> , 256 U.S. 170 (1921).....	14
<i>Park Vill. Apartment Tenants Assoc. v. Mortimer Howard Tr.</i> , 636 F.3d 1150 (9th Cir. 2011).....	31
<i>Pennell v. San Jose</i> , 485 U.S. 1 (1988).....	17

Univ. of Haw. Prof'l Assembly v. Cayetano,
16 F. Supp. 2d 1242 (D. Haw. 1998)..... 30, 31

Univ. of Haw. Prof'l Assembly v. Cayetano,
183 F.3d 1096 (9th Cir. 1999)..... 31

W. B. Worthen Co. v. Kavanaugh,
295 U.S. 56 (1935)..... 14, 40, 41, 42, 43

Statutes

Assembly Bill 1436 (2019-2020 Reg. Sess.) 36

Assembly Bill 3088 (2019-2020 Reg. Sess.),
2020 Cal. Stats., ch. 37 (“AB 3088”) *passim*

Cal. Civ. Code § 1941 *et seq.*..... 16

Cal. Code Civ. Proc. § 116.223 40

Cal. Code Civ. Proc. § 116.223(c)(3) 39

Cal. Code Civ. Proc. § 1179.01.5 39

Cal. Code Civ. Proc. § 1179.02(d)..... 37

Cal. Code Civ. Proc. § 1179.02.5 37

Cal. Code Civ. Proc. § 1179.03(g)(1)..... 37

Cal. Code Civ. Proc. § 1179.03(g)(2)(B)..... 36

L.A. Muni. Code § 9.8104 17

L.A. Moratorium Ordinance (Ord. No. 186606) *passim*

 L.A. Muni. Code § 49.99.2(C)..... 38

 L.A. Muni. Code § 49.99.2(D) 38

 L.A. Muni. Code § 49.99.7 38

L.A. Muni. Code § 49.99.8	38
L.A. Muni. Code § 161.401	16
L.A. Muni. Code § 161.410(A)	17
L.A. Muni. Code § 161.805(1).....	16

Other Authorities

13 C.F.R. § 120.110	27
Broady, Edelberg & Moss, “An eviction moratorium without rental assistance hurts smaller landlords, too,” BROOKINGS INSTITUTION (Sept. 21, 2020), https://www.brookings.edu/blog/up-front/2020/09/21/an-eviction-moratorium-without-rental-assistance-hurts-smaller-landlords-too/ (last visited Dec. 21, 2020)	19, 20, 21
City of Los Angeles, “Emergency Renters Assistance Subsidy Program,” https://eccandc.org/emergency-renters-assistance-subsidy-program/ (last visited Dec. 21, 2020).....	28
Dillon, “Rent strike’ aims to put focus on housing relief; Lost jobs spark a plea to halt payments until pandemic ends,” L.A. TIMES (May 2, 2020), https://www.latimes.com/homeless-housing/story/2020-05-01/coronavirus-rent-strike-eviction-squatting-landlord-los-angeles-california (last visited Dec. 21, 2020)	44

Dinzeo, “Relief Closer for California Renters, Landlords as Protection Bill Clears Legislature,” COURTHOUSE NEWS SERVICE (Aug. 31, 2020), <https://www.courthousenews.com/relief-closer-for-california-renters-landlords-as-protection-bill-clears-senate/> (last visited Dec. 22, 2020)..... 35

Housing Finance Policy Center, “Small Multifamily Units,” URBAN INSTITUTE (May 2020), https://www.urban.org/sites/default/files/2020/05/15/small_multifamily_units_0.pdf (last visited Dec. 21, 2020)..... 19

L.A. Housing & Cmty. Investment Dept., “Referral to City Attorney’s Office” (July 30, 2020), <https://hcidla2.lacity.org/rental-property-owners/referral-to-city-attorneys-office> (last visited Dec. 23, 2020)..... 17

Los Angeles Tenants Union, “Food Not Rent!,” <https://foodnotrent.org/> (last visited Dec. 21, 2020)..... 44

Manville, *et al.*, “COVID-19 and Renter Distress: Evidence from Los Angeles,” *UCLA: The Ralph and Goldy Lewis Center for Regional Policy Studies* (Aug. 31, 2020), <https://escholarship.org/uc/item/7sv4n7pr> (last visited Dec. 21, 2020)..... 18

Nat’l Assoc. of Hispanic Real Estate Professionals, “NAHREP Landlord Survey” (July 2020), <https://nahrep.org/landlord-survey/> (last visited Dec. 21, 2020)..... 22

Nat'l Council of State Housing Agencies, "Analysis of Current and Expected Rental Shortfall and Potential Evictions in the U.S." (Sept. 25, 2020), Appx. B, https://www.ncsha.org/wp-content/uploads/Analysis-of-Current-and-Expected-Rental-Shortfall-and-Potential-Evictions-in-the-US_Stout_FINAL.pdf (last visited Dec. 21, 2020)..... 24, 25

Popov, Warnock, & Salviati, "Despite Slight Improvement, Rent Payment Struggles Continue," APARTMENT LIST (Sept. 9, 2020), <https://www.apartmentlist.com/research/september-housing-payments> (last visited Dec. 21, 2020)..... 22

Reed & Divringi, "Household Rental Debt During COVID-19," FED. RESERVE BANK OF PHILADELPHIA (Oct. 2020), <https://www.philadelphiafed.org/-/media/frbp/assets/community-development/reports/household-rental-debt-during-covid-19.pdf> (last visited Dec. 21, 2020)..... 23, 24

Refo Letter to Congressional Leaders, "ABA Support for Emergency Rental Assistance to End the COVID-19 Eviction Crisis," AM. BAR ASSOC. (Sept. 5, 2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/eviction-crisis-letter-september.pdf (last visited Dec. 21, 2020)..... 23

Reid & Heisler, “The Ongoing Housing Crisis: California Renters Still Struggle to Pay Rent Even as Counties Re-Open,” TERNER CENTER FOR HOUSING INNOVATION, U.C. BERKELEY (Oct. 2, 2020), <https://turnercenter.berkeley.edu/research-and-policy/ongoing-housing-crisis/> (last visited Dec. 21, 2020)..... 19

Schuetz, “Halting evictions during the coronavirus crisis isn’t as good as it sounds,” BROOKINGS INST. (Mar. 25, 2020), <https://www.brookings.edu/blog/the-avenue/2020/03/25/halting-evictions-during-the-coronavirus-crisis-isnt-as-good-as-it-sounds/> (last visited Dec. 21, 2020) 20

Scott, “Landlords and Renters Struggling to Make Ends Meet During COVID-19 Uncertainty,” AVAIL, INC. (Sept. 11, 2020), <https://www.avail.co/blog/landlords-and-renters-struggling-to-make-ends-meet-during-covid-19-uncertainty> (last visited Dec. 21, 2020) 22, 23

Small Bus. Admin., “Business Loan Program Temporary Changes; Paycheck Protection Program,” 85 Fed. Reg. 20811 (Apr. 15, 2020)..... 27

Small Bus. Admin, “Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2,” https://www.sba.gov/sites/default/files/files/ser_v_sops_50105b_0_5.pdf (last visited Dec. 22, 2020)..... 27

Turner Center for Housing Innovation, U.C. Berkeley, “How Are Smaller Landlords Weathering the COVID-19 Pandemic?” (July 2020), <https://nahrep.org/downloads/NAHREP-Turner-Center-Landlord-Survey-Factsheet.pdf> (last visited Dec. 21, 2020)..... 21, 22, 23, 26

U.S. Census Bureau, Quick Facts: Los Angeles city, Cal., <https://www.census.gov/quickfacts/losangelestycalifornia> (last visited Dec. 21, 2020)..... 24

U.S. CONST. art. I, § 10, cl. 1 (Contracts Clause)..... *passim*

INTEREST OF AMICUS CURIAE

The California Apartment Association (“CAA”) is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property owners and operators who are responsible for nearly two million rental housing units throughout California. Many of its members are located in Los Angeles and are subject to the Moratorium Ordinance challenged herein.

CAA’s mission is to promote fairness and equality in the rental of residential housing, and to promote and aid in the availability of high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local fora. CAA was also directly involved in the legislative negotiations regarding [Assembly Bill 3088 \(2019-2020 Reg. Sess.\), 2020 Cal. Stats., ch. 37](#) (“AB 3088”), enacted by the Legislature and signed into law by Governor Newsom this past summer. AB 3088 was featured prominently—and incorrectly—in the district court’s opinion below.

CAA's counsel authored this brief in whole. No party, party's counsel, or other person besides CAA contributed money that was intended to fund preparing or submitting this brief.

BACKGROUND & SUMMARY OF
ARGUMENT

There is no doubt that 2020 has been economically trying for thousands of tenants across the United States, and CAA has no wish to downplay the fact that many tenants have been truly affected by the COVID-19 virus. However, it is also the case that across California many thousands of property owners face significant threats to their livelihoods and life savings, also as a result of COVID-19 and resulting government regulations. Those property owners continue to be burdened with timely paying significant costs relating to the rental properties they own—mortgages, property taxes, insurance, utilities, and maintenance, but extreme forms of rent moratoria—like the one in Los Angeles—deprive them of the rental income necessary to meet those expenses. Los

Angeles is thereby placing property owners—who may be facing their own pandemic-related economic troubles—at risk of bankruptcy or foreclosure, the liening of their properties, or the shutdown of utilities and other property-related services. The Los Angeles Moratorium Ordinance is a one-sided, unreasonable, and unconstitutional proposal that will devastate the rental housing industry.

This is not the first time that governments have been called on to address an emergency that impacts the average person's ability to pay their bills, nor is it the first time that the courts have been asked to pass upon such government measures. But the Moratorium Ordinance at issue in this case goes far, *far* beyond what the Supreme Court has ever previously sanctioned as a legitimate adjustment of contractual rights.

In the 1920s, the Supreme Court addressed a series of rent control laws in the wake of World War I. In all those cases, the government was allowed to foreclose eviction of a holdover tenant, *but the tenant was not exempt from the*

obligation to pay a reasonable rent. See [Edward A. Levy Leasing Co., Inc., v. Siegel](#), 258 U.S. 242 (1922); [Marcus Brown Holding Co. v. Feldman](#), 256 U.S. 170 (1921); [Block v. Hirsch](#), 256 U.S. 135 (1921). And during the Great Depression, the Court upheld Minnesota’s mortgage moratorium law that allowed troubled homeowners to extend their mortgage payments through a court review process, but in that case, too, the homeowners still had to pay a *reasonable rental value* while the mortgage payments were extended. *See [Home Bldg. & Loan Asso. v. Blaisdell](#), 290 U.S. 398 (1934)* (“*Blaisdell*”). Laws that did not provide for reasonable interim payments, by contrast, have been struck down. *See [W. B. Worthen Co. v. Kavanaugh](#), 295 U.S. 56 (1935)* (“*Worthen*”).

Under the LA Moratorium Ordinance, property owners are required to provide homes to needy tenants (and sometimes non-needy tenants, about which more below) for *up to two years* without any rent to cover the expenses of maintaining the properties that they are now required to provide for free. At the same time landlords are barred from

enforcing lease provisions designed to limit wear-and-tear to the property owners' rental units—such as a limitation on occupants or a prohibition on pets. And landlords face substantial civil penalties for violating the Moratorium Ordinance, even though tenants are subject to no requirement that they certify that they are unable to pay due to negative COVID-19 economic impacts.

The district court, in rejecting Appellant's request for a preliminary injunction, wrongly concluded that landlords in Los Angeles do not face imminent, irreparable harm as a result of the Ordinance, and it wrongly concluded that the existence of renters' protections in state law—namely AB 3088—render injunctive relief meaningless, though AB 3088 is far more tailored to the exigencies of the moment and incorporates baseline protections for landlords that the LA Moratorium Ordinance does not.

Though there is no denying that the COVID-19 health pandemic has been economically disruptive across the economy, the City of Los Angeles seeks to shift all the

detriment to property owners by giving tenants all of the benefits of their rental agreements, while landlords retain all of the burdens.¹ In so doing, the City is “forcing some people

¹ The burdens are not slight, to say the least. Under California law, landlords have an implied duty to maintain the “habitability” of a rental unit. See [Green v. Superior Court, 10 Cal. 3d 616 \(1974\)](#). The Legislature has elaborated upon this duty in considerable detail; it includes the responsibility to maintain the structure of the unit—roof, walls, floors, ceilings, stairways, and railings—in good repair; to ensure that the plumbing—including hot and cold water—sewage, gas, heating, electric, and lighting, are in good working order; to ensure clean and sanitary buildings, grounds, and appurtenances, free from debris, filth, rubbish, garbage, rodents, and vermin; it requires the provision of adequate trash receptacles in good repair; it requires the provision of suitable deadbolts and other locks on doors and windows; working smoke detectors; natural lighting in every room, etc. [Cal. Civ. Code § 1941 et seq.](#) The characterization of real estate as a “passive” investment is far from a literal description. Moreover, significant penalties can attach to the failure to comply with this obligation, up to and including criminal misdemeanor prosecution. See [L.A. Muni. Code § 161.805\(1\)](#) (following administrative hearing for violation of any provision within the authority of the L.A. Housing & Community Investment Department, the General Manager of such department may, among other remedies, “[o]rder that the violation be referred to the City Attorney’s office for prosecution”); [L.A. Muni. Code § 161.401](#) (General Manager has authority to administer enforce the State Housing Law, State Housing Law Regulations, and L.A. Municipal Code provisions “relating to the maintenance, sanitation, ventilation, use, occupancy, and habitability of existing residential rental properties, buildings, units, and

alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Pennell v. San Jose*, 485 U.S. 1, 9 (1988). It was in response to precisely such one-sided shifting of burdens, arising from the economic depression following the Revolutionary War, that the Contracts Clause was adopted. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 256-57 (1978) (“*Spannaus*”) (Brennan, J., dissenting) (summarizing the historical practices that gave rise to the Clause).

The district court’s order denying a preliminary injunction should be REVERSED, and the case should be remanded for the entry of such an injunction.

structures”); L.A. Muni. Code § 161.410(A) (General Manager’s “Arrest Authority” includes violations of LAMC § 9.8104); L.A. Muni. Code § 9.8104 (“Basic Maintenance and Repair of Existing Buildings and Premises”); L.A. Housing & Cmty. Investment Dept., “Referral to City Attorney’s Office” (July 30, 2020), <https://hcidla2.lacity.org/rental-property-owners/referral-to-city-attorneys-office> (last visited Dec. 23, 2020) (“after a public hearing your property may be referred to the Office of the City Attorney for misdemeanor prosecution”).

ARGUMENT

A. The Los Angeles Moratorium Threatens Irreparable Harm to Property Owners in Los Angeles, Especially the Mom-and-Pop Landlords That Make Up the Majority of Landlords.

Make no mistake: landlords in Los Angeles face imminent, irreparable harm as a result of the LA Moratorium Ordinance, and the trial court's holding the contrary is just wrong.

The situation created by the Ordinance—permitting no rental income but continuing all of the costs—poses an extraordinary burden for landlords generally, and it effectively drains the rental agreements of all of their value from the perspective of the landlord. But it is especially burdensome for smaller landlords, who comprise the majority of rental housing providers in the country and in California specifically. As the nonpartisan Brookings Institution recently observed, “without rental income, a significant number of noncorporate, ‘mom and pop’ landlords—who may be coping with their own unemployment or additional

expenses related to the COVID-19 pandemic—will also struggle to pay their mortgages, utilities bills, property taxes, maintenance costs, and other property-related expenses.”²

According to Census Bureau data collected by the Urban Institute, more than 22 million rental units—approximately half of the country’s rental units—are found in small buildings with between one and four units.³ The real estate market in Los Angeles, and California more broadly, trends even more towards such lower density small buildings than the nation as a whole due to the nature of the region’s housing stock.⁴ Most of the units are owned by mom-and-pop

² [Broady, Edelberg & Moss, “An eviction moratorium without rental assistance hurts smaller landlords, too,” BROOKINGS INSTITUTION \(Sept. 21, 2020\)](#) (last visited Dec. 21, 2020) (“Brookings Institution Report”).

³ See [Housing Finance Policy Center, “Small Multifamily Units,” URBAN INSTITUTE \(May 2020\), p. 4](#) (last visited Dec. 21, 2020).

⁴ Reid & Heisler, “The Ongoing Housing Crisis: California Renters Still Struggle to Pay Rent Even as Counties Re-Open,” TERNER CENTER FOR HOUSING INNOVATION, U.C. BERKELEY (Oct. 2, 2020), <https://ternercenter.berkeley.edu/research-and-policy/ongoing-housing-crisis/> (last visited Dec. 21, 2020) (“Terner Center Report #1”).

landlords, many of whom invested in property to save for retirement. Among those owning residential investment property, roughly a third are from low- to moderate-income households; property income constitutes up to 20 percent of their total household income.⁵ Even in normal circumstances, the owners of these smaller buildings spend at least half of their rental income on mortgage payments, property taxes, and insurance for their properties.⁶

Now those landlords, who may themselves be coping with their own unemployment or additional expenses related to the pandemic, are also dealing with a dramatic loss of rental income, facing the prospect of either trying to sell their property or going into debt to meet financial obligations including mortgage and insurance payments, property taxes, utilities, and maintenance costs. “Without rental income to

⁵ See Brookings Institution Report, *supra*, note 2.

⁶ Schuetz, “Halting evictions during the coronavirus crisis isn’t as good as it sounds,” BROOKINGS INST. (Mar. 25, 2020), <https://www.brookings.edu/blog/the-avenue/2020/03/25/halting-evictions-during-the-coronavirus-crisis-isnt-as-good-as-it-sounds/> (last visited Dec. 21, 2020).

offset these expenses, low- to moderate-income landlords may struggle to maintain the residences on which tenants depend. Consistent rental income is essential for individual investor landlords—especially those of modest means who rely on rental income as a substantial portion of their total household budget.”⁷ Significant decreases in rental income threatens to lead to declines in property upkeep and foreclosures, which in turn can lead to more evictions and loss of affordable rental housing.

In a recent national survey, more than half of small landlords reported that they had at least one tenant fail to pay rent in June,⁸ and more than half of landlords reported that rent collections were down from the first quarter to the second quarter, with 30% of respondents saying they were down more

⁷ See Brookings Institution Report, *supra*, note 2

⁸ Turner Center for Housing Innovation, U.C. Berkeley, “How Are Smaller Landlords Weathering the COVID-19 Pandemic?” (July 2020), <https://nahrep.org/downloads/NAHREP-Turner-Center-Landlord-Survey-Factsheet.pdf> (last visited Dec. 21, 2020) (“Turner Center Report #2”).

than 25%.⁹ (In a four-unit building, if one person doesn't pay rent that's a loss of 25 percent of a landlord's rental income.) Nationwide, "[o]ne-in-three renters started September with outstanding back rent owed."¹⁰ Moreover, only about a third of all renters "made an on-time rent payment in the first week of September."¹¹

One in four small landlords said they had already borrowed to make ends meet in a July survey by the National Association of Hispanic Real Estate Professionals,¹² while another survey of small landlords in August found that 35 percent were dipping into savings to cover operating costs.¹³

⁹ *Id.*

¹⁰ Popov, Warnock, & Salviati, "Despite Slight Improvement, Rent Payment Struggles Continue," APARTMENT LIST (Sept. 9, 2020), <https://www.apartmentlist.com/research/september-housing-payments> (last visited Dec. 21, 2020).

¹¹ *Id.*

¹² Nat'l Assoc. of Hispanic Real Estate Professionals, "NAHREP Landlord Survey" (July 2020), <https://nahrep.org/landlord-survey/> (last visited Dec. 21, 2020).

¹³ Scott, "Landlords and Renters Struggling to Make Ends Meet During COVID-19 Uncertainty," AVAIL, INC. (Sept. 11, 2020), <https://www.avail.co/blog/landlords-and-renters->

Furthermore, “[m]ore than half (58%) of small rental property owners lack access to credit to cover emergencies, such as lost rent payments, and they may lack sufficient assets to pledge to a lender when rental income stops,” wrote American Bar Association President Patricia Lee Refo in a September 5 letter urging Congress to provide rental assistance.¹⁴ Nearly 40% of respondents lacked confidence “in being able to cover their operating costs over the next quarter,” even *without* restrictions on evictions.¹⁵

Focusing more specifically on California, a report from the Federal Reserve estimates that 240,000 renter households in California are already behind on rent, with an average debt of \$6,953.¹⁶ In Los Angeles, about 10% of renters did not pay

[struggling-to-make-ends-meet-during-covid-19-uncertainty](#)
(last visited Dec. 21, 2020).

¹⁴ See Refo Letter to Congressional Leaders, “ABA Support for Emergency Rental Assistance to End the COVID-19 Eviction Crisis,” AM. BAR ASSOC. (Sept. 5, 2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/eviction-crisis-letter-september.pdf (last visited Dec. 21, 2020).

¹⁵ See Turner Center Report #2, *supra*, note 8.

¹⁶ Reed & Divringi, “Household Rental Debt During COVID-19,” FED. RESERVE BANK OF PHILADELPHIA (Oct. 2020),

rent in full for at least one month between May and July, and about 2% of renters are three full months behind on rent.¹⁷ The Federal Reserve report estimates that landlords in California will face a shortfall of approximately \$1.7 *billion* in rental payments through the end of the year, equating to more than a quarter of all back rent owed nationwide.¹⁸

Other studies suggest the impact may be even more dire. The National Council of State Housing Agencies recently issued a study (based on U.S. Census Bureau “Household Pulse” survey data), estimating that between 1.1 and 1.7 million renter households in California are unable to pay rent,

p. 22, <https://www.philadelphiafed.org/-/media/frbp/assets/community-development/reports/household-rental-debt-during-covid-19.pdf#page=22> (last visited Dec. 21, 2020).

¹⁷ Manville, *et al.*, “COVID-19 and Renter Distress: Evidence from Los Angeles,” UCLA: THE RALPH AND GOLDY LEWIS CENTER FOR REGIONAL POLICY STUDIES (Aug. 31, 2020), p. 6, <https://escholarship.org/uc/item/7sv4n7pr> (last visited Dec. 21, 2020).

¹⁸ See Reed & Divringi, *supra*, note 16, pp. 22-23.

with an estimated \$3.7 to \$5.6 billion in rental debt owed by to California landlords by January 2021.¹⁹

The Turner Center for Housing Innovation at U.C. Berkeley has recently summarized the situation, as it relates to smaller property-owners in particular, thus:

The nonpayment of rent also has implications for the landlords of these properties. The majority of households behind on their rent payments (60.6 percent) live in properties with 4 or fewer units (Figure 4). While this reflects in part the distribution of California's housing stock (which skews to lower density developments), in both California and Los Angeles, renters in smaller properties are also more likely to be behind on their rent payments. ([This finding aligns with the landlord survey we did with the National Association of Hispanic Real Estate Professionals in July.](#)) The majority of these smaller properties are owned by either individuals or smaller property owners, who are more likely to have lower incomes and more likely to be people of color. Some evidence suggests that these smaller landlords may be more willing to work with renters to negotiate payment terms, but they may also face larger barriers to covering shortfalls in their

¹⁹ Nat'l Council of State Housing Agencies, "Analysis of Current and Expected Rental Shortfall and Potential Evictions in the U.S." (Sept. 25, 2020), Appx. B, p. 36, [https://www.ncsha.org/wp-content/uploads/Analysis-of-Current-and-Expected-Rental-Shortfall-and-Potential-Evictions-in-the-US Stout FINAL.pdf#page=36](https://www.ncsha.org/wp-content/uploads/Analysis-of-Current-and-Expected-Rental-Shortfall-and-Potential-Evictions-in-the-US-Stout-FINAL.pdf#page=36) (last visited Dec. 21, 2020).

mortgage, property taxes, and/or insurance payments. These landlords may also be less likely to access small business support or payment protection programs, meaning that they will also be less likely to be able to keep on a tenant who can't pay their rent over the long-term.”²⁰

Further exacerbating these problems, many landlords have not been able to avail themselves of the governmental financial assistance that has been granted to other businesses. Most significantly, on March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act to provide emergency assistance to individuals, families, and businesses affected by the COVID-19 pandemic. Among other things, the CARES Act created the Paycheck Protection Program (PPP), a new loan program to assist small businesses that are being adversely impacted by the pandemic. The interim rule adopted to implement the PPP states that small businesses in operation on February 15, 2020, are eligible for such loans, including businesses that operate under sole proprietorship or as an independent

²⁰ Turner Center Report #2, *supra*, note 8 (footnotes omitted).

contractor or eligible self-employed individual. However, the rule goes on to state that some small businesses are *ineligible* for the PPP and that those businesses are identified in a preexisting rule, [13 C.F.R. § 120.110](#), and described further in SBA's preexisting [Standard Operating Procedure \(SOP\) 50 10, Subpart B, Chapter 2](#).²¹ Those referenced documents indicate that “passive businesses owned by landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds” are generally ineligible for SBA business loans. [13 C.F.R. § 120.110\(c\)](#); [SOP 50 10 5\(B\), p. 85](#). This means that landlords are, by and large, ineligible for the Paycheck Protection Program.

Moreover, in its order denying the motion for preliminary injunction, the trial court observed that “although the Moratorium does not mandate that tenants pay a reasonable, or any, amount of rent, neither has the City Council simply thrown landlords to the wolves. Along with the

²¹ See [Small Bus. Admin., “Business Loan Program Temporary Changes; Paycheck Protection Program,” 85 Fed. Reg. 20811, 20812 \(Apr. 15, 2020\)](#).

Moratorium and other coronavirus [*sic*]-related measures, the City implemented an Emergency Rental Assistance Program (“ERAS”), which will provide over \$100 million in rental assistance payments to approximately 50,000 low-income households by the end of this year.” Excerpts of Record at 19. Respectfully, this amount is a mere drop in the bucket, providing *partial* assistance²² to a mere 50,000 households in a City with nearly 1 million renter households.²³ Moreover, the ERAS program is now closed—indeed, it provided so little funding that the application program was only open for five days in July.²⁴

²² The assistance was capped at \$2,000 per household. See City of Los Angeles, “Emergency Renters Assistance Subsidy Program,” <https://eccandc.org/emergency-renters-assistance-subsidy-program/> (last visited Dec. 21, 2020) (“City of Los Angeles ERAS Webpage”).

²³ See U.S. Census Bureau, Quick Facts: Los Angeles city, Cal., <https://www.census.gov/quickfacts/losangelesciticacalifornia> (last visited Dec. 21, 2020) (nearly 1.4 million households in total, of which 63.2% are renter occupied).

²⁴ See City of Los Angeles ERAS Webpage, *supra*, note 22 (“The application will be open for five (5) days, starting at 8 AM on July 13th, and closing at 11:59 PM on July 17, 2020”).

Inevitably, the coronavirus pandemic would have resulted in some level of disruption to these landlords in any event. However, the LA Moratorium Ordinance vastly compounds the problem by depriving landlords of the ability to mitigate the damages they are suffering. Rather than evicting the nonpaying tenants, and replacing them with tenants who will pay, the Ordinance requires landlords to house nonpaying tenants for up to two years without any rent at all. The City and the trial court make much of the fact that the tenants are not ultimately relieved of the need to pay the back rent for this two-year period, but that does not change the fact that landlords are required to bear heavy financial burdens without receiving any rent for two years. And, as the federal district court for Massachusetts recognized in a similar case, [*Baptiste v. Kennealy*, ___ F. Supp. 3d ___, 2020 U.S. Dist. LEXIS 176264 \(D. Mass. Sep. 25, 2020\)](#), the promise of repayment at the end of that period “is largely illusory, as tenants who have not paid their rent for many months because of economic distress—or, indeed, for any other

reason—are unlikely to pay a money judgment against them.”

Id. at *24.²⁵ And even in the rare event that a tenant does pay months of back rent, a two-year delay in receiving those funds may still push a landlord into foreclosure.

In either event, the harm is irreparable. Univ. of Haw. Prof'l Assembly v. Cayetano, 16 F. Supp. 2d 1242 (D. Haw. 1998), is instructive on this point. In that case, the court preliminarily enjoined the alteration of a labor contract, finding that unconstitutional impairment of contract constituted irreparable harm where affected union members “may experience harm from a pay lag including incurring late fees for bills and credit cards and delays in mortgage payments. In some cases, a delay of even five days could effect [sic] a person’s credit report. It is highly unlikely that any

²⁵ The district court distinguished this finding by *Baptiste* on the wholly artificial ground that the Massachusetts court’s holding was articulated “in the course of the substantial impairment analysis, and not as part of an irreparable harm inquiry.” Excerpts of Record at 23 (underline in original). Exactly why that should matter is left unexplained. If the ability to collect down the line is illusory, that fact may be relevant to multiple parts of the analysis.

damages remedy would adequately compensate the injury of each and every member of UHPA.” *Id.* at 1247. This Court affirmed that finding. *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999). See also *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994) (“[A] district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant....”); *Park Vill. Apartment Tenants Assoc. v. Mortimer Howard Tr.*, 636 F.3d 1150, 1159 (9th Cir. 2011) (“It is well-established that the loss of an interest in real property constitutes an irreparable injury.”).

Because many of CAA’s members will be forced to go months on end without rent, while continuing to incur *significant* costs and burdens relating to their properties, see note 1, *supra*, they face an imminent, overwhelming, and irreparable hardship if the LA Ordinance is not enjoined.

B. Far from Supporting the Denial of a Preliminary Injunction, the Provisions of AB 3088 Show Why the Los Angeles Ordinance Is Unconstitutional.

In rejecting Appellant’s motion for preliminary injunction, the district court relied heavily on the fact that even if the Moratorium Ordinance were enjoined, landlords in Los Angeles would still be subject to restrictions on their ability to evict tenants and collect rent—those embodied in AB 3088, adopted in August of this year. *See* Excerpts of Record at 24-27. From this, the court drew the conclusion that the requested injunction would have no benefit to the Appellants and was therefore gratuitous. *See id.* at 24. Indeed, the court concluded that “the State Law goes beyond the Moratorium in ways that are *more* burdensome on landlords.” *Id.* at 25 (emphasis added). Respectfully, the district court’s analysis was badly mistaken. Viewed from a practical, real-world perspective, AB 3088 offers landlords significant protections and benefits that the LA Moratorium Ordinance does not, and, in fact, a comparison of the two laws emphasizes the very reasons why the LA Moratorium

Ordinance is an unconstitutional impairment of Los Angeles landlords' contracts.

In assessing whether a law unlawfully impairs contracts, courts apply the three-part test set out in [*Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400 \(1983\)](#).

Under that test, a court asks:

1. “[W]hether the state law has, in fact, operated as a substantial impairment of a contractual relationship.”
2. If a substantial impairment is found, whether there is “a significant and legitimate public purpose behind the regulation”;
3. And, finally, “[o]nce a legitimate public purpose has been identified, the next inquiry is whether the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.’”

[*Id.* at 411-12](#) (internal citations omitted).

As for the first prong, rent—along with the corresponding ability to evict a tenant for the failure to pay rent—is, without question, *the* single most essential term of a residential lease from the perspective of the landlord, and the Ordinance deprives landlords of their end of the bargain for

up to two years. The district court, thus, rightly held that Moratorium Ordinance substantially impairs the contractual relationship between landlords and tenants. Excerpts of Record at 10-13. But having correctly reached that conclusion the district then lost its way, applying an inappropriately lenient standard to the remaining analysis.

The Supreme Court has held that “[t]he severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. *Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.*” [Spannaus, 438 U.S. at 245](#) (emphasis added). But the district court did not engage in that careful examination. Instead, it deferred to the assessment of the City Council. Excerpts of Record at 17 & 27. But the “careful examination” called for in *Spannaus* must be undertaken “[d]espite the customary deference courts give to state laws directed to social and economic problems...” [438 U.S. at 244](#)

(emphasis added). Having applied the incorrect standard, the order below is erroneous as a matter of law.

As for the second prong—whether there is a significant and legitimate purpose—Appellants did not dispute that part of the analysis in the district court and do not do so in this Court. Nor does CAA dispute it.

AB 3088, however, is relevant to the analysis under the third prong—whether the conditions of the impairment are reasonable in light of the “careful examination” that is required. Contrasting AB 3088 with the LA Moratorium Ordinance demonstrates the patent unreasonableness of the latter.

CAA was deeply involved in the legislative negotiations over AB 3088, engaging in around-the-clock discussions with Governor Newsom’s office and leaders in the Senate and Assembly during the crucial final days before the end of the legislative session.²⁶ While recognizing that the final product

²⁶ Dinzeo, “Relief Closer for California Renters, Landlords as Protection Bill Clears Legislature,” COURTHOUSE NEWS SERVICE (Aug. 31, 2020),

was imperfect, CAA also recognized that it offers a less-burdensome alternative to [Assembly Bill 1436 \(2019-2020 Reg. Sess.\)](#), the “free rent” bill that CAA adamantly opposed and was successful in helping to defeat. Among the most objectionable features of AB 1436 were provisions that would have let tenants skip 100% of rent payments until April 1, 2022, without fear of eviction, and without providing any proof that they have been negatively affected by COVID-19. The LA Moratorium shares these damaging features.

Under AB 3088, by contrast, tenants must pay landlords at least 25% of the rent due between September 1, 2020, and January 31, 2021, to avoid being subject to an eviction proceeding in February 2021—more than a year earlier than would be the case under the LA Ordinance. *See* [Cal. Code Civ. Proc. § 1179.03\(g\)\(2\)\(B\)](#).

Furthermore, under AB 3088 tenants must provide a declaration, signed *under penalty of perjury*, stating that the

<https://www.courthousenews.com/relief-closer-for-california-renters-landlords-as-protection-bill-clears-senate/> (last visited Dec. 22, 2020).

reason for the inability to pay rent is related to COVID-19 itself or the economic impact of government measures to combat the disease's spread, *see* [Cal. Code Civ. Proc. §§ 1179.02\(d\) & 1179.03\(g\)\(1\)](#), and high-income earners (those within incomes exceeding \$100,000 or 130% of the area median income, whichever is higher) must provide additional documentation to demonstrate the negative impact that COVID-19 has had upon their finances. *See* [Cal. Code Civ. Proc. § 1179.02.5](#). The LA Moratorium Ordinance contains no requirement that tenants make any certification of economic hardship or inability to pay at all. Indeed, a great many tenants work in positions considered “essential,” or are able to work virtually, and have suffered little or no economic loss from the pandemic, yet the LA Moratorium Ordinance authorizes them to pay no rent just as if they had lost their jobs.

Under AB 3088, tenants remain fully subject to their lease agreements' terms, including not just the obligation to pay rent in a timely fashion but also liability for late fees and

interest, and restrictions designed to prevent wear-and-tear, including limitations on the number of tenants and prohibitions on pets. The LA Moratorium Ordinance bars the imposition of late fees and interest, and essentially nullifies contractual limitations on tenants and pets. [L.A. Muni. Code § 49.99.2\(C\) & \(D\)](#).

Finally, while tenants who are able to pay their rent and fail to do so theoretically remain subject to eviction under the LA Moratorium Ordinance, that Ordinance authorizes significant monetary penalties—in the tens of thousands of dollars—against landlords who seek to evict without a “good faith” belief that the tenant does not qualify for the Ordinance’s protections, even though tenants are placed under no obligation to inform landlords that they have suffered the negative COVID-19 financial effects that trigger those protections. See [L.A. Muni. Code §§ 49.99.7 & 49.99.8](#). There is no comparable punitive provision under AB 3088.

It is true that under AB 3088, just as under the LA Moratorium Ordinance, a landlord may not be able to evict a

tenant for failure to pay rent during the period from March 2020 through August 2020. However, under AB 3088 that is only the case if the tenant affirmatively verifies his or her hardship under oath (and high-income tenants provide back-up documentation). The statute permits the eviction of tenants that do not provide the required sworn declaration and documentation for failure to pay rent between March 2020 and August 2020, starting October 5, 2020. See [Cal. Code Civ. Proc. § 1179.01.5](#). Under the LA Moratorium Ordinance, the landlord must wait until at least April 1, 2022—an additional 18 months—to seek eviction for that non-payment, without the need for any verification that the tenant was unable to pay.

Moreover, under AB 3088, for tenants that do provide the required verification, rent that was not paid during the period from March 2020 to August 2020 is converted to consumer debt, which may be pursued in a suit filed as early as March 1, 2021. [Cal. Code Civ. Proc. § 116.223\(c\)\(3\)](#). A landlord in Los Angeles, by contrast, must wait an additional

year before pursuing outstanding rental debt. And finally, AB 3088 makes that consumer debt collectible in small claims court, even if it would not otherwise qualify, see [Cal. Code Civ. Proc. § 116.223](#), thereby reducing the likely litigation costs to the landlord.

All of these features of AB 3088—especially the 25% payment requirement and the requirement for verification of hardship under penalty of perjury—are important to landlords as they seek to weather their own financial struggles.

That a 25% payment of rent is preferable to no rent from the perspective of a landlord hardly needs explanation. Though it will not avoid all hardship to landlords, the 25% payment at least helps to mitigate the ongoing costs to landlords of owning and maintaining rental properties. This is a crucial distinction from a constitutional perspective, as demonstrated by the Supreme Court’s jurisprudence under the Contracts Clause—in particular, the contrast of [Blaisdell](#) and [Worthen](#).

In *Blaisdell*, the Minnesota Legislature enacted a law imposing a temporary two-year moratorium on the ability of a mortgagee (a bank) to evict a mortgagor (homeowner) who was delinquent on mortgage payments and allowing the homeowner to retain possession. If, during that two-year period, the homeowner became current on the mortgage, eviction was disallowed. [290 U.S. at 416-18](#). The Court upheld the statute. Crucially, however, while the law at issue in *Blaisdell* allowed homeowners to defer mortgage payments for up to two years, the homeowner was nevertheless required, during those two years, “to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage ... indebtedness at such times and in such manner’ as shall be determined by the court [in which an eviction proceeding was brought].” [Id. at 416-17](#).

In *Worthen*, by contrast, the Court considered—and struck down—Arkansas’ version of the mortgage moratorium laws as an unconstitutional impairment of contract. In that case, the law, among other things, extended the time for

payment upon demand, reduced a lateness penalty, extended the time to answer, increased the statutory redemption period, and removed the ability of a purchaser to possess the property during the redemption period. [295 U.S. at 57-59](#).

The Court struck the law down in significant part because “[t]here [wa]s no enforceable obligation in the interval to pay instalments of the principal or even the accruing coupons.” [Id. at 61](#). In some circumstances, when the value of the property was so low as to threaten the security on the property, rent would be paid to, and held by, a receiver, and the investor might *eventually* receive those rents upon the ultimate eviction. [Id. at 62-63](#). But they did not receive the rent payments while they waited to foreclose, “except [to cover] necessary expenses.” [Id. at 62](#). The Court noted that in view of the delay in receiving rents held by the receiver, “This is small comfort for an investor who has put his money into a mortgage in the expectation of receiving a return on his investment.” [Id.](#) And if the value of the property was not so

low as to threaten the security on the property, no rent was collected at all.

Indeed, the *Worthen* Court expressly distinguished *Blaisdell* on the ground that, under the Minnesota law that it had previously upheld, a delinquent mortgagor was still required to “pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness.” [*Id.* at 63](#).

In this case, the LA Moratorium Ordinance goes even further in impairing contracts than the law struck down in *Worthen*. The Arkansas statute at least made provision for the payment of “necessary expenses” in the narrow circumstance where the nonpayment of the mortgage threatened the property’s security interest. Here, the LA Moratorium Ordinance doesn’t even do that. AB 3088, however, ensures that a landlord will receive at least a percentage of the income stream needed to meet the costs of carrying the rental property.

As for the requirement in AB 3088 that tenants verify their hardship under penalty of perjury, unfortunately, during the pandemic some tenant organizations have irresponsibly urged all tenants to forego rent payments, even if those tenants have been unaffected financially by COVID-19 and can afford to pay.²⁷ The LA Moratorium Ordinance turns a blind eye to this unethical action, by allowing tenants to withhold rent with no proof of a hardship or inability to pay. AB 3088, by contrast, guards against such gamesmanship by requiring that tenants verify their hardship under penalty of perjury, and by further requiring that high-income tenants provide back-up documentation to substantiate their claims of inability to pay.

²⁷ See Los Angeles Tenants Union, “Food Not Rent!,” <https://foodnotrent.org/> (last visited Dec. 21, 2020) (“Those who can’t pay, won’t; those who can pay, don’t. Join the rent strike. Keep your rent.”); Dillon, “‘Rent strike’ aims to put focus on housing relief; Lost jobs spark a plea to halt payments until pandemic ends,” L.A. TIMES (May 2, 2020), p. B1 <https://www.latimes.com/homeless-housing/story/2020-05-01/coronavirus-rent-strike-eviction-squatting-landlord-los-angeles-california> (last visited Dec. 21, 2020).

In sum, if the LA Moratorium Ordinance were enjoined, tenants would still retain significant protections under state law. However, under that state law landlords' interests are not wholly and entirely subordinated to tenants' interests for as much as two years; landlords are at least somewhat protected, and provision is made for partial payment of rent that would help at least some landlords weather their own financial storms. Under such circumstances, it cannot plausibly be said that "the adjustment of 'the rights and responsibilities of contracting parties [by the LA Moratorium Ordinance is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" [*Energy Reserves Grp.*, 459 U.S. at 411-12](#) (internal citations omitted).

CONCLUSION

The LA Moratorium Ordinance constitutes an entirely unprecedented shifting of contractual burdens that goes far beyond anything that the courts have ever blessed. Though COVID-19 has visited economic hardship across the economy,

the City of Los Angeles has altered the contractual relationships between landlords and tenants in a manner that shifts the burdens of those arrangements entirely to the landlords, without any regard for the fact that landlords, too, continue to face significant expenses. In the process, the City threatens to subject many of those landlords to bankruptcy or foreclosure. This represents an imminent, irreparable harm, and the district court's opinion to the contrary cannot stand.

For the foregoing reasons, the order denying Appellant's motion for preliminary injunction should be REVERSED, with directions to enter such an injunction.

Respectfully submitted,

December 23, 2020 NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: 

James R. Parrinello
Christopher E. Skinnell

Attorneys for Amicus Curiae
CALIFORNIA APARTMENT
ASSOCIATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s): 20-56251 (*Apartment Assoc. of Los Angeles County, Inc. v. City of Los Angeles, et al.*)

I am the attorney or self-represented party.

This brief contains 6,235 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

complies with the word limit of Cir. R. 32-1.

is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

it is a joint brief submitted by separately represented parties;

a party or parties are filing a single brief in response to multiple briefs; or

a party or parties are filing a single brief in response to a longer joint brief.

complies with the length limit designated by court order dated _____.

is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Christopher E. Skinnell **Date** December 23, 2020

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov