20-4238-cv

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,

– v. –

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 DORIS, 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 AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, of the Federal Rules of Appellate Procedure, 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 in this action, state that they do not have a corporate parent, and there is no publicly held corporation that owns 10 percent or more of either company's stock.

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JURISDICTIONAL STATEMENT

The District Court exercised jurisdiction over Plaintiffs-Appellants' ("Appellants") claim under Article I, Section 10 (the "Contract Clause") and the First Amendment to the United States Constitution pursuant to 28 U.S.C. §§ 1331 and 1343. The District Court entered a final judgment granting Defendants-Appellees' ("Appellees") motion to dismiss and denying Appellants' motions for preliminary injunctive and declaratory relief on November 30, 2020. Melendez, et al. v. City of New York, et al., No. 20-cv-5301 (RA) (S.D.N.Y. Nov. 25, 2020). Appellants timely filed a notice of appeal on December 21, 2020. Appellate jurisdiction over that judgment is conferred pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Is the "Guaranty Law," a hurriedly passed New York City Council local law, that permanently prohibits the enforcement of all personal guarantees executed in connection with commercial leases in New York City, (i) a substantial impairment of contract; (ii) designed to only protect commercial tenants; and (iii) unreasonably drawn to ameliorate its purported purpose, violative of the Contract Clause of the United States Constitution?

2. Do the Residential and Commercial Harassment Laws prohibiting landlords from "threatening" tenants based on, *inter alia*, status as a person or business "impacted by COVID-19," (i) restrict lawful commercial speech; (ii) fail to directly advance a substantial government interest; and (iii) amount to a prohibition more extensive than necessary to serve that interest, in violation of the First Amendment to the United States Constitution?

3. Are the Residential and Commercial Harassment Laws violative of the United States Constitution because they are void for vagueness?

STATEMENT OF THE CASE

Appellants brought this action for preliminary injunctive and declaratory relief, pursuant to Federal Rule of Civil Procedure 65, 28 U.S. § 2201 and 42 U.S.C. 1983, seeking to enjoin Appellees from enforcing New York City Local Law 55 of 2020 (the "Guaranty Law"), Local Law 53 of 2020 (the "Commercial Harassment Law") and Local Law 56 of 2020 (the "Residential Harassment Law") and declaring them unconstitutional. (A-14)[1]

Appellants commenced the action on July 10, 2020, asserting that the Guaranty Law violated the Contract Clause and that the Commercial and Residential Harassment Laws violated the First Amendment and Due Process Clause of the U.S. Constitution and the Free Speech Clause of the New York State Constitution. (A-14-77) On July 22, 2020, Plaintiffs filed a motion for preliminary injunction and declaratory relief, arguing that the sweeping and unreasonably overbroad laws permanently extinguished Appellants' contractual rights and muzzled their ability to engage in lawful speech. Defendants filed a motion to dismiss all claims and by decision dated November 25, 2020, Judge Abrams decided both motions, granting the motion to dismiss and denying Plaintiffs'

[1] Citations to "A" refer to Joint Appendix and "SPA" refer to the Special Appendix.

motions for a preliminary injunction and declaratory relief. (SPA-1-37) This appeal followed.

SUMMARY OF ARGUMENT

COVID-19 has undeniably ravaged New York City, creating significant public health, budgetary and economic crises. The pandemic's economic impact has required necessary action on both a State and Federal level to help those greatest in need. But this case presents the question of how far a local governmental entity can legislatively overreach under the guise of this COVID-19 emergency. The pandemic does not grant the New York City Council (the "Council") *carte blanche* to pass overbroad and ill-tailored laws that operate to advance an exceedingly narrow public purpose—*to wit*, the Harassment and Guaranty Laws. During May 2020, the Council passed a package of local ordinances in blunderbuss fashion, "relatively quickly," to "combat the pandemic's economic impact." (SPA-7, SPA-11). While the measures may have had political appeal to certain Council members and "headline" appeal to certain New Yorkers, the Laws fail to pass constitutional muster.

The Contract Clause ensures that a State can only unilaterally abridge private contractual rights in limited emergency circumstances, when it is reasonable and necessary to remedy a general social or economic problem and to safeguard the "vital interests of its people." Energy Reserves Group, Inc. v.

Kansas Power & Light Co., 459 U.S. 400, 410 (1983). Even during an emergency, to withstand constitutional scrutiny, a law upending private contractual rights must be aimed at serving a broad public purpose rather than providing a benefit to special interests, and must be reasonably drawn to ameliorate that problem. Sanitation and Recycling Indus., Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997).

The Guaranty Law does not serve a broad public purpose, nor was it reasonably drawn to protect the "vital interests" of New Yorkers. Instead, the law retroactively and permanently strips commercial landlords in New York City of their primary security and contractual remedy in the event of a default under a lease, the personal guaranty. Rather than specifically targeting tenants in need of rent relief, the Guaranty Law unnecessarily targets thousands of commercial landlords, canceling millions in rent already owed and preventing them from exercising their rights under valid, existing contracts.

The Guaranty Law's likely impact was known to the Council at the time of its passage. Purportedly enacted to provide relief to small businesses, the limited testimony the Council heard demonstrated that the Guaranty Law, among other things, would (i) significantly hurt small landlords, particularly those "who own one or two buildings" and (ii) was just as likely to "end up helping Louis Vuitton as much as it helps Louise'[s] pizza." (A-475). The District Court recognized this

bare shifting of contractual burdens, asserting the Guaranty Law "shift[s] the pandemic's financial burden from small business owners to their landlords, many of whom are also struggling financially during this difficult time." (SPA-30). The Guaranty Law, as the Court plainly acknowledged, "directly benefits only commercial tenants." (SPA-27).

Yet, because the Council cited the ongoing pandemic and perfunctorily paid lip-service to the notion that its legislation benefited the "public interest," it was accorded complete and absolute deference by the Court below. When more carefully scrutinized, however, the record demonstrates the Guaranty Law was a scattershot, knee-jerk and politically expedient measure. With little more than a statistic that small businesses employ nearly half of the City's workforce and anecdotal testimony from a handful of small business owners, the Council permanently gutted hundreds of thousands of commercial real estate leases throughout the City, and the Court below completely abdicated its responsibility to provide appropriate scrutiny. In one fell swoop, the Council repudiated millions in contractually owed rent—Appellant Bochner has lost $110,000—by defaulting tenants to landlords Citywide without any real remedy. In many cases, landlords will not even be able to obtain the return of their properties from delinquent tenants under the "good guy" guaranty provisions agreed to by the parties. Going forward, the Court's decision to uphold the Guaranty Law upends landlords' ability to

negotiate leases with the assurance that their constitutional and contractual rights will be protected, and further destabilizes an already unsteady City real estate market at the wrong time.

The Contract Clause was meant to invalidate precisely this type of legislation. Article I, Section 10 of the United States Constitution provides that "[N]o State shall…pass any…Law impairing the Obligation of Contracts" and has operated as a safeguard of private contracts from governmental interference since this Country's founding. More than any other constitutional provision, it was designed to ensure stability and predictability in contractual relationships, particularly in troubled economic times, for it was then that people and governments would most often seek "legislative interference" with their contractual obligations. See Home Bld. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). "Treating existing contracts as 'inviolable' would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them – even if they or their agreements later prove unpopular with some passing majority." Sveen v. Melin, 138 S. Ct. 1815, 1827 (2018) (Gorsuch, J. dissenting) (citing Surges v. Crowninshield, 17 U.S. 122, 206 (1819))

Over time, however, the application of the Contract Clause has eroded from the language of the Constitution's absolute text. The Supreme Court and commentators alike have observed that the increasingly flexible standard "seems

hard to square with the Constitutional's original public meaning." Sveen, 138 S. Ct. at 1827; Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 526, 559 (1987). However, despite the relaxation, it remains clear that the Contract Clause was written to "promo[e] confidence in the stability of contractual obligations." U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 14 (1977).

It is hard to imagine how commercial landlords can have any confidence in the ongoing stability of their contractual obligations if the District Court decision is allowed to stand. If the Contract Clause is to have any continuing viability, governmental entities cannot be permitted to ham-handedly declare a measure in the "public interest," eschew more narrowly tailored measures to serve that interest and avoid serious constitutional scrutiny. See Association of Surrogates & Supreme Court Reports v. New York, 940 F.2d 766, 773 (2d Cir. 1991) ("[T]he contract clause, if it is to mean anything, must prohibit New York from dishonoring its existing contractual obligations when other policy alternatives are available."). As one astute Council Member urged at the time of the Guaranty Law's passage, "*[t]his feels unconstitutional*…we cannot go backwards into a contract that was entered into five, six, seven…years ago … and amend [it] retroactively to remove a provision." (A-758) (emphasis added). The District Court's decision on the Guaranty Law should be reversed.

The other two bills passed by the Council, the Commercial and Residential Harassment Laws, which prohibit landlords from "threatening" a tenant based on the tenant's status as a person or business "impacted by COVID-19" or receipt of a rent concession during COVID-19, further gutted the ability of small commercial and residential landlords to lawfully collect rent. The Laws restrict Appellants' lawful commercial speech in violation of the First Amendment. Central Hudson Gas & Elec. Corp. v. Public Servs. Comm'n, 447 U.S. 557, 566 (1980). Due to the Laws' vagueness and sweeping scope, Appellants have been chilled from making routine rent demands and communicating with tenants about unpaid rent because they fear potential accusations of harassment. The District Court ignored this reality and instead relied on the City's bald representations, concluding that the Laws do not proscribe routine rent demands. Like the Guaranty Law, the Laws' speech prohibitions also fail constitutional muster they do not directly advance a substantial government interest and are more extensive than necessary to serve that interest. Id. The District Court's decision on the Harassment Laws should be reversed.

STATEMENT OF FACTS

1. COVID-19 and its Impact on New York City

COVID-19, the disease caused by the novel coronavirus, has led to a global pandemic and a statewide health emergency in New York State. On January 21,

2020, the U.S. Centers for Disease Control and prevention ("CDC") confirmed the first U.S. case of COVID-19. (A-81 ¶ 2). Nine days later, on January 30, 2020, the World Health Organization ("WHO") declared a global health emergency. (Id. at ¶ 3). On January 31, 2020, the U.S. declared the COVID-19 outbreak a public health emergency. On March 1, 2020, New York State confirmed its first COVID-19 case. (Id. at ¶ 4). To this day, New York continues to fight the outbreak.

COVID-19 has also indisputably impacted the New York State and New York City economies – and the real estate industry in particular. Property owners, including Appellants, have seen a precipitous decline in their rental income, threatening their ability to pay their own bills, such as property taxes, mortgages, maintenance expenses and employee salaries. (A-1334 ¶ 30; A-1328 ¶ 37). In New York City, surveys demonstrate that landlords report having been unable to receive as much as 80% in rent from their commercial tenants. (A-178). Because of the economic climate, many property owners assisted distressed tenants by offering rent concessions. In Brooklyn, for example, approximately 20% of commercial tenants have received a rent concession each month since March 2020 (A-83 ¶ 10).

This drop in the real estate market has severely impacted the City's budget. Real estate taxes account for more than half of the City's tax revenue. (A-359). Largely because of the pandemic, the Independent Budget Office ("IBO")

estimates a multi-billion dollar shortfall in the City's budget over the next three fiscal years. (A-312, A-316).

2. Legislative Responses to the Pandemic

In response to COVID-19, the State Legislature conferred broad emergency powers on the Governor to address the pandemic by amending Section 29-a of the Executive Law. (A-87 ¶ 22). Pursuant to that amendment, the Governor, by executive order, may issue any directive during a state disaster emergency – including an epidemic – that can only be overridden by a joint resolution of the Legislature. (A-386-87). The Governor passed several executive orders impacting small businesses in New York City:

- Executive Order No. 202.3 prohibited bars and restaurants from serving patrons food or beverages on-premises. (A-90 ¶ 32);
- Executive Order 202.6 ordered "non-essential" businesses to reduce its in-person workforce at any work locations by 50%. (Id. at ¶ 33); and
- Executive Order 202.7 ordered the closure of additional businesses, including barbershops, hair salons, and cosmetologists. (Id. at ¶ 34).

Additional Executive Orders have been specifically aimed at the real estate industry:

- Executive Order 202.8, issued on March 20, 2020, established a moratorium on the enforcement of an eviction of any residential or commercial tenant, or any foreclosure of any residential or commercial property for a period of ninety days. (A-91 ¶ 37).

- In Executive Order 202.28, the Governor authorized landlords and tenants to enter written agreements through which security deposits and any interest accrued on them can be used to pay rent that is in arrears or will become so. The Order mandates that landlords must provide this relief to tenants facing financial hardship due to the pandemic. (Id. at ¶ 39, A-411).

- Executive Order 202.28 also prohibits residential landlords from demanding tenants pay fees or other charges for late rent payments. (Id.) (A-411).

The Legislature also passed two statutes to provide relief to both landlords and residential tenants: The Emergency Rent Relief Act of 2020 ("ERRA") and the Tenant Safe Harbor Act ("TSHA"). (A-93-94 ¶¶ 45-46). The ERRA makes rental assistance vouchers available to landlords on behalf of those tenants who have experienced an increase in their rent burdens between April 1 through July 31, 2020 because of a loss in income due to COVID-19. (Id., A-421-22). The TSHA prevents courts from issuing warrants of eviction for nonpayment of rent that accrues from March 7, 2020 until the executive orders on non-essential gatherings expire. (Id., A-424-25).

3. The Challenged Laws

Despite the panoply of existing protections, on April 21, 2020, the Council announced its intention to add three bills to the Governor's and Legislature's directives. In describing the bills, the Speaker of the Council explained: "[i]t's essential that New Yorkers get the rent cancellation they need." (A-517). Yet, the laws were not targeted at New Yorkers who actually needed rent relief. Instead, in

blunderbuss fashion, the Council laws covered broad swaths of the City, including those managing the pandemic and even faring well during the economic crisis.

The laws were passed with little analysis or close consideration. The Council's Committee on Housing and Building and its Committee on Consumer Affairs and Business Licensing held a hearing on April 28, 2020. On April 29, 2020, the Committee on Small Business and the Committee on Consumer Affairs and Business Licensing held a hearing. (A-95 ¶ 55). No empirical evidence was presented at either hearing to support the necessity of the new laws. The Council's hearings largely consisted of a patchwork of vague and anecdotal evidence. For example, a not-for-profit representative claimed her organization "hear[d]" anecdotes from tenants who had been harassed because the landlords believed that the tenants had lost income, but offered no statistical or any other support. (A-95-96 ¶ 56, A-588). A restauranteur testified that he feared that if he was required to pay he might risk personal bankruptcy. (A-1084-85). The legislative analysis, too, reflects the roughshod nature of the process. The Committee Report merely summarized the bills' terms, providing no factual justification, no analysis of the bills' scope and no consideration of any alternatives that might have been less burdensome or more narrowly tailored to those truly in need. (A-45-46).

In fact, the Council received just as much evidence for not passing any of the eventual laws, and directly in opposition to the Guaranty Law in particular.

Council Member Justin Brannan, for example, spotlighted his "concerns that [the Guaranty Bill] may end up helping Louis Vuitton as much as it helps Louise['s] [P]izza." (A-475). Council Member Peter Koo warned the City "need[ed] to address th[e] ecosystem as a whole and find a comprehensive solution for all," including "small landlords who are struggling to make payments and meet their obligations." (A-500). Indeed, at the hearings, a tenants' rights group identified a prescient issue presented by the Guaranty Law – "tenants who can pay but who are going to withhold rent out of solidarity." (A-565, A-569). Council members also recognized the Guaranty Law simply shifted contractual burdens from the tenant to the landlord. As Council Member Yeger put it "we are in tough times and everybody is hurting" and "it can't just be that the tenant is not going to pay rent because the tenant doesn't have income…[we] have to find a way to reduce the burden on all New Yorkers that are trying to come out of this." (A-759-60).

No serious alternatives to either the Harassment or Guaranty Laws were discussed by the Council. Council Member Fernarndo Cabrera questioned if it made "more sense to have the state come up with a fund to pay for [] rent, just like Delaware." (A-97 ¶ 60, A-576). But discussions went no further. Towards the end of the hearing, several Council Members openly expressed doubts about the constitutionality of the Guaranty Law, including one member who argued "the city

cannot retroactively adjust, amend a contract that was entered into by two parties at arm's length…[e]mergency or not." (A-97 ¶ 61, A-758).

Despite these reservations, at a signing ceremony purporting to be a public hearing, on May 26, 2020, Mayor de Blasio signed the three bills into law without any further debate. (A-46 ¶¶ 118-119). In total, the public and any interested parties had just 21 days to comment on these bills, which will have a significant and long-lasting impact on the residential and commercial real estate industry in New York City and on the livelihood of thousands of New Yorkers, including Appellants. (A-46 ¶ 120).

A. The Guaranty Law

The Guaranty Law[2] forever prohibits landlords from enforcing personal guaranties executed as security for commercial leases for defaults occurring between March 7, 2020 until September 30, 2020. Specifically, the Guaranty Law, entitled "Personal Liability Provisions in Commercial Leases" provides that:

> A provision in a commercial lease or other rental agreement involving real property located within the city … that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, **shall not**

[2] Local Law No. 50-2020, amended the N.Y.C. Administrative Code, adding §22-1005.

> **be enforceable** against such natural persons if the conditions of paragraph 1 and 2 are satisfied.

Id. at § 22-1005 (emphasis added). The bill's first condition for application involves tenants required to cease serving members of the public under executive orders 202.3, 202.6 and 202.7, mostly impacting restaurants, bars, or non-essential retail establishments. Id. at § 22-1005(1). The second requirement is that the default or other event causing the personal guarantor to become personally liable have occurred between March 7, 2020 and September 30, 2020, inclusive. Id. On September 30, 2020, the Guaranty Law was extended to encompass liabilities that accrued through March 31, 2021.[3] The Guaranty Law makes all personal guaranties non-enforceable regardless of the type of personal guaranty or the financial circumstances of the guarantor. It permanently eliminates the ability of the landlord to recoup uncollected rent payments owed by defaulting tenants or to re-let commercial premises.

i. The Personal Guaranty in Commercial Leases

To put the prohibition in context, the personal guaranty is an essential part of commercial leasing in New York City. (A-1288 ¶ 27). Depending on their credit-worthiness, personal guaranties enable tenants to lease space which they would

[3] While the Council has taken no formal action, recent public statements as well as the extension of similar Council rent protective measures suggest strongly the Guaranty Law will be extended past its current March 31, 2021 expiration date.

otherwise be precluded from leasing because of a property owner's need or desire to place a more creditworthy tenant on the lease. (Id.) Guaranty agreements provide additional security where the tenant named on the lease is a corporation, LLC, or other entity, such that the entity's officers or members would be protected from personal liability for the entity's debts. (Id. at ¶ 28). Often, the guarantor is an owner or other principal of the business entity who agrees to be personally liable for the obligations of the tenant. (Id.)

Guaranties take various forms. (A-1289 ¶ 29). A guaranty agreement may constitute a "full" guaranty, where the guarantor guarantees payment of the tenant's obligations through the end of the lease, whether or not the lease is terminated early or not. (Id.) Alternatively, it may be a limited guaranty – or a "good guy" guaranty – where a guarantor's obligations run through the date when the tenant surrenders possession of the premises to the landlord, which he can do prior to the end of a lease to avoid the balance of rent payments. Guaranty agreements – and "good guy" guaranties, in particular – benefit both owners and tenants. They encourage property owners to lease property to commercial tenants who may not be as creditworthy and they incentivize tenants to voluntarily surrender a leased property without the landlord having to resort to an eviction proceeding giving the landlord the ability to re-let a commercial space. (Id. at ¶ 30). Good guy guaranties help prevent the worst-case scenario for small landlords

– and for the overall health of the real estate market – when a tenant continues to occupy the premises during and beyond the lease term without paying rent. (Id. at ¶ 31).

The Guaranty Law forever cancels "good guy" and any other personal guaranties contained in New York City commercial leases for at least a year. The Guaranty Law's triggers do not contain any substantial injury requirement and therefore could be – and, indeed, have been – invoked by businesses that are well-capitalized or surviving the pandemic well. It is believed that tens of thousands of small business landlords in New York City will be impacted by the Guaranty Law. (A-105 ¶ 86).

ii. The Guaranty Law's Impact on Appellant Bochner

Appellant Bochner ("Mr. Bochner") is one of those landlords. Mr. Bochner is a shareholder of 287 7th Avenue Realty LLC, a limited liability company, which owns the property located at 287 7th Avenue, a mixed-use building with one commercial space. (A-4245 ¶ 3). Mr. Bochner and his family rely on the rental payments for their company and he requires "good guy" guaranties for all of his commercial tenants in the regular course of business. (A-4247 ¶ 14). Like thousands of commercial landlords throughout New York City, Mr. Bochner would not have entered into any lease agreements with a small business if not for the "good guy" guarantee given by the principals of the business. (Id.).

The principal of the commercial tenant at 287 7th Avenue – Sunburger 1 LLC ("Sunburger") – agreed to a "good guy" guaranty with a six-month notice provision. (Id. at ¶ 15). Starting in December 2019, even before the pandemic, Sunburger defaulted in paying full rent. (Id. at ¶ 16). On March 20, 2020, Sunburger provided notice of its intent to surrender the property on September 20, 2020, agreeing to be liable for six months of rent, but avoiding rent beyond that point by handing the premises back over to Mr. Bochner. (Id.) Both parties agreed that pursuant to the "good guy" guaranty, Sunburger's principal pay rent until September 20, 2020. (A-4248 ¶ 17). However, Sunburger's principal defaulted, and because of the Guaranty Law, the personal guaranty can no longer be enforced and Mr. Bochner now has no practical means under the commercial lease agreement to collect unpaid rent pursuant to the parties' agreement. (Id. at ¶ 18). The Guaranty Law has canceled the six month's rent payments the parties agreed upon and rendered the commercial lease virtually valueless for the period March 20, 2020 to March 20, 2021. (Id.)

The Guaranty Law threatens to bankrupt Mr. Bochner's small business. Because it has been unable to recover unpaid rent amounts (approximately $110,000), 287 7th Realty LLC may not have sufficient assets to continue to operate as a going concern and may not be able to meet the tax obligations and operational expenses of the property. (Id. at ¶¶ 19, 20). Indeed, Mr. Bochner had

to pay the $35,000 in taxes for the property due July 1, 2020 using his own personal funds. (Id. at ¶ 20)

B. The Harassment Laws

The Commercial Harassment Law[4] forever creates a new form of "harassment" that makes it extraordinarily difficult to collect back rent owed during a specific period of time. The law extends the existing harassment section of the Administrative Code to prohibit landlords from "threatening" a commercial tenant based on either: i) the "tenant's status as a person or business impacted by COVID-19"; or ii) the "tenant's receipt of a rent concession or forbearance for any rent owed during the COVID-19 period." (A-47 ¶ 121). Violations of the law are punishable by a civil penalty of between $10,000 and $50,000 and plaintiffs may recover attorneys' fees and punitive damages. N.Y.C. Admin. Code § 22-903(a), (a)(3).

The Residential Harassment Law extends the protection of Section 27-2004(a)(48) of the Administrative Code to prohibit landlords from "threatening" a residential tenant who has: i) "actual or perceived status as an essential employee"; ii) "status as a person impacted by COVID-19"; or iii) received a rent concession or forbearance for any rent owed during the COVID-19 period…" (A-50 ¶ 128).

[4] Amended Section 22-902 of the N.Y.C Administrative Code.

Violations of the law are punishable by a civil penalty of between $2,000 and $10,000 and plaintiffs may recover attorneys' fees and punitive damages. N.Y.C. Admin. Code § 27-2115(m)(2), (h)(i), (o); § 27-2005)(d).

Neither the Commercial nor the Residential Harassment Law defines the term "threatening." (Id. at ¶ 129). Nor are the Harassment Laws – which potentially cover tens of thousands of business and millions of individuals in the City – narrowly tailored to protect only those truly injured by the pandemic.

i. The Harassment Laws' Impact on Appellants

Appellant Marcia Melendez ("Ms. Melendez") owns two properties in Brooklyn through Appellant Jarican Realty Inc. and 1025 Pacific LLC (the "Melendez Companies" and together with Ms. Melendez, the "Melendez Appellants"). (A-1330-31 ¶¶ 3-6). Originally from Jamaica, Melendez immigrated to the U.S. at the age of 17. (A-1331 ¶ 7). Ms. Melendez and her husband funded the purchase of the two properties they own in Brooklyn. (Id. ¶¶ 10, 12). In 2000, they bought their first property located at 547 Nostrand Ave., Brooklyn, New York, scraping together the funds for the down payment, and taking out loans to fund extensive renovations. (Id. ¶¶ 10–11). In 2016, Ms. Melendez and her husband invested in the purchase of the second Brooklyn property located at 283 East 55th St. (Id. ¶ 12). In 2017, Ms. Melendez and her husband retired. (Id.). They rely on the rent payments from their two properties to fund their retirement.

(A-1331-32 ¶¶ 13–14). They also rely on this rent revenue to pay various tax and mortgage obligations on the properties, as well as to fund maintenance on the properties. (A-1332 ¶¶ 15–18).

Appellant Ling Yang ("Ms. Yang") and her son own two properties in Queens, New York through Haight Trade LLC and Top East Realty LLC. (A-1323-24 ¶¶ 3-6). Ms. Yang is originally from the People's Republic of China, and arrived in the U.S. with very little money, and unable to speak, read or write English. (A-1324 ¶¶ 7, 8, and 10). For years, she worked hard to support herself and her family. (Id. ¶ 11). She was employed as a housekeeper, as a nanny, in restaurants, at a clothing factory, and in food delivery. (Id.) In 2002, she started and invested in small businesses using the savings she accumulated through her jobs and the assets from her life in China. (Id. ¶¶ 12-14). In 2012, Ms. Yang invested in the purchase of the property located at 41-18 Haight St., Flushing, N.Y. (A-1325 ¶ 15). Several years later, she invested in the purchase of a second property located at 4059 College Point Blvd., Flushing, N.Y. (Id. ¶ 16). Ms. Yang funded these purchases with money from the sale of assets in China, and her life savings. (Id. ¶ 17). Like many other small businesses throughout New York City, the Yang Companies are not yet profitable: all of the rent payments need to be dedicated to pay various tax and mortgage obligations, plus expenses related to maintaining the two buildings. (A-1325-26 ¶¶ 19-23). Ms. Yang also plans to

support herself and her family during her retirement from the rent payments once additional principal on the mortgage loans are satisfied. (A-1326 ¶ 23).

Prior to the passage of the Harassment Laws, the Melendez and Yang Appellants communicated from time-to-time with delinquent tenants concerning unpaid rent. (A-1333 ¶¶ 21, 25); (A-1328 ¶ 34). Both sent notices of late rent, additional demand notices and sought to recover unpaid rent in housing court. As a result of the eviction moratorium, however, the Melendez Appellants have had a tenant remaining in their premises without paying rent from April 2020 to the present. Another commercial tenant at 547 Nostrand Avenue, whose rent makes up half the rent roll for the property, has not made any rent payments since February 2020. (A-1333 ¶¶ 23-24).

Since the Harassment Laws were passed both the Melendez and Yang Appellants have stopped even mentioning to their tenants the consequences of their continued failure to pay rent and have halted any attempt to enforce their contractual rights out of fear that such statements could be considered "harassment." (A-1328 ¶ 35; A-1334 ¶ 26). The fear is particularly acute because residential tenants at Ms. Melendez's properties had previously accused her of "harassment" simply for seeking payments through demand notices before the passage of the Harassment Laws. (A-1333 ¶ 21, A-1334 ¶ 29). Due to their continuing inability to collect the full rent on their properties, the Melendez and

Yang Appellants are struggling to meet their property tax and mortgage obligations. (A-1334-35 ¶ 30; A-1328 ¶¶ 36-38). If this hardship continues, Appellants face the prospect of financial ruin.

STANDARD OF REVIEW

This Court reviews issues of law *de novo*. In First Amendment cases, "an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." Safelite Grp., Inc. v. Jepsen, 764 F.3d 258, 261 (2d Cir. 2014) (internal citations and quotation marks omitted).

ARGUMENT

I. THE GUARANTY LAW IS UNCONSTITUTIONAL UNDER THE SECOND CIRCUIT'S CONTRACT CLAUSE FRAMEWORK

The test to determine whether a law treads unconstitutionally on contract rights is well-settled. The Second Circuit determines: (1) whether the contractual impairment is substantial; (2) whether the state action serves a legitimate purpose; and (3) whether the means chosen to accomplish the purpose are reasonable and necessary. Sullivan v. Nassau Cty. Interim Fin. Auth., 959 F.3d 54, 64 (2d Cir. 2020), cert. denied, 20-560, 2021 WL 78148 (Sup. Ct. Jan. 11, 2021). Here, while the District Court correctly found a substantial impairment, the Court erred in its analysis of the second and third prongs. On the second element, the Guaranty Law serves only a discrete "special interest" group – commercial tenants – and therefore

fails to serve a legitimate public purpose. While the District Court held that the third question of whether the legislation was reasonable and necessary "present[ed] the closest question," the analysis should not have been a close one. The Guaranty Law – introduced and enacted into law in just a few short weeks – was neither reasonable nor necessary in light of readily available, far less draconian alternatives never even considered by the Council. Accordingly, this Court should reverse the District Court's Order regarding the Guaranty Law.

A. The Contractual Impairment Was Substantial

The threshold inquiry of any Contract Clause claim is "whether the state law has, in fact, operated a substantial impairment of a contractual relationship." Energy Reserves Group, Inc. v. Kansas Power and Light, 459 U.S. 400, 411 (1983). Contractual impairments that go to the heart of a contract are substantial under long-established case law. U.S. Trust Co., 431 U.S. at 26-27. As the District Court recognized, whether a substantial impairment has occurred depends upon "the extent to which the reasonable expectations under the contract have been disrupted," Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 993 (2d Cir. 1997), which in turn depends largely on "whether the legislative action was foreseeable." Sullivan, 959 F.3d at 64.

The District Court correctly held – and there can be little doubt – that the Guaranty Law operates as a substantial impairment. The imposition of the

legislation, like the pandemic itself, was "entirely unforeseeable." (SPA- 26). Moreover, in the commercial leasing industry the personal guaranty is a "primary inducement" for a commercial landlord to enter into a lease with a tenant and therefore goes to the heart of any executed lease. (Id.) Finally, the District Court recognized the severity of the Guaranty Law, underscoring the permanence of the measure and the undisputed fact that Plaintiffs, such as Appellant Bochner, and others impacted like him, "will never be able to collect from the personal guarantor money due and owing between March 2020 and March 2021, even after the pandemic ends." (SPA-21, SPA-27).

Yet, the Court's analysis did not go far enough. The Guaranty Law not only disrupts contractual arrangements, it *obliterates* reasonable expectations in existing commercial leases. For many landlords, including Appellant Bochner, a personal guaranty constitutes a property owner's only remedy to regain possession of the leased premises pursuant to a "good guy" provision, to re-let fallow properties, and to recover unpaid rent absent protracted court proceedings. For commercial landlords whose tenants fail to pay rent from March 2020 to March 2021, the Guaranty Law extinguishes an "essential provision" of the commercial lease. (SPA-26).

Aside from the inequity, the severity of the impairment matters to the Contract Clause analysis. The degree of the abrogation impacts how reasonable

the impairing legislation must be to pass constitutional muster. The more severe the impairment, the higher the level of scrutiny. As the Supreme Court has articulated it, "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978). Legislation that operates as a severe impairment of contract "will push the inquiry to a careful examination of the nature and purpose of the state legislation." Id.

Here, while recognizing that the Guaranty Law operates as a "substantial impairment," the District Court failed entirely to follow Supreme Court precedent and to balance the severity of the impairment with the reasonableness of the law. There was no "careful examination" of the nature and purpose of the Council legislation. Instead, despite acknowledging that the law benefits only commercial tenants, the District Court deemed it inappropriate to "opine on the wisdom of the policy decision at issue here" and insisted that the policy decision "be left to the policymakers." (SPA-30, SPA-31).

The error in the District Court's complete deference to the Council in light of the substantial contractual impairment may be best illustrated by the Supreme Court's decision in Spannaus, 438 U.S. 234. There, the Supreme Court voided a Minnesota law that superimposed additional pension obligations on private employers beyond those it had agreed to undertake. Id. at 240. The Supreme

Court held that the effect of the legislation was severe, forcing a recalculation of benefits and additional funding to employers' pension funds which "nullifi[ed] express terms of the company's contractual obligations and impos[ed] a complete[] unexpected liability." Id. at 247. Because of the "severe disruption of contractual expectations," the Supreme Court held that the normal "presumption [of] favoring legislative judgment as to the necessity and reasonableness of a particular measure" simply "cannot stand." Id. at 247 (internal quotations omitted).

The similarities here to Spannaus on this prong of the Contract Clause analysis are manifest. Because of the nature of this severe impairment and the unforeseen and complete evisceration of all personal guaranties, the presumption of favoring legislative judgment should not stand. The nullification of an express term of a commercial landlord's private contract requires a more robust showing that the legislation is "necessary to meet an important general social problem." Id. Accordingly, the District Court should not have completely deferred to the Council in assessing the reasonableness of the Guaranty Law.

B. The Guaranty Law Fails To Serve A Legitimate Purpose

If a law operates as a substantial impairment, courts must next determine whether its enactment furthers a legitimate public purpose. See Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 368 (2d Cir. 2006). The legitimate public purpose requirement ensures that a government exercises its police power to benefit the

general welfare, rather than merely providing a benefit to a political or "special interest." Sanitation & Recycling Indus. Inc., 107 F.3d at 993. Historically, laws prescribing a rule of general applicability having an incidental impact on contractual obligations are more likely to be upheld, whereas those that "directly adjust the rights and responsibilities of contracting parties" are more likely to be struck down. Exxon Corp. v. Eagerton, 462 U.S. 176, 191 (1982)(internal quotations omitted). Even when legislators invoke the public welfare, "legislative perception regarding the more worthy recipient" of state assistance "does not render a complete divestiture of contractual rights a legitimate state interest." W. Nat'l Mut. Ins. Co. v. Lennes (In re: Worker's Compensation Refund), 46 F.3d 813, 821 (8th Cir. 1995).

Here, stressing the "wide berth" allowable to infringe upon private contractual rights, the District Court held that the Guaranty Law "advances the public interest," despite its recognition in the very same analysis that, at least "on its face," the Guaranty Law "*benefits only commercial tenants*." (SPA-27 – SPA-28 (emphasis added)) The fundamental error in the Court's decision is that it simply assumed the Guaranty Law benefits the public interest because the legislation did not benefit the Council itself. (SPA-27). The Court emphasized that "critically," unlike cases such as Sullivan, there was no allegation that the Council passed the Guaranty Law to breach its own public contracts or to "reneges

to get out of a bad deal." (SPA-28). While true, that does not end the analysis. Not every piece of legislation impairing private contracts automatically passes the "legitimacy" prong because it is not self-serving in nature. Courts must still cast a critical eye – far more than the District Court applied below – to discern whether the "public interest" invoked actually benefits the public. Merely parroting the "public interest" language and using precatory language in a statute claiming it is designed with the public welfare in mind is insufficient. In other words, while the Council paid lip service to the "public interest," the District Court actually should have engaged a closer analysis aided by the record, rather than simply take the Council's word for it.

In re: Worker's Compensation Refund, a decision from the Eighth Circuit, proves this point. There, the Minnesota legislature passed a law retroactively redistributing $400 million in excess reinsurance premiums from 1972 to 1992 from insurers to employers in violation of the existing contract rights of insurers who paid and expected to receive any excess premium. 46 F.3d at 821. The legislators claimed to benefit the "public welfare" by lowering employer costs in Minnesota and eliminating windfall profits for insurance companies. Id. In fact, the legislative findings for the statute indicated that employers were a more "worthy recipient" of any windfall premium refunds than insurance companies. Id.

The district court "assumed" a significant and legitimate public purpose because the statute's stated rationale was to benefit the "public welfare." Id. at 820. However, the Eighth Circuit rejected that reasoning, holding that "[e]ven when public welfare is invoked as a justification, the security of a contract cannot be cut down without 'moderation or reason or in the spirit of oppression.'" Id. (citing Spannaus, 438 U.S. at 243). The Eighth Circuit found that "[d]espite its sweeping language about benefitting the broad societal interest or class, the statute's retroactive implementation benefits only a selected few" and did not actually "benefit all Minnesota employers." 46 F.3d 821. Accordingly, the Eighth Circuit struck down the legislation based on its failure to meet the public purpose requirement.

The similarities here to the Eighth Circuit's decision are self-evident. Here, as in In re: Worker's Compensation Refund, the District Court "assumed" the Council passed the Guaranty Law to benefit the "public interest." (SPA-27). Yet, despite purporting to serve a broader societal interest, the Guaranty Law's retroactive implementation "directly benefits only commercial tenants" only. (SPA-27). While perhaps politically more advantageous for the Council to allocate contractual burdens away from tenants to landlords – just as the Minnesota legislature deemed it more "worthy" to benefit employers at the expense of insurers – "the security of a contract cannot be cut down without moderation or

reason." In re: Worker's Compensation Refund, 46 F.3d at 821. "Legislative perception regarding the more worthy recipient," here commercial tenants, does not render the complete abrogation of contract a "legitimate state interest." Id.

Perhaps the best evidence the Council did not have a legitimate purpose in enacting the Guaranty Law is the difficulty the District Court had in even articulating the Council's purpose. The Court wrote that the reasonableness of the measure was "difficult to discern" because the "[t]he City's aim *seems to be* to protect small business owners from personal financial ruin on the heels of the pandemic-related closure of their businesses." (SPA-30 (emphasis added)). The stated objective at the Council hearing was "so that city business owners don't face the loss of their businesses and also personal bankruptcy." (A-105, Decl. ¶ 86, A. 680-681. Yet, when all the laws, including the Harassment Laws, were passed by the Council, the press release revealed yet another supposed public purpose, claiming the laws were essential so "New Yorkers get the rent cancellation they need." (A-95, ¶ 54, A-517).

Regardless of the confused stated aim, the pandemic affects small business owners who are *tenants and landlords alike* and the record is bereft of any evidence demonstrating that favoring commercial tenants actually benefits the public-at-large. Indeed, none of the following facts presented by the City, and exclusively relied upon by the District Court, demonstrate that the Guaranty Law

actually benefits the "public interest": (i) a report of the New York City Municipal Government, suggesting that "small businesses employ nearly half of New York City's workforce"; (ii) an amicus submission, similarly indicating that "[s]mall businesses represent 98% of New York City's employers and provide employment for over 3 million people"; and (iii) brief testimony from law's author that the Guaranty Law seeks to prevent small business owners from being "pushed into both business and personal bankruptcy." (SPA-27 – SPA-28).

It cannot be seriously disputed that these top-line statistics about the number of small-businesses in the City and their number of employees have little, if any, bearing on whether the Guaranty Law actually helps these small businesses or the City, more broadly. Moreover, nothing in these statistics proves, in any way, that the provisions of the Guaranty Law protect or promote the public interest. Nor is there any evidence in the record that the Guaranty Law provides any relief at all to the three million people employed by small businesses. Even more, the self-serving testimony from the legislation's author demonstrates the duplicitous nature of the Guaranty Law—while its stated goal is to prevent small business owners from being pushed into both business and personal bankruptcy, the Guaranty Law does nothing to help small business landlords, like Appellant Bochner, who will suffer a similar fate of insolvency from failing to be able to

exercise the appropriate remedies under the personal guaranty he received in connection with the commercial lease. *See*, Section C below.

In fact, far more relevant statistics in the record counsel against the legislation and suggest the "public interest" and the overall City economy and its residents will actually *suffer* from its implementation. Reports from the City's IBO, for example, project a multi-billion dollar deficit over the next three years for the City's budget and explain that real estate related taxes account for approximately half of the City's tax revenue. Real estate property tax is the City's largest source of tax revenue. (A-86-87 ¶ 19-21). The IBO recognized that landlords' ability to lease commercial space and collect rent is vital to the City's economy and that "projected increases in delinquencies and cancellation" will impede landlords' ability to pay their property taxes. (Id. at A. 86 ¶ 20.) If property owners are starved of revenue to pay taxes, the City will in turn be starved of an enormous revenue stream that helps pay for critical public services for all New Yorkers. None of this record evidence was seriously considered by the Council nor analyzed by the District Court.

Public reporting also confirms that the Guaranty Law has created a perverse incentive where financially healthy tenants, particularly national retail chains (decidedly not those facing personal bankruptcy) have taken advantage of the crisis to get better deals and force commercial landlords to renegotiate leases and offer

steep discounts. (A-85 ¶ 16). In turn, commercial landlords have started requesting concessions or restructuring of their own loans from banks, which have some $2.38 trillion of commercial real estate loans on their books. (A-85). Changes in the laws and the inability to collect rent has left landlords scrambling to pay annual property taxes on their buildings. (Id.) Commercial real estate collections on a monthly basis have been down between 43% and 66% since this past summer.

The real estate sector is the City's economic engine. While the pandemic has caused the engine to stall, legislation such as the Guaranty Law threatens to drive the market into even deeper and more permanent economic distress. Rather than hasten the City's financial recovery, the Guaranty Law will likely delay it. Plainly stated, the Guaranty Law fails to serve the "public interest."

C. The Guaranty Law Is Not Reasonable

Even if the Guaranty Law was enacted for a legitimate public purpose—and Appellants submit it was not—the means chosen to achieve that goal must still be "reasonable and appropriate." Sanitation and Recycling Industry, Inc., 107 F.3d at 993. A law that works a substantial impairment of contractual relations must be "specifically tailored to meet the societal ill it is supposedly designed to ameliorate." Id. As noted, the more severe the impairment, the greater level of scrutiny that is required. Energy Reserves, 459 U.S. at 411. The failure of a

legislature to consider any less restrictive alternatives constitutes, at the very least, strong evidence that the law is unreasonable. Buffalo Teachers, 464 F.3d at 368; Sveen v. Melin, 138 S. Ct. at 1829 (Gorsuch, J. dissenting) ("our cases suggest that a substantial impairment is unreasonable when an evident and more moderate course would serve the state's purpose equally well.") (citation omitted).

The District Court found this third prong of the Contract Clause analysis presented "the closest question," yet ultimately found the Guaranty Law reasonable and necessary. (SPA-28). A more searching review, however, would have revealed the Guaranty Law is so categorial in nature and so wide sweeping in its coverage, that it far overreaches its stated objectives and is hardly reasonably drawn to meet the societal ill it superficially seeks to ameliorate.

1. The Guaranty Law Is Unreasonably Designed

The Guaranty Law forever cancels personal guarantees for a year-long period without any regard to the particular circumstance of the commercial tenant or the commercial landlord—demonstrating it is neither reasonable nor appropriate to achieve its purported purpose of preventing loss of business or personal bankruptcy. Indeed, while some commercial tenants have been disproportionately impacted by COVID-19, others or the well-capitalized principals behind them have not seen their financial situations change. Moreover, commercial landlords are also small business owners – the precise population the legislation is ostensibly

designed to protect – who themselves rely on rent collection to meet numerous tax and mortgage obligations and expenses for properties and themselves will be at risk of personal bankruptcy if they cannot enforce their contracts.

In its decision, the District Court reasoned that the Guaranty Law was reasonable because (1) it was limited to a subset of commercial leases; (2) the law is limited to those debts between March 2020 and March 2021; and (3) the legislation leaves commercial landlords with other means through which they can recoup the rental income they have lost. (SPA-31, SPA-32). The Court therefore concluded that the law is reasonable because it is not without '"limitations as to time, amount, circumstances, or need.'" (SPA-33) (quoting W.B. Worthen Co. v. Thomas, 292 U.S. 426, 434 (1934).

The District Court's conclusion is flawed. First, with respect to scope, the Court assumed the Guaranty Law applied to a subset of commercial leases because it covered businesses "serving patrons food or beverage for on-premises consumption" and other business required to close pursuant to executive order. (SPA-31) (citing N.Y.C. Admin. Code § 22-1005(1)(a). However, the requirements hardly create a meaningful limitation of coverage or circumstance. According to the City, the "subset" of commercial leases as the Court describes it represents approximately 2,100 bars and 27,000 restaurants. (A-105 ¶ 86). Thus, tens of thousands of landlords may be impacted by the Guaranty Law, regardless

of their tenant's financial status. (Id.) It is hard to see how the District Court could find this legislation sufficiently circumscribed when it potentially impacts so many New Yorkers.

Second, the District Court ruled that the law is reasonably tailored because it is "temporally limited in that it only applies to those debts that arose between March 2020 and March 2021." (SPA-31). In so holding, the Court expressly relied upon the facts of this Court's ruling in Buffalo Teachers to underscore the importance of the temporary nature of the Guaranty Law.

The District Court's decision, however, misapplies Buffalo Teachers and underestimates the impact of a permanent forfeiture of a year's rent for a small landlord in the City. Specifically, the temporary and *prospective* nature of the wage freeze in Buffalo Teachers made the legislation reasonable to this Court (and the freeze was enacted after far more draconian measures had been tried and failed). The City of Buffalo froze wages of municipal workers only on a *going forward* basis. Municipal workers in Buffalo still received their salary, but their scheduled increases were put on hold. Here, rent that is owed to commercial landlords has been entirely repudiated. If the City of Buffalo had retroactively canceled the ability of teachers to recover *earned wages*, that would be analogous to the Council's measure. This distinction is determinative. The Court in Buffalo Teachers found the prospective impairment to be a critical distinction from cases

such as U.S. Trust Co. because the repudiation of contract did not "affect past salary due for labor already rendered." Buffalo Teachers, 464 F.3d at 372. Not so here. The Guaranty Law unassailably prevents the recoupment of past rent properly due and owing.

Additionally, in Buffalo Teachers the question of "legitimate purpose" was clear; there was no serious question that temporarily freezing the wages of public sector workers would inure to the benefit of the overall public fisc. Here, by contrast, and as detailed *supra* at Point I.B, the overall City budget is likely to be *harmed* by the Guaranty Law and the measure does not benefit the public-at-large, but rather a specific subset of commercial tenants with personal guaranties that can no longer be enforced.

The Guaranty Law also *permanently* prevents landlords from ever recovering rent lost during this time period. The seminal Supreme Court case of Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) is instructive. In Blaisdell, in order to forestall a massive foreclosure crisis during the Great Depression, Minnesota passed the Minnesota Mortgage Moratorium Act, which gave mortgagors an extended redemption period in which the mortgagor could remain in possession of the property. Id. at 441. The law was upheld and deemed "reasonable" by the Supreme Court because the underlying "integrity of the mortgage indebtedness was not impaired" *and* the mortgagor was still required to

pay the fair rental value of the premises and interest on the mortgage, albeit at a later point in time. Id. at 445. The Court made clear that it was critical that the mortgagee not be "left without compensation for the withholding of possession." Id. Thus, even in the midst of the Great Depression, owners of property could still collect income because the Court recognized that legislation could "only be of a character appropriate to that emergency" and only upon "reasonable conditions." Id. The legislation sought to prevent the "impending ruin" of *both* mortgagor and mortgagee by passing legislation that had the interests of both parties in mind. Id. at 446.

It is difficult to understand why similar "reasonable conditions" could not have been enacted here. Just as in Blaisdell, the Council could have provided relief, "appropriate to the emergency," by giving commercial tenants temporary relief without sacrificing the "integrity" of the security to which the landlord is entitled. It was wholly unreasonable to ignore the interests of the landlord in passing the Guaranty Law, when, as set forth in greater detail below, any number of alternative measures could have sufficiently protected both the commercial landlord and tenant in need of emergency relief.

Indeed, this case more resembles the Supreme Court's lesser known case decided shortly after Blaisdell, W.B. Worthen Co. ex. Rel. Bd. of Comm'rs of St. Improvement Dist. No. 513 of Little Rock, Ark. v. Kavanaugh, 295 U.S. 56

(1935), where it held that an Arkansas mortgage moratorium law which effectively provided for no payment of interest or principal to mortgage holders for six years violated the Contract Clause. The Court in Kavanaugh found the statute unconstitutional because the statute with "studied indifference to the interests of the mortgagee…[had] taken from the mortgagee the quality of an acceptable investment for a rational investor." 295 U.S. at 60. This Court should reach the same conclusion here.

Lastly, the District Court held the Guaranty Law "leaves commercial landlords with other means through which they can recoup the rental income they have lost." (SPA-32). In so holding, the Court reasoned that "Plaintiff remains free to attempt to recover unpaid rent and interest from tenants, charge late payment fees, terminate the tenant's right to possession, evict the tenant, and recover damages." (SPA-32).

The Court's rationale is specious. Putting aside the fact that landlords generally look to the guarantor *only after* the tenant has defaulted on the rent, so seeking payment from the tenant is futile, because of the host of COVID-19 tenant protections already in place, landlords are decidedly *not* free to recover unpaid rent and interest, evict tenants, or to terminate a tenant's right to possession. See, e.g., Executive Order No. 202.8, 202.48 (establishing and extending the moratorium on commercial eviction proceedings); see also Executive Order 202.28, 202.38

(prohibiting demands for late fees and requiring landlords to provide relief and concessions on interest for rent that is in arrears).

In reality, for landlords with a "good guy" guaranty, the Guaranty Law wipes out a commercial landlord's most important remedy, which allows for guarantors to have tenants "turn-over the keys" for properties for which neither the tenant nor guarantor want to continue paying. The Council never even discussed the "good guy" guaranty and the District Court wholly ignored the significance of eliminating it. The "good guy" guaranty allows the tenant to simply walk away from its obligations if its business fails and it permits the landlord to retake possession of the property and re-let the premises, rather than engage in protracted eviction proceedings, while its commercial property remains fallow.

In eliminating any incentive to utilize the "good guy" guaranty, the Guaranty Law deprives commercial landlords—like Appellant Bochner, whose guarantor defaulted with impunity, even after the tenant agreed to turn over the keys—of their principal existing remedy of recoupment, contrary to the District Court's conclusion. It rips from commercial leases in New York City the one contractually bargained-for provision that – far more than the Guaranty Law itself – is narrowly tailored to avoid a tenant's personal bankruptcy while still protecting a landlord's rights.

2. The Council Failed to Consider Other, Less Draconian Measures Short of Eliminating the Personal Guaranty

The Guaranty Law was introduced on April 22, 2020; the Council held hearings concerning the law on April 28, and April 29, 2020; and on May 13, 2020, the Council passed all the Laws, which were signed by the Mayor on May 26, 2020 at a "public hearing" where only three speakers spoke. Thus, in a few short weeks, the Council introduced, debated and enacted the Guaranty Law. None of the summaries of the terms of the law, the Committee Reports or any of the testimony at the Council hearings produced any empirical evidence supporting elimination of the personal guaranty. Nor did any of the analyses or testimony discuss the scope of the proposed law, its likely impact or whether there were any less burdensome alternatives to an outright permanent cancellation of the personal guaranty. (A-98 ¶ 64).

The record demonstrates that dissenting Council Members were concerned that the body's failure to more fully explore the scope or impact of the law or less draconian alternatives. Council Member Koo warned that the City "need[ed] to address th[e] ecosystem as a whole and find a comprehensive solution for all, including small landlords who are struggling to make payments and meet their obligations." (Id. at A-97 ¶ 59 (internal quotation marks omitted)). Others such as Council Member Cabrera questioned whether there were other less onerous means to achieve the stated purpose of rent cancellation, and if it made "more sense to

have the state come up with a fund to pay for [] rent, just like Delaware." (Id. at A-97 ¶ 60).

Had the Council conducted any analysis at all, any number of reasonable alternatives to assist personal guarantors could have been enacted without canceling the guaranty. The City could have declared a temporary moratorium on these guaranties or extended the time within which the guarantor could pay. The City could have also offered low interest loans to affected guarantors. With respect to the "good guy" guaranty, the Council could have just as easily relieved tenants of their rent obligation but still allowed a commercial landlord to retake possession of the commercial premises upon a tenant's default, or upon a reasonable amount of time after default.

Perhaps most obviously, the City could have included a substantial injury requirement to avoid well-capitalized commercial tenants taking advantage of the Guaranty Law. This clearly less restrictive alternative – never considered – dooms the Guaranty Law and demonstrates that it is far more extensive than necessary. Any type of substantial injury requirement would have achieved the stated goal of business owners not "fac[ing] the loss of their business and also personal bankruptcy," without a wholesale repudiation of virtually all personal guaranties. Contract Clause caselaw is clear that a governmental entity cannot "impose a drastic impairment when an evident and more moderate course would serve its

purposes equally well." U.S. Trust Co., 431 U.S. at 30-31. A substantial injury requirement was an "evident and more moderate course" that would have served the Council's purposes equally well. The Council's failure to consider less restrictive alternatives short of eliminating personal guaranties further demonstrates the Guaranty Law is unreasonable and unnecessary.

3. The Guaranty Law Was Not Necessary

For the foregoing reasons, the Guaranty Law was not reasonable to achieve the legislation's stated purpose. There were myriad ways to advance the public interest without so violently stripping landlords of their contractual rights. The absence of any real analysis done by the Council before enacting the Guaranty Law demonstrates that impairing Appellants' contracts was not only considered on par with other alternatives, it was the preferred alternative. The Guaranty Law was neither reasonable nor necessary.

In a telling passage from the District Court's Order, the Court explained that in considering a law's necessity, courts have "looked to whether the law in question seeks to address a real emergency." (SPA-29). The Court concluded that because "there can be no doubt the City is in crisis," the "law is 'necessary' for the purposes of this analysis." (Id.)

One does not follow from the other. While courts certainly look to whether a true crisis exists in determining if a measure is necessary, an assessment of

emergency circumstances is not the only part of the "necessity" analysis. Instead, courts look to whether the impairment is greater than necessary to meet the legitimate public purpose. U.S. Trust Co., 431 U.S. at 29-30 (criticizing the "total repeal" of a bond covenant when a "less drastic modification would have permitted the contemplated plan without entirely removing the covenant's limitations.") Here, as detailed above, it was not.

Finally, in addition to alternatives not tried, the Guaranty Law is unnecessary because there are already a plethora of legislative protections designed to mitigate the pandemic's economic impact. Among other measures, gubernatorial orders predating the Guaranty Law provide for: 1) a moratorium on tenant evictions, 2) a requirement that landlords provide certain rent relief to tenants if they face financial hardships due to COVID-19, and 3) a temporary prohibition against demands for payment of fees or charges for late payment of rent. (A-91-93 ¶¶ 37, 39, 41-43).[5] Notably, the relief extended under these three provisions was restricted to those New Yorkers who have suffered substantial injuries. (Id.) Even if the Guaranty Law was necessary – and these significant protections for commercial tenants demonstrate it was not – at the very least, the Governor's executive orders should have provided a clear model for the Council to

[5] New York State also launched the New York Forward Loan Fund, a program aimed at providing working capital loans to small businesses. (A-94 ¶ 49-50).

enact a more evenhanded and far more narrowly tailored law to address the needs of New York City commercial tenants. The Council, however, ignored such guidance and enacted a Guaranty Law which unnecessarily tramples on the valuable contractual rights negotiated by commercial landlords, and which if left unremedied by this Court, will further stifle the future recovery of the City of New York. Accordingly, this Court should reverse the District Court's Order finding the Guaranty Law constitutional.

II. THE HARASSMENT LAWS VIOLATE APPELLANTS' FIRST AMENDMENT RIGHTS

In Central Hudson, the Supreme Court established the well-settled four-part test to determine the constitutionality of content-based restrictions on commercial speech.[6][7] Courts must first determine whether "(1) the speech restriction concerns lawful activity;" and then determine whether "(2) the [government's] asserted interest is substantial; (3) the prohibition 'directly advances' that interest; and (4)

[6] It is undisputed that the Harassment Laws implicate and restrict commercial speech because they "restrict[] . . . expression related solely to the economic interests of the speaker and its audience" as to efforts to collect on bills, and concern "lawful activity." Central Hudson, 447 U.S. at 561, 563 (internal citations omitted); see also Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 113 (2d Cir. 2017).

[7] Appellants challenged the Harassment Laws under both the United States Constitution and the New York State Constitution. The District Court declined to exercise supplemental jurisdiction over Appellants' state constitutional claims. (SPA-17 – SPA-18 n.8).

the prohibition is no more extensive than necessary to serve that interest"—in other words, the law is narrowly tailored. Vugo, Inc. v. City of New York, 931 F.3d 42, 51 (2d Cir. 2019) (citing Central Hudson, 447 U.S. at 566). Importantly, Appellees bear the burden of proving that the restriction directly advances a substantial government interest, and that it does so by means no more extensive than necessary. Id. at 52.

The District Court erred in holding that the Harassment Laws do not implicate Appellants' free speech rights by relying on Appellees' bald representations regarding the meaning of the provisions at issue while disregarding the Laws' plain language and expansive scope. The District Court's holding also provided no clarity on what speech is proscribed under the Harassment Laws, leaving Appellants and other New York City landlords in the dark.

Further, the Laws also fail the last two prongs of Central Hudson, because the prohibitions do not directly advance a substantial government interest, and are significantly broader than necessary to serve that interest, particularly in light of other, less restrictive options never meaningfully considered by the Council. The Laws are also void for vagueness under the Due Process Clause.

Thus, this Court should reverse the District Court's Order and find the Harassment Laws unconstitutional.

A. The Harassment Laws Restrict Appellants' Lawful Speech

A restriction on commercial speech "concerns lawful activity" so long as the speech it restricts does not "necessarily constitute an illegal act." Centro de la Comunidad, 868 F.3d at 114. Here, the Harassment Laws restrict Appellants' lawful speech. In a pre-enforcement claim like the one here, Appellants need not establish their speech is certainly proscribed to demonstrate an injury in fact. Rather, Appellants need only show that (1) their future course of constitutionally protected conduct is "arguably proscribed" and (2) there is a "credible threat of [enforcement]." Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159-65 (2014) (quotations omitted). Appellants easily meet both requirements here.

1. The District Court Disregarded the Plain Meaning of the Harassment Laws and Instead Relied on Appellants' Interpretation of Key Language

It is worth pointing out at the outset that the Harassment Laws purportedly prohibit landlords from "threatening" a commercial or residential tenant, but fail to provide any definition of this key term. Thus, the term must be interpreted in accordance with its "plain meaning," which here generates more confusion than clarity for landlords. Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583 (1998). A landlord's communication that she intends on pursuing eviction proceedings falls squarely within the plain meaning of "threatening" as articulated by the Second Circuit: "a denunciation to a person of ill to befall him

. . . a declaration of hostile determination or of loss . . . punishment, or damage to be inflicted in retribution for or conditionally upon some course," or "an indication of impending danger or harm." U.S. v. Davila, 461 F.3d 298, 302 (2d Cir. 2006) (internal citations and quotation marks omitted). As the District Court acknowledged, "to most, being told that failure to pay rent may result in the loss of their home would constitute '[a]n indication of impending danger or harm.' It is hard to imagine many things as traumatic as being forced from one's home." (SPA-20) (internal citations omitted).

Despite this basic acknowledgement, the District Court nonetheless relied on the City's assurances that rent demands are not prohibited under the Harassment Laws. (SPA-17 ("[a]s the City avows, the Harassment Laws do not prevent landlords from asking their tenants for rent due"); see also SPA-18 (citing Tr. at 35:23, 38:15-25)).

Appellants, however, should not be expected to rely on this interpretation of a broad and unclear restriction simply because "the City's attorneys . . . say so." Id. First, the City can always change its mind in the future: its current representations are not necessarily binding, and Appellants cannot claim estoppel if the City later chooses to interpret the Harassment Laws to proscribe demands for overdue rent. See Vermont Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 383 (2d Cir. 2000) ("The State also argues that VRLC's fear of suit could not

possibly be well-founded because the State has no intention of suing VRLC for its activities. While that may be so, there is nothing that prevents the State from changing its mind. It is not forever bound, by estoppel or otherwise, to the view of the law that it asserts in this litigation."). Accordingly, the District Court erred in relying on the City's representations.

Second, the District Court's reasoning overlooks that enforcement of the Harassment Laws is not limited to the City: both Laws contain private rights of action. N.Y.C. Admin. Code §§ 22-903, 27-2005(d), 27-2115(h)(1). Despite the District Court's findings to the contrary, the fact remains that a lawful rent demand accompanied by threat of eviction falls squarely within the plain meaning of "threatening" as articulated in Davila. Davila, 461 F.3d at 302. The City's representations will not bar commercial and residential tenants from taking their landlords to court for harassment.

Ignoring this reality, the District Court left it up to state courts to distinguish between "improper threats . . . and permissible warnings of adverse but legitimate consequences," while providing no clarity for landlords on what is and is not proscribed. (SPA-20). Accordingly landlords will not know what constitutes a lawful rent demand until they go to court, because the Harassment Laws "fail[] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct [is] prohibit[ed]." Hill v. Colorado, 530 U.S. 703, 732 (2000). The

fear of substantial civil penalties, punitive damages, and legal fees "can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution." Vermont Right to Life, 221 F.3d at 382. Thus, even assuming that state courts can distinguish between lawful and harassing rent demands, the Laws chill Appellants' lawful commercial speech, causing them to avoid lawful rent requests for fear of litigation. (See, e.g., A-1334 ¶¶ 26, 29; A-90-91 ¶ 35). For these reasons, the Laws are also void for vagueness under the Due Process Clause. Smith v. Goguen, 415 U.S. 566, 573 (1974).

2. The District Court Misinterpreted the Commercial Harassment Law's "Savings Clause" to Allow Rent Demands

While the Commercial Harassment Law purportedly contains a "savings" clause, the Residential Harassment Law is bereft of any such provision.[8] Notably, neither the Commercial Harassment Law's "savings clause" nor the text of the Residential Harassment Law actually addresses routine rent demands or lawful eviction threats by landlords. Appellees argued, in essence, that such an exception is implied, but such an expansive reading is both contrary to the plain

[8] The Commercial Harassment Law provides that "[a] landlord's lawful termination of a tenancy, lawful refusal to renew or extend a lease or other rental agreement, or lawful reentry and repossession" does not constitute "commercial tenant harassment." N.Y.C. Admin. Code § 22-902(b). Further, a commercial tenant is not relieved "of the obligation to pay any rent for which the commercial tenant is otherwise liable." Id. § 22-903(b).

language of the ordinance and contrary to law. See Farnham v. Kittinger, 83 N.Y.2d 520, 529 (1994) ("The exception must be strictly construed in order that the major policy underlying the legislation itself is not defeated, with all doubts resolved in favor of the general provision rather than the exception") (internal citations and quotation marks omitted).

The District Court erred in concluding that rent demands are allowed under the "savings clause." First, in conclusory fashion, the District Court simply decided that the provisions "plainly permit the collection of rent from commercial tenants" despite being silent on that subject. (SPA-19). Second, the District Court ignored that the Council plainly knew how to draft a "savings clause" allowing commercial landlords to, *inter alia*, lawfully terminate a tenancy or repossess premises, but chose not to address whether communications concerning unpaid rent and its consequences are considered "threatening." Lastly, the Residential Harassment Law lacks any savings clause, "rais[ing] the question as to whether the legislature intended to distinguish between communications about past-due rent by residential landlords and commercial ones." (SPA-19). However, after acknowledging this fact, the District Court again glossed over it, concluding simply that "[t]he law's text . . . leads the Court to the conclusion that . . . the Residential Harassment Law does allow for routine rent demand notices and

discussions about the consequences flowing from unpaid rent and efforts to collect rent." (Id.) (internal quotation marks omitted).

3. The District Court Disregarded the Harassment Laws' Expansive Scope While Providing No Guidance to Appellants

The Harassment Laws' protections are triggered, *inter alia*, when threats are "based on" the tenant's status as a person "impacted by COVID-19" or "receipt of a rent concession or forbearance for any rent owed during the COVID-19 period." The Commercial Harassment Law defines a "business impacted by COVID-19" as one that, *inter alia*, "was subject to seating, occupancy or on-premises service limitations pursuant to an executive order issued by the governor or mayor during the COVID-19 period." N.Y.C. Admin. Code § 22-902(a)(11)(c).

The Residential Harassment Law's definition is similarly broad: the law defines a "person impacted by COVID-19" as "a person who has experienced one or more of the following: (i) such person was diagnosed with COVID-19 or is experiencing symptoms . . . ; (ii) a member of such person's household was diagnosed with COVID-19; (iii) such person was providing care for a family member . . . diagnosed with COVID-19; (iv) such person became unemployed, partially unemployed, or could not commence employment as a direct result of COVID-19 or the state disaster emergency declared . . . on March 7, 2020; or (v) such person became primarily responsible for providing financial support for the

household . . . because the previous head of the household died as a direct result of COVID-19[.]" Id. § 27-2004(a)(48)(f-7)(4).

This sweeping definition of what renders a tenant "impacted by COVID-19" implicates tens of thousands of residential and commercial tenants in the City, making it nearly impossible for landlords to know whether a tenant has been "impacted by COVID-19." As the District Court recognized, with respect to tenants who have been affected financially by the pandemic, it may be impossible for landlords to distinguish between the tenant's failure to pay rent and the tenant's status as a person or business impacted by COVID-19. (SPA-21 – SPA-22). The other trigger—receipt of a rent concession or forbearance—similarly affects a significant number of commercial and residential tenants throughout the City. A recent survey indicated that nearly two thirds of small property owners had granted some sort of rent concessions, which would expose them to potential harassment claims. (A-4034 ¶ 8).

Here again the District Court declined to provide meaningful guidance, instead leaving it up to the state courts to "differentiate those cases in which the but-for impetus for a rent demand is . . . the tenant's loss of employment due to COVID, and those in which it is simply because the tenant has not paid her rent." (SPA-21 – SPA-22). The District Court's reasoning overlooks the fact that, although "based on" indicates "but-for" causation—as the Court recognized—

"but-for" causation does not require the triggers to be the "sole" cause of the purported threats. (SPA-20 – SPA-21). See, e.g., Kwan v. Andalex Grp. LLC, 737 F.3d 834, 846 n.5 (2d Cir. 2013). Accordingly, even if a landlord's rent demand was "based on" the tenant's failure to pay rent, the tenant may still assert "but-for" causation. The Harassment Laws' lack of clarity on what behavior constitutes a threat, coupled with the broad triggers of "impacted by COVID-19" and rent concessions, restrict Appellants' lawful speech and force them to avoid routine, lawful rent demands for fear of litigation. The District Court erred in holding that the Harassment Laws do not proscribe lawful demands for rent, and its holding should be reversed.

B. The Harassment Laws Fail to Directly Advance a Substantial Government Interest

If a law restricts speech, courts must next "evaluate the City's asserted goal in enacting the regulation." Vugo, 931 F.3d at 51. To satisfy Central Hudson, the City must demonstrate that (1) "the harms it recites are real," and (2) "that its restriction will . . . alleviate them to a material degree." Vugo, 931 F.3d at 52 (citing Edenfield v. Fane, 507 U.S. 761, 771 (1993)). Appellants cannot meet either burden here.

First, Appellants failed to show that the specific harms the Laws are intended to address—harassment by landlords of tenants affected by COVID-19—were real. Critically, the Council reviewed no empirical evidence and failed to

identify any instances of tenant harassment by landlords based on COVID-19. "[M]ere speculation or conjecture" does not suffice. Hayes v. N.Y. Attorney Grievance Comm. Of the Eighth Jud. Dist., 672 F.3d 158, 166 (2d Cir. 2012) (internal quotations marks omitted).

Like the Guaranty Law, the Harassment Laws were passed with little analysis and were introduced a few weeks before their passage. Council hearings failed to produce any empirical evidence supporting the Laws. Instead, the Council considered secondhand accounts, like that of a not-for-profit representative claiming her organization "hear[d]" anecdotes about harassment because landlords believed that their tenants had lost income. (A-95-96 ¶ 56, A-588. During oral argument, the District Court questioned the specific harms the Laws purportedly address, observing that "landlords . . . going after people saying . . . you have to pay me more than you owe me; you have to pay me in advance because now I know you don't have a job" "seems so untethered to reality" and "doesn't happen very often." (A-564 Tr. at 39:13-17). The District Court further recognized that "it really doesn't seem . . . all that tethered to reality to suggest that landlords are going to go after tenants because they don't have money. That's not what's happening in reality." (A-569 Tr. at 44:8-15).

Another witness mentioned "one call" about COVID-related tenant harassment—but the harassment involved the tenant's roommate rather than a

landlord. (A-95-96 ¶ 56, A-653). The New York City Department of Housing Preservation and Development—the City's agency tasked with investigating claims of tenant harassment—failed to report any harassment claims involving "threatening speech," and instead reported that of the sixty harassment claims received since the outbreak of COVID-19, the majority concerned heat or hot water. (A-96 ¶ 57, A-653). The bills' Committee reports similarly lacked empirical data and fact-based analysis. (A-97-98 ¶¶ 62-64, A-965, A-1011-1013, A-1086-1087, A-1110).

Nor can Appellants demonstrate that the Harassment Laws restrictions will directly alleviate the harms they are intended to address to a material degree. Here, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." Central Hudson, 447 U.S. at 564; see also Bad Frog Brewery, Inc. v. N.Y.S. Liquor Auth., 134 F.3d 87, 100 (2d Cir. 1998) (a regulation that simply makes "*any* contribution to achieving a state objective" does not pass muster) (emphasis in original).

The Harassment Laws do not target New Yorkers who need rent relief. In fact, the Harassment Laws are so broad that they undermine the purported goal of protecting small businesses, which include "small landlords" such as Appellants "who are struggling to make payments and meet their obligations" because the Harassment Laws gut their ability to collect rent—a fact that the Council—and the

District Court—largely failed to consider. (A-97 ¶ 59, A-500, A-565, A-569; A-1332, A-1334-1335 ¶¶ 15-18, 30; A-1325-1326, A-1328 ¶¶ 19-24, 36).

C. The Harassment Laws Are More Extensive Than Necessary To Serve the Government Interest

Appellants bear the burden to "establish that the regulation does not burden substantially more speech than is necessary to further the government's legitimate interests." Vugo, 931 F.3d at 58 (internal citations and quotation marks omitted). Central Hudson requires "not necessarily the single best disposition but one whose scope is in proportion to the interest served." Bd. of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 482 (1989) (internal citations and quotation marks omitted). The Harassment Laws' speech restrictions fail this prong.

A law is not narrowly tailored "if there existed numerous and obvious less burdensome alternatives to the restriction on commercial speech." Centro de la Comunidad, 868 F.3d at 117 (internal citations and quotation marks omitted). The government must give "[]adequate consideration" to "alternatives that would prove less intrusive to . . . commercial speech." Bad Frog Brewery, 134 F.3d at 101 (internal quotation marks omitted). "[I]f the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive." Central Hudson, 447 U.S. at 564.

Here, the Council failed to consider several less burdensome alternatives. (A-97-98 ¶¶ 60, 64, A-576, A-965, A-1011-1012, A-1086-1087, A-1110). As

noted earlier, one alternative raised during the hearings was "to have the state come up with a fund to pay for . . . rent," as another state had done. (A-97 ¶ 60, A-576). The Council never meaningfully considered this option. (Id.). Alternatively, the Council could have conditioned protections on a showing of financial hardship or tenants' inability to pay rent—which it also failed to consider. (A-569). The record demonstrates that over 45,000 businesses—and likely more—in New York City have closed as a result of COVID-19 and could therefore be covered by the Commercial Harassment Law. (A-98-99 ¶¶ 66-70, A-1115, A-1118, A-113). The rent concession trigger also implicates a large number of businesses, with 20% of commercial tenants having received such rent concessions. (A-102 ¶ 77, A-108). The number of individuals who can claim to be covered under the Residential Harassment Law is similarly extremely large and measures in the hundreds of thousands, reflecting the broad categories of individuals who have tested positive for COVID-19, are essential workers, or have lost employment. (A-102-104 ¶¶ 78-84, A-1115, A-1118, A-113). In fact, a June 2020 report from New York University estimated that about one third of the rental households in the City have at least one member who lost employment due to COVID-19. (A-104 ¶ 83, A-1223). In sum, the Council failed to consider any less burdensome and more narrowly-tailored alternatives.

Further, a speech restriction is more extensive than necessary where "[p]re-existing law provides a thoroughly effective way of protecting" the asserted interest. Safelite, 764 F.3d at 265. Here, the record indicates that pre-existing laws already provided effective means to address some of the purported problems that the Harassment Laws sought to address. (A-96 ¶ 58, A-622-624).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the judgment of the District Court.

Dated: New York, New York
February 11, 2021

STROOCK & STROOCK & LAVAN LLP

By: /s/ Claude Szyfer

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(5) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 13,827 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated: February 11, 2021
New York, New York

/s/ Claude Szyfer
Claude Szyfer

Special Appendix

SPECIAL APPENDIX
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MELENDEZ, *et al.*,

Plaintiffs,

v.

THE CITY OF NEW YORK, *et al.*,

Defendants.

No. 20-CV-5301 (RA)

OPINION & ORDER

RONNIE ABRAMS, United States District Judge:

In the spring of this year, the COVID-19 pandemic ravaged New York, hitting the state harder than nearly anywhere else on earth. In response, New York State enacted a slate of statutes, administrative orders, and executive orders aimed at combatting both the public health and economic devastation wrought by the disease. New York City, the epicenter of the outbreak within the state, passed multiple local ordinances of its own, aiming to achieve the same goals. Three of those ordinances are being challenged here today.

The first of these three laws is "the Residential Harassment Law," which amended a decade-old ordinance prohibiting residential landlords from harassing tenants out of their lawfully-occupied dwellings. The Residential Harassment Law added to the existing law a prohibition on harassment of "person[s] impacted by COVID-19," a term broadly defined to include essential workers, those diagnosed with COVID, caretakers of those with COVID, and persons unemployed or with additional financial responsibilities as a direct result of the pandemic.

The second of the laws, "the Commercial Harassment Law," likewise amended a pre-existing ordinance prohibiting commercial landlords from harassing tenants out of their lawfully-occupied properties. It added a similar prohibition on harassment of those "impacted by COVID-19," a term the law broadly defined to include those diagnosed with COVID, caretakers of those with COVID, persons who could not attend work because of quarantine or child-care difficulties, and businesses closed as a direct result of the pandemic.

The third law, entitled "Personal Liability Provisions in Commercial Leases," is known as the "Guaranty Law." This law limits the ability of commercial landlords to enforce a "personal guaranty"—that is, a contractual promise by a third-party, typically the principal of the business-tenant, to pay rent, utilities, or taxes in the event that the tenant defaults on those payments. The Guaranty Law only applies when the guarantor is a natural person other than the tenant, and only covers payments due between March 2020 and March 2021, but its effects are permanent: the landlord may never collect from the personal guarantor for those payments, even after the pandemic ends.

The three plaintiffs challenging these laws today are the owners of small commercial and residential buildings in Brooklyn, Queens, and Manhattan. They allege that the laws cause them severe economic harm by impeding their ability to profit from their properties. Specifically, they claim that the Harassment Laws prevent them from pursuing routine efforts to collect rent from their tenants, while the Guaranty Law prevents them from recouping income pursuant to personal guaranties in connection with defaulting businesses. They urge this Court to find that these laws violate three constitutional rights: the right to free speech, the right to due process, and the Contract Clause.

Plaintiffs have expressed some legitimate concerns, and the Court recognizes the toll the pandemic has taken on them, in addition to their tenants, all New Yorkers, and millions more around the world. Nonetheless, for the reasons articulated below, the Court cannot conclude that these three challenged laws violate any of Plaintiffs' constitutional rights. First, because the Court finds—as the City insists—that the Harassment Laws do not prevent landlords from making routine rent demands, these laws do not implicate Plaintiffs' free speech rights. Moreover, because the Harassment Laws are sufficiently clear on what constitutes harassment, the Court further concludes that these laws do not violate due process. And because this Circuit's jurisprudence affords broad deference to the good-faith efforts of policymakers to regulate in the interest of the public good, the Court must conclude that the Guaranty Law does not violate the Contract Clause. Finally, the Court holds that these ordinances are not in conflict with the State's efforts to respond to the pandemic, and so they are not preempted.

Plaintiffs' suit is thus dismissed in its entirety.

BACKGROUND[1]

I. The State's Response to the Pandemic

The New York State Legislature, together with the Chief Administrative Judge of the New York Courts and the Governor, have responded to the COVID-19 crisis with numerous state-

[1] In adjudicating a motion to dismiss, a court may consider not only the facts set forth in the complaint, but also "documents attached thereto and incorporated by reference therein, *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 67 (2d. Cir. 1998), matters of public record such as case law and statutes, *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d. Cir. 1998), and matters of judicial notice. *See Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)." *In re Doubleclick Privacy Litig.*, 154 F. Supp. 2d 497, 506 (SDNY 2001). In this opinion, the Court relies on those facts alleged in Plaintiffs' Amended Complaint, as well as the legislative history that accompanied the passage of the three laws at issue, and several publicly-available resources published by the City and State governments and submitted to the Court, of which the Court takes judicial notice.

wide regulations aimed to protect the health, safety, and economic wellbeing of the people of New York.

On March 3, 2020, the New York State Legislature amended section 29-a of the New York Executive Law, granting the Governor the power to "issue any directive during a state disaster emergency" that the Governor deemed "necessary to cope with the disaster." S*ee* SB S7919; N.Y. Exec. Law Art. 2-B § 29-a. The amendment also expanded the Governor's existing authority to temporarily suspend "any statute, local law, ordinance, or orders, rules or regulations," as necessary to aid with coping with the disaster. *Id.*

Following this expansion in authority, the Governor passed a series of executive orders—over seventy as of the date of this opinion. *See* EXECUTIVE ORDERS, governor.ny.gov/executive-orders (last visited November 25, 2020). On March 7, 2020, the Governor passed EO 202, which declared a state of emergency in New York until September 7, 2020. N.Y. Exec. Order No. 202 (Mar. 7, 2020), Dkt. 38 Ex. B.[2] The order "authorize[d] all necessary State agencies to take appropriate action to assist local governments and individuals in containing, preparing for, responding to and recovering from this state disaster emergency." The Governor subsequently filed a series of executive orders mandating the closure of the vast majority of businesses in the state. *See, e.g.*, N.Y. Exec. Order No. 202.3 (Mar. 16, 2020), Dkt. 29 Ex. 18 (prohibiting bars and restaurants from serving food or beverages on premises and closing gyms and movie theatres); N.Y. Exec. Order No. 202.5 (Mar. 18, 2020), Dkt. 38 Ex. D (closing indoor malls, amusement parks, aquariums, zoos, and arcades); N.Y. Exec. Order No. 202.6 (Mar. 18, 2020),

[2] The declaration of a State disaster emergency has since been extended; at present, the declaration will remain in effect through December 3, 2020. N.Y. Exec. Order No. 202.72 (November 3, 2020).

Dkt. 38 Ex. E (closing all non-essential businesses); N.Y. Exec. Order No. 202.7 (Mar. 19, 2020), Dkt. 29 Ex. 20 (ordering barbershops, salons, and tattoo parlors to close).[3]

The Governor also passed a series of executive orders regulating commercial and residential real estate. For example, Executive Order 202.8 announced a ninety-day moratorium on commercial and residential evictions and foreclosures. N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), Dkt. 29 Ex. 21. Executive Order 202.9 instructed the Superintendent of the Department of Financial Services to ensure that "any person or entity facing a financial hardship due to the COVID-19 pandemic" be given the opportunity for a forbearance of mortgage payments. N.Y. Exec. Order No. 202.9 (Mar. 21, 2020), Dkt. 38 Ex. H. Executive Order 202.28 mandated that residential landlords allow tenants facing financial hardships due to the pandemic to use their security deposits to pay past-due rent, and prohibited landlords from demanding late payment fees for rent due and owing from March to August. N.Y. Exec. Order No. 202.28 (May 7, 2020), Dkt. 29 Ex. 23.[4]

In June 2020, the state legislature passed a series of laws further regulating real estate. On June 17 it passed the Emergency Rent Relief Act ("ERRA"), which is to remain in effect until July 2021. 2020 Sess. Law News of N.Y. Ch. 125 (S. 8419) § 3, Dkt. 29 Ex. 26. Section 2.2 of the act authorized the state housing commissioner to establish a residential rent relief program for those affected by COVID-19. *Id.* § 2.2. Section 2.4 provided for rental subsidies, capped at 125 percent fair market rent, to be paid directly to landlords in the form of a rent-voucher. *Id.* §

[3] Since then, many, but not all, of these businesses have been permitted to re-open in a limited capacity. *See*, *e.g.*, N.Y. Exec. Order No. 202.36 (June 2, 2020), Dkt. 38 ¶ 19 (permitting barbershops and hair salons to reopen in some parts of the state); N.Y. Exec. Order No. 202.38 (June 16, 2020), Dkt. 29 Ex. 24 (permitting restaurants to serve food and beverages outside).
[4] In May of this year, the constitutionality of this executive order was litigated in the case of *Elmsford Apt. Assocs., LLC v. Cuomo*, no. 20-CV-4062 (CM), 2020 U.S. Dist. LEXIS 115354, 2020 WL 3498456 (S.D.N.Y. June 29, 2020). The law was upheld.

2.4. Priority for these vouchers is to be given to those with greatest social and economic need. *Id*. § 2.7. That same day, the legislature amended the State Banking Law, adding § 9-x, which requires all entities regulated by the New York Department of Financial Services to grant forbearance on all monthly mortgage payments for up to 180 days, subject to certain restrictions. N.Y. C.L.S. Bank § 9-x (2020), Dkt. 39. Ex. EE. On June 30, the legislature passed the Tenant Safe Harbor Act ("TSHA"). 2020 Sess. Law News of N.Y. Ch. 125 (S. 8192-B), Dkt. 29 Ex. 27. The TSHA prohibits courts from issuing warrants of eviction against those residential tenants who have suffered financial hardship during the COVID-19 period—a period of time defined to include "March 7, 2020 until the date on which none of the . . . Executive Order[s] issued in response to the COVID–19 pandemic continue to apply in the county of the tenant's or lawful occupant's residence." *Id*. §§ 1, 2.1. The TSHA instructed courts to consider factors such as change in income and liquid assets in determining whether a tenant suffered "financial hardship." *Id*. § 2.2(b). Section 3 of the law provided that—notwithstanding the other restrictions it imposed—courts may still award a judgment for rent due and owing in a summary proceeding. *Id* § 3.

Finally, the Chief Administrative Judge of the New York Courts issued a series of administrative orders, prohibiting the initiation of foreclosures on commercial properties and suspending commercial and residential evictions. *See*, *e.g.*, N.Y. Admin. Order No. 68/20 (Mar. 16, 2020), Dkt. 38 Ex. AA (suspending all eviction proceedings until further notice); N.Y. Admin. Order No. 157/20 (July 23, 2020), Dkt. 56 Ex. C (prohibiting the initiation of foreclosures on commercial mortgages for non-payment if the property owner is facing financial hardships due to COVID-19); N.Y. Admin. Order No. 160A/20 (Aug. 13, 2020), Dkt. 56 Ex. D (continuing to prohibit the initiation of eviction proceedings for commercial tenants if the tenant

is facing financial hardships due to COVID-19 and suspending all residential eviction proceedings commenced after March 1).

II. The City's Response to the Pandemic

New York City's City Council also passed a host of local ordinances to combat the pandemic's economic impact. Of relevance here are three of those laws, passed on May 26, 2020: the Residential Harassment Law, the Commercial Harassment Law, and the Guaranty Law.

A. The Residential Harassment Law

New York City Administrative Code ("Admin. Code") § 27-2005(d), which was enacted pre-COVID, prohibits an owner of a dwelling from "harassing" tenants or occupants lawfully entitled to occupancy of such dwelling. Admin Code § 27-2005(d). Section 27-2004(a)(48) of the Code defines harassment as "any act or omission by or on behalf of an owner that (i) causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy," and (ii) includes certain acts or omissions, ranging from repeated failure to correct hazardous housing-code violations to changing the locks without consent. *Id*. §27-2004(a)(48). Prior to the pandemic, one of the offending acts or omissions that constituted harassment was "threatening any person lawfully entitled to occupancy of such dwelling unit based on such person's actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, uniformed service, sexual orientation, alienage or citizenship status, status as a victim of domestic violence, status as a victim of sex offenses or stalking, lawful source of income or because children are, may be or would be residing in such dwelling unit." *Id*. § 27-2004(a)(48)(f-5). Local Law No. 56-2020, known as "the Residential Harassment

Law," amended this definition by adding a new form of harassment: "threatening any person lawfully entitled to occupancy of such dwelling unit based on such person's actual or perceived status as an essential employee, status as a person impacted by COVID-19, or receipt of a rent concession or forbearance for any rent owed during the COVID-19 period." *Id.* § 27-2004(a)(48)(f-7); Dkt. 38 Ex. OOO. The law defines the relevant terms "COVID-19 period," "essential employee," and "person impacted by COVID-19," but it does not define the term "threaten," nor did earlier versions of the law.[5]

The Residential Harassment Law may be enforced by the City, N.Y. Real Prop. Acts. Law § 770, or private persons, Admin. Code § 27-2115(h)(1) (providing a private cause of action for enforcement of the Residential Harassment Law). Violations are punishable by a civil penalty of between $2,000 and $10,000, as well as attorneys' fees and punitive damages. See Admin. Code §§ 27-2115(m)(2), 27-2115(o).

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[5] The relevant definitions are as follows:
"[T]he term 'COVID-19 period' means March 7, 2020 through the later of (i) the end of the first month that commences after the expiration of the moratorium on enforcement of evictions of any tenant residential or commercial set forth in executive order number 202.8, as issued by the governor on March 20, 2020 and extended thereafter or (ii) September 30, 2020, inclusive[.]" Admin Code § 27-2004(a)(48)(f-7)(2).
"[T]he term 'essential employee' means a person employed by or permitted to work at or for a business classified as an essential business by the New York state department of economic development in accordance with executive order number 202.6, as issued by the governor on March 18, 2020 and extended thereafter[.]" *Id.* § 27-2004(a)(48)(f-7)(3).
"[T]he term 'person impacted by COVID-19; means a person who has experienced one or more of the following: (i) such person was diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (ii) a member of such person's household was diagnosed with COVID-19; (iii) such person was providing care for a family member or a member of such person's household who was diagnosed with COVID-19; (iv) such person became unemployed, partially unemployed, or could not commence employment as a direct result of COVID-19 or the state disaster emergency declared in executive order number 202, as issued by the governor on March 7, 2020; or (v) such person became primarily responsible for providing financial support for the household of such person because the previous head of the household died as a direct result of COVID-19[.]" *Id.* § 27-2004(a)(48)(f-7)(4).

B. The Commercial Harassment Law

Local Law No. 53-2020, known as "the Commercial Harassment Law," made a similar amendment to the City's pre-existing law prohibiting harassment of commercial tenants. Admin Code § 22-902(a)(11); Dkt. 38 Ex. MMM. Section 22-902 of the Administrative Code forbids a landlord from harassing a commercial tenant. The provision defines harassment as "any act or omission by or on behalf of a landlord that (i) would reasonably cause a commercial tenant to vacate covered property" and (ii) includes one of a list of prohibited actions. *Id.* Section 22-902(a)(11)(i) already prohibited threatening a commercial tenant based on "actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, uniformed service, sexual orientation, alienage or citizenship status, status as a victim of domestic violence[,] or status as a victim of sex offenses or stalking." *Id.* § 22-902(a)(11)(i). The Commercial Harassment Law added a new form of harassment: "threatening" a commercial tenant based on "the commercial tenant's status as a person or business impacted by COVID-19, or the commercial tenant's receipt of a rent concession or forbearance for any rent owed during the COVID-19 period." *Id.* § 22-902(a)(11)(ii). As with the Residential Harassment Law, the Commercial Harassment Law defines the relevant terms "COVID-19 period" and "impacted by COVID-19," but it does not define the term "threaten," nor did earlier versions of the law.[6] Unlike the Residential Harassment Law, the Commercial Harassment Law

[6] The relevant definitions are as follows:
"[T]he term 'COVID-19 period' means March 7, 2020 through the later of (i) the end of the first month that commences after the expiration of the moratorium on enforcement of evictions of any tenant, residential or commercial, set forth in executive order number 202.8, as issued by the governor on March 20, 2020 and extended thereafter, (ii) the end of the first month that commences after the expiration of the moratorium on certain residential evictions set forth in section 4024 of the coronavirus aid, relief, and economic security, or CARES, act and any subsequent amendments to such section or (iii) September 30, 2020, inclusive[.]" Admin. Code. § 22-902(a)(11)(a).

includes a savings clause providing that "[a] landlord's lawful termination of a tenancy, lawful refusal to renew or extend a lease or other rental agreement, or lawful reentry and repossession" cannot constitute "commercial tenant harassment." *Id.* § 22-902(b). The law also states that none of the ordinance's provisions relieve a commercial tenant "of the obligation to pay any rent for which the commercial tenant is otherwise liable." *Id.* § 22-903(b).

"[T]he term 'impacted by COVID-19' means a person who has experienced one or more of the following situations:

> (1) such person was diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis . . .
> (2) a member of such person's household was diagnosed with COVID-19;
> (3) such person was providing care for a family member or a member of such person's household who was diagnosed with COVID-19;
> (4) a member of such person's household for whom such person had primary caregiving responsibility was unable to attend school or another facility that was closed as a direct result of the COVID-19 state disaster emergency and such school or facility care was required for the person to work; provided that for the purposes of this subparagraph, the term "COVID-19 state disaster emergency" means the state disaster emergency declared by the governor in executive order number 202 issued on March 7, 2020;
> (5) such person was unable to reach their place of business because of a quarantine imposed as a direct result of the COVID-19 state disaster emergency or because such person was advised by a health care provider to self-quarantine due to concerns related to COVID-19;
> (6) such person became primarily responsible for providing financial support for the household of such person because the previous head of the household died as a direct result of COVID-19;
> (7) such person's business is closed as a direct result of the COVID-19 state disaster emergency[.]" *Id.* § 22-902(a)(11)(b).

"[A] business is 'impacted by COVID-19' if (i) it was subject to seating, occupancy or on-premises service limitations pursuant to an executive order issue by the governor or mayor during the COVID-19 period or (ii) its revenues during any three-month period within the COVID-19 period were less than 50 percent of its revenues for the same three-month period in 2019 or less than 50 percent of its aggregate revenues for the months of December 2019, January 2020, and February 2020 and such revenue loss was the direct result of the COVID-19 state disaster emergency. A revenue loss shall be deemed to be the direct result of the COVID-19 state disaster emergency when such disaster emergency was the proximate cause of such revenue loss[.]" *Id.* § 22-902(a)(11)(c).

Violations of the Commercial Harassment Law are punishable by a civil penalty of between $10,000 and $50,000, as well as attorneys' fees and punitive damages. *See id.* §§ 22-903(a).

C. The Guaranty Law

Local Law No. 55-2020, entitled "Personal Liability Provisions in Commercial Leases"—but referred to herein as the "Guaranty Law"—provides that:

> A provision in a commercial lease or other rental agreement involving real property located within the city that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied.

Id. § 22-1005. The first requirement for the Guaranty Law to apply is that either

> (a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020; (b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or (c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.

Id. § 22-1005(1). The second requirement is that "[t]he default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and September 30, 2020, inclusive." *Id.* § 22-1005(1). On September 28, 2020, the Guaranty Law was extended to encompass all those liabilities that accrued between September 30, 2020 and March 31, 2021. *Id.*; Dkt. 69.

Each of these three local laws were passed relatively quickly. They were each introduced during a New York City Council meeting on April 22, 2020. Ugalde Decl. ¶ 40 & Dkt. 28 Ex.

KK. On April 28, 2020, the Council's Committee on Housing and Building and the Committee on Consumer Affairs and Business Licensing released a report discussing, *inter alia*, the Residential Harassment Law. Dkt. 38 Ex. LL. The report discussed the perceived need for legislative action above and beyond the above-cited state laws and EOs, noting that "[a]lthough the eviction moratoriums serve as temporary stopgaps to allow tenants to remain in their apartments, they do not . . . guarantee . . . that tenants will be safe from landlord harassment on the basis of having been impacted by the virus." *Id.* at 4.

The next day, the committees released a report discussing the pandemic's effect on small businesses and the need for laws like the Commercial Harassment Law and the Guaranty Law. Dkt. 38 Ex. QQ. The report noted that while the State's efforts "to support small businesses during this crisis have provided some measure of relief for small business owners and their employees," there were a "range of outstanding issues that continue to make operating a business during the pandemic particularly difficult." *Id.* at 28. Specifically, the report expressed concern with "[b]usinesses who experience a drop in revenue due to COVID-19 . . . fac[ing] added legal pressure to meet financial obligations," including "personal liability" for their owners, *id.* at 28–29, which could result in those persons facing personal bankruptcy and the loss of "the entirety of [their] life savings." *Id.* 32; *see also* Dkt. 29 Ex. 31 (testimony of Speaker Johnson recognizing that "[l]osing your home is hard enough. But imagine someone coming after your home, as well, while your business is closed"). The report also noted that "[w]ithout recourse, landlords and debt servicers may resort to threats, which continues to make protecting businesses from harassment an important issue as the City grapples with the effects of COVID-19." Dkt. 38 Ex. LL at 29.

The committees also held a series of open hearings on the laws, inviting feedback from "a broad spectrum of stakeholders including tenants, property owners, the Marshals, Sheriff[s], the advocates, and the public, so that the Council can get a better perspective on both sides of the issue." Dkt. 29 Ex. 33 at 11. During the April 28 hearing on the proposed Residential Harassment Law, the committees heard testimony from representatives from the New York City Commission on Human Rights, the New York City Department of Housing Preservation and Development ("HPD") and the Real Estate Board of New York ("REBNY"), housing advocates, and non-profit organizations, Dkt. 38 Ex. OO, and received written testimony from the Deputy Commissioner of Policy and Intergovernmental Affairs of the New York City Commission on Human Rights, REBNY, the New York City Community Housing Improvement Program ("CHIP"), and the Legal Aid Society, Dkt. 38 Ex PP. During the April 29 hearing on the proposed Commercial Harassment Law and Guaranty Law, the committees continued to hear from the Deputy Commissioner of Policy and Intergovernmental Affairs of the New York City Commission on Human Rights, REBNY, the New York City Community Housing Improvement Program ("CHIP"), and the Legal Aid Society, Dkt. 38 Ex. YY, and received almost 1,000 pages of written testimony from representatives from the New York City Department of Small Business Services ("SBS"), REBNY, United for Small Businesses NYC, Volunteers of Legal Service ("VOLS"), CHIP, and the Legal Aid Society. Dkt. 38 Exs. ZZ-1, ZZ-2, ZZ-3.

During these hearings, the majority of speakers—both council members and community stakeholders—expressed support for the three laws. Some spoke of the harms they believed the laws would ameliorate. For example, with regard to the Harassment Laws, Councilmember Adams noted that businesses are "vulnerable to harassment from landlords in search of ways to collect" and emphasized that "the threat of harassment will particularly impact the city's small

independently owned and immigrant owned businesses, many of which were operating on thin margins and struggling to pay rent even before this crisis." Dkt. 29 Ex. 34 at 26; *see also* Dkt. 29 Ex. 33 at 94 (Deputy Commissioner for Policy Intergovernmental Affairs at the New York City Commission on Human Rights reporting that "[f]rom February through mid-April, the agency recorded 284 reports of harassment and discrimination related to COVID-19"). Concerning the Guaranty Law, Councilmember Rivera relayed the concerns of small business owners who feared their landlords "going after their personal life savings and asset[s]." Dkt. 29 Ex. 31 at 29–30; *see also* Dkt. 29 Ex. 37 at 32 (small business owner explaining that enforcement of a personal liability provision "may leave him 'personally bankrupt' and 'at risk of losing the entirety of [his] life savings'"). Several speakers, meanwhile, expressed reservations about the laws' efficiency and legality. *See*, *e.g.*, Dkt. 29 Ex. 33 at 99 (representative from the New York City Commission on Human Rights noting that "[s]everal of the protections contemplated in [the Harassment Laws] already exist to protect tenants against harassment in housing"); Dkt. 29 Ex. 34 at 214 (project members from the Asian American Federation noting that Harassment Laws don't change the fact that small businesses can't pay rent); *id*. 219–20 (representative from Real Estate Board of New York "agree[ing] wholeheartedly" that tenants should be protected from harassment of any kind during COVID-19, but urging the City to clearly define what harassment means to prevent certain acts from being misconstrued as harassment); *see also* Dkt. 29 Ex. 31 at 56 (Councilmember Yeger arguing that the Guaranty Law violates the Contract Clause).

All three laws passed just over a month after they were first introduced. Ugalde Decl. ¶ 40, 57–59.

III. Plaintiffs

Three local landlords, Marcia Melendez, Ling Yang, and Elias Bochner, each claim to have been harmed by these three local laws.

Plaintiff Marcia Melendez, through Plaintiffs Jarican Realty Inc. and 1025 Pacific LLC, owns two properties in Brooklyn. Melendez Decl. ¶¶ 3–6. Retired, Melendez and her husband rely on rent payments from their two properties to fund their retirement, pay for maintenance of their properties, and to pay the tax and mortgage obligations on the properties. *Id.* ¶¶ 13-18. According to the complaint, "[p]rior to the outbreak of COVID-19, in accordance with [her] normal business practices, [Melendez] sent [her] delinquent residential tenant notices of late rent and sought to recover unpaid rent in Housing Court." *Id.* ¶ 21. Multiple tenants, both commercial and residential have not paid rent during the COVID period. *Id.* ¶¶ 20–25. Fearful that she would be accused of harassment under these new laws, Melendez has not sent these tenants demand notices. *Id.* ¶ 29. This concern stems in part from the fact that Melendez's residential tenant had previously accused her of "harassment" for seeking payment of late rent even before this law went into effect. *Id.* ¶ 21. Due to the thousands of dollars in unpaid rent from March through June, Melendez has been unable to pay the full amount of her tax obligations to the city from January 1, 2020 through June 30, 2020. *Id.* ¶ 16, 30.

Plaintiff Ling Yang owns two properties in Queens with her two sons, through their companies, Plaintiffs Haight Trade LLC and Top East Realty LLC. Yang Decl. ¶¶ 3–6. All rent payments go to paying tax and mortgage obligations as well as maintenance for the properties. *Id.* ¶19. Yang similarly used to send notices of late rent, but "[s]ince [she] learned of the Residential Harassment Law, however, [she] ha[s] stopped even mentioning to the residential tenants the consequences of their continued failures to pay rent out of fear that such statements

could be considered 'harassment' under the City's Law." *Id.* ¶ 35. Due to the rent payment she has not received, Yang may be unable to pay her property taxes going forward. *Id.* ¶ 20, 36–37. In her commercial leases, Yang has included a personal guaranty clause. Dkt. 38 Exs. UUU, VVV.[7] Yang states that she requires personal guaranties for all her commercial tenants because "[a]bsent a personal guaranty, the risk of having a small business as a tenant would be so great as to be prohibitive." Yang Decl. ¶31.

Plaintiff Elias Bochner, through his company 287 7th Avenue Realty LLC, owns a mixed-use property in Manhattan with a commercial space. Bochner Decl. ¶3. Bochner and his family rely on the rental payments for income. *Id.* ¶6. Bochner's commercial tenants have a "good guy" personal guaranty clause in their lease, which requires the guarantor—that is, the principal of the business-tenant—to pay the tenant's rent from the date the tenant's business fails through an agreed upon date. *Id.* ¶¶ 14–15; *see also id.* at ¶ 14 ("In a good guy guaranty, the principal of the business promises us that if the business does not succeed, the business will vacate the premises and the principal will pay rent through that date (or another agreed-upon date)."). In Bochner's commercial lease, operative during the first half of 2020, the tenant was a corporate entity, but the personal guarantor for the tenant's lease was Mitch Cantor, a natural person. Dkt. 64 Ex. 5 at 81. Bochner states that he requires guaranties for all commercial tenants, and that he would not have entered into the lease without one. Bochner Decl. ¶ 14. Bochner's tenant stopped paying full rent in January, and on March 20, 2020, gave six month notice of intent to surrender, turning over the keys on June 30, 2020. *Id.* ¶ 16. Bochner alleges that because he

[7] The Court notes that in one of the two commercial leases Plaintiff Yang proffered, the guaranty clause is unexecuted, *id.* Ex. UUU at 6, and in the other, the guarantor is the tenant, *id.* Ex. VVV at 15, 20.

cannot enforce the guaranty against the guarantor, he cannot recover $110,000 in rental income owed to him between March 7, 2020 and September 30, 2020. *Id.* ¶ 18.

Plaintiffs have brought this suit seeking injunctive and declaratory relief, invalidating the Harassment Laws and the Guaranty Law under both the New York Constitution and the Federal Constitution, or in the alternate, declaring the laws preempted by state law. On July 22, 2020, Plaintiffs filed a motion for preliminary injunctive and declaratory relief. Dkt. 28. On August 12, 2020, Defendants filed a motion to dismiss all claims. Dkt. 37.

DISCUSSION

The Court finds that each of Plaintiffs' claims fail as a matter of law and thus denies their motion for preliminary relief and grants Defendants' motion to dismiss.

I. The Harassment Laws Are Not Unconstitutional

Plaintiffs challenge the Harassment Laws on two grounds: First, they argue that the Harassment Laws violate free speech by prohibiting them from sending to their tenants "routine rent demand notices and discussions about the consequences flowing from unpaid rent and efforts to collect rent." Amended Compl. ¶ 172. Second, Plaintiffs claim that—to the extent the Harassment Laws are unclear about what conduct they prohibit and allow—the laws are void for vagueness and thus violate due process. While the Court appreciates Plaintiffs' concerns, their interpretation is unsupported by the text of the laws and the relevant case law. As the City avows, the Harassment Laws do not prevent landlords from asking their tenants for rent due and owing. For this reason, the laws neither violate the free speech provision of the First Amendment nor the Due Process Clause of the Fourteenth Amendment.[8]

[8] Although Plaintiffs challenge the Harassment Laws under both the Federal Constitution and the New York State Constitution, the Court only adjudicates Plaintiffs' federal claims. As the Supreme Court noted in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), "[a]

A. The Harassment Laws Do Not Implicate Plaintiffs' Free Speech Rights

Plaintiffs seek to—but argue that they are chilled from—communicating with delinquent tenants about past-due rent and pursuing available remedies to either collect that rent or to repossess their property. Amended Compl. ¶¶ 149–66, 232. The Harassment Laws do not prevent them from doing so.

As an initial matter, the City's attorneys unequivocally say so. At oral argument before this Court, counsel for the City repeatedly insisted that "lawful demands for rent are not pr[o]scribed" by the harassment laws. Dkt. 66 at Tr. 35:23; *id.* at Tr. 38:15–25; *see also* Defendants' Memorandum of Law in Support of Their Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunctive and Declaratory Relief ("Def. Mem.") (dated Aug. 12, 2020) (Dkt. 39) at 10 ("[T]he plain meaning of the Harassment Laws does not preclude landlords from making lawful demands for unpaid rent."). Even without these assurances of the City's counsel, the text and context of the laws support such a reading.

The Commercial Harassment Law addresses the tenant's obligation to pay rent directly. It contains a provision that reads: "[a] landlord's lawful termination of a tenancy, lawful refusal to renew or extend a lease or other rental agreement, or lawful reentry and repossession of the covered property shall not constitute commercial tenant harassment." Admin. Code § 22-902(b). The law further states that none of the ordinance's provisions relieve a commercial tenant "of the obligation to pay any rent for which the commercial tenant is otherwise liable." *Id.* § 22-903(b).

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federal court's grant of relief against state officials on the basis of state law . . . does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism." *Id.* at 106. This Court heeds *Pennhurst*'s stricture and declines to exercise supplemental jurisdiction over Plaintiffs' state constitutional claims.

Although Plaintiffs rightly argue that the law does not explicitly address rent demands, *see* Amended Compl. ¶ 121, these provisions plainly permit the collection of rent from commercial tenants, and the Court interprets them, by extension, to allow landlords to make routine rent demands from their tenants.

The Residential Harassment Law, by contrast, lacks a comparable savings clause, which raises the question as to whether the legislature intended to distinguish between communications about past-due rent by residential landlords and commercial ones. The law's text, however, leads the Court to the conclusion that—like the Commercial Harassment Law—the Residential Harassment Law does allow for "routine rent demand notices and discussions about the consequences flowing from unpaid rent and efforts to collect rent." Amended Compl. ¶ 172.

Three things must be shown to establish a violation of the Residential Harassment Law: (1) the landlord threatened the tenant, (2) the threat was made "based on" the tenant's status or perceived status as a person affected by COVID-19, and (3) the threat causes or was intended to cause someone lawfully entitled to occupy the premises to relinquish their rights to the property. Admin. Code § 27-2004(a)(48). The Court assesses each of these elements in turn.

First, the Court examines what constitutes a "threat." Because the statute does not define it, the Court looks to the "ordinary, contemporary, common meaning" of the term for guidance. *United States v. Davila*, 461 F.3d 298, 302 (2d Cir. 2006) ("Because neither statute defines the words 'threat' or 'threaten,' we give them 'their ordinary, contemporary, common meaning.'"). The Second Circuit has identified the plain meaning of the word "threat" as follows:

> According to the Oxford English Dictionary, a threat is a "denunciation to a person of ill to befall him; esp. a declaration of hostile determination or of loss, pain, punishment, or damage to be inflicted in retribution for or conditionally upon some course; a menace." The American Heritage Dictionary, Fourth Edition, defines the word as "[a]n expression of an intention to inflict pain, injury, evil, or punishment," or "[a]n

> indication of impending danger or harm." The same dictionary defines the word "threaten," in turn, as "[t]o express a threat against."

Id. at 302 (alterations in original). The Court recognizes that to most, being told that failure to pay rent may result in the loss of their home would constitute "[a]n indication of impending danger or harm." *Id.* It is hard to imagine many things as traumatic as being forced from one's home. Yet as courts have done in other contexts, it important to "distinguish between improper threats or coercion and permissible warnings of adverse but legitimate consequences." *Walia v. Veritas Healthcare Sol., L.L.C.*, no 13-CV-6935 (KPF), 2015 U.S. Dist. LEXIS 105429, 2015 WL 4743542, *14–15 (S.D.N.Y. Aug. 11, 2015) (citing *Headley v. Church of Scientology Int'l*, 687 F.3d 1173, 1180 (9th Cir. 2012)); *see also United States v. Raniere*, 384 F. Supp. 3d 282, 312–13 (E.D.N.Y. 2019) (citing *United States v. Bradley*, 390 F.3d 145, 155 (1st Cir. 2004), *judgment vacated on other grounds*, 545 U.S. 1101 (2005)). Informing a tenant that she will be obligated to vacate her home if she fails to make the payments for which she contracted is not the same thing as—for example—commencing repeated frivolous court proceedings against her. *See, e.g.*, *Aguaiza v. Vantage Props, LLC*, 69 A.D.3d 422, 423 (N.Y. Sup. Ct. 2010).

This is not to say that a rent demand could *never* be adjudged a threat. As the City acknowledged at oral argument, a "repeated onslaught [of] demands for rent . . . could rise to the level of harassment," Dkt. 66 at Tr. 37: 13–14, as could rent demands made in a particularly threatening manner. But this Court trusts the New York courts to faithfully make these judgments, and determine when a routine rent demand has transformed into a threat—due to repetition, tone, timing, or form.

Second, the Court assesses the meaning of the term "based on." Courts interpret this term to require but-for causation. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64

& n.14 (2007) (observing that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition" and that the statutory phrase, "based on," has the same meaning as the phrase, "because of" (internal quotation marks omitted)); *Gross v FBL Fin. Servs.*, 557 U.S. 167, 176–77 (2009) (the phrase "based on" is commonly understood to mean that something is created in reliance on identified factors). Hence, for a rent demand to violate the Residential Harassment Law—assuming, *arguendo*, it is adjudged to be "a threat"—the demand must be made for the but-for reason that the tenant has been impacted by COVID-19 in one of the ways recognized by the statute. Put differently, a tenant would need to show that but-for the impact of COVID on them, the landlord would not be making the rent demand or "communicating with them about the consequences flowing from unpaid rent and efforts to collect rent." Amended Compl. ¶ 172.

In other words, while a landlord may not harass someone because she has been impacted by COVID-19, the landlord may demand rent because the rent is due. In cases in which the tenant is protected by the Residential Harassment Law because she is a front-line worker, a caretaker of a person with COVID-19, or she herself has been diagnosed with COVID, a typical rent demand would be unrelated to that tenant's status as a "person impacted by COVID-19." Admin. Code § 27-2004(a)(48)(f-7). In cases in which the impact of COVID-19 on a tenant has been exclusively economic in nature (because she "became unemployed, partially unemployed, or could not commence employment as a direct result of COVID-19," or received "a rent concession or forbearance for any rent owed during the COVID-19 period") it may be more difficult to distinguish that tenant's failure to pay rent from her "status as a person impacted by COVID-19." *Id.* Nonetheless,

the Court remains confident in the state courts' ability to differentiate those cases in which the but-for impetus for a rent demand is, for example, the tenant's loss of employment due to COVID, and those in which it is simply because the tenant has not paid her rent. The former may violate the Residential Harassment Law; the latter does not.

Lastly, the law's requirement that the threat causes or was intended to cause someone lawfully entitled to occupy the premises to relinquish her rights to the property, *id.* § 27-2004(a)(48), provides yet another basis for a court to separate a routine effort to collect rent from harassment.

In sum, routine demands for rent are beyond the purview of either the Residential or the Commercial Harassment Laws. Plaintiffs have thus failed to plausibly allege that the Harassment Laws violate their right to free speech under the First Amendment.

B. The Harassment Laws Are Not Void for Vagueness

"As one of the most fundamental protections of the Due Process Clause, the void-for-vagueness doctrine requires that laws be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them." *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007) (internal citations and quotation marks omitted). "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Plaintiffs assert that the Harassment Laws are void for vagueness because they fail to "give[] any notice as to whether routine requests for rent and the consequences for nonpayment

constitute unlawful threats." Plaintiffs' Reply Memorandum of Law in Further Support of Their Motion for Preliminary Injunctive and Declaratory Relief and in Opposition to Defendants' Motion to Dismiss ("Pl. Reply") (dated Aug. 26, 2020) (Dkt. 48) at 11.[9] For the reasons articulated above, however, the Court cannot conclude that a "pe[rson] of ordinary intelligence" would understand the Harassment Laws in this way. *Hill*, 530 U.S. at 732.

To support their vagueness argument, Plaintiffs set out what they assert are two instances of the laws being misinterpreted. First, Plaintiffs point to the complaint in *Gap, Inc. v. 44-45 Broadway Leasing Co., LLC*, No. 652549/2020, in which a commercial tenant of a landlord not affiliated with this lawsuit claimed that an attempt to terminate a lease due to non-payment of rent violated the Commercial Harassment Law. Dkt. 29 Ex. 5. Second, Plaintiff Melendez also notes that a residential tenant of hers previously accused her of harassment when she sent a late-rent notice. *See* Melendez Decl. ¶ 21. Yet upon closer inspection, neither of these examples advance Plaintiffs' arguments. With respect to Melendez's tenant, that individual accused Melendez of harassment *before* the laws at issue were passed, and so this anecdote is not illustrative of anyone's understanding of these new laws. In the *Gap* case, though the tenant sought a declaratory judgment that it had been harassed, Dkt. 29 Ex. 5 ¶ n, its Commercial

[9] It is unclear whether Plaintiffs' challenge is facial or as-applied. Plaintiffs' challenge is styled as a facial challenge, yet Plaintiffs allege only that a single application of the laws is unconstitutional: when applied against landlords making a routine rent demand from their tenants. Pl. Mem. at 28. To show that a law is facially invalid, a plaintiff must demonstrate either "(1) 'that the law is unconstitutional in all of its applications,' or (2) that 'a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep.'" *Expressions Hair Design v. Schneiderman*, 803 F.3d 94, 105 (2d Cir. 2015) (*quoting Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 & n.6 (2008)). Plaintiffs have not attempted to make this showing, and do not dispute that the harassment laws would be lawful in certain applications—for example, if applied against a landlord seeking to evict a sick tenant because of the tenant's illness. Because Plaintiffs only address the law's application to routine rent demands, Pl. Mem. at 18 n.7, the Court will consider this an as-applied due process challenge.

Harassment Law argument consisted solely of one paragraph in a 25-page complaint, *Id.* ¶ 42. Tellingly, the court in that case ultimately ordered the plaintiffs to pay the defendants the rent it owed, and did so without mention of the Commercial Harassment Law. *See Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, No. 652549/2020, 2020 N.Y. Misc. LEXIS 3505, at *1 (N.Y. Sup. Ct. July 21, 2020). Hence, if anything, the *Gap* litigation stands for the proposition that landlords are indeed permitted to ask for rent, which tenants are required to pay.

The Court does not go so far as to say that the Harassment Laws will never be misinterpreted. The City surely could have written the laws more clearly to explicitly state what its lawyers now acknowledge: that the Harassment Laws do not bar routine rent demands. Dkt. 66 at Tr. 35:23; *id.* at Tr. 38:15–25; Def. Mem. at 10.[10] But because the Court cannot conclude that a "pe[rson] of ordinary intelligence" would understand the Harassment Laws to prohibit routine rent demands the law is not void for vagueness. *Hill*, 530 U.S. at 732. Plaintiffs have thus failed to plausibly allege that the Harassment Laws violate the Due Process Clause of the Federal Constitution.

II. The Guaranty Law Is Not Unconstitutional

Plaintiff Bochner[11] challenges the constitutionality of the Guaranty Law under the Contract Clause of the Federal Constitution, which provides that "no State shall . . . pass any . . . Law impairing the Obligations of Contracts." U.S. CONST. art. 1, § 10. Though written in absolute

[10] The Court notes that the City's Department of Housing Preservation & Development has provided guidance as to what constitutes harassment in its 2019 publication "ABCs of Housing," which can be accessed through the department's website. *See* NYC Dep't of Housing Preservation & Dev., ABCs of Housing at 15–16, https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/abcs-of-housing.pdf (last visited November 25, 2020).

[11] Plaintiff Yang is no longer prosecuting the Contract Clause issue, Dkt. 59 at 1, and there is no evidence that Plaintiff Melendez has any commercial leases including a personal guaranty by a non-tenant. The Guaranty Law challenge is thus brought by Plaintiff Bochner alone.

terms, the Contract Clause does not give private parties the unconditional right to contract without government interference. Rather, the Supreme Court has plainly stated that "the police power . . . is paramount to any rights under contracts between individuals." *Manigault v. Springs*, 199 U.S. 473, 480 (1905) ("It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected."); *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (permitting contract interference so long as it is in furtherance of the "inherent police power of the State 'to safeguard the vital interests of its people.'"). Indeed, "[t]he principle is firmly established today that all contracts are subject to the police power of the State." *Twentieth Century Assocs., Inc. v. Waldman*, 63 N.E.2d 177, 179 (N.Y. 1945).

When deciding whether a law violates the Contract Clause, courts in this Circuit ask: "(1) [whether] the contractual impairment [is] substantial and, if so, (2) [whether] the law serve[s] a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, (3) [whether] the means chosen to accomplish this purpose [are] reasonable and necessary." *Sullivan v. Nassau Cty. Interim Fin. Auth.*, 959 F.3d 54, 64 (2d Cir. 2020) (quoting *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006)); see also *Energy Reserves*, 459 U.S. at 411–18 (applying the same test). Although the Court finds that Plaintiff has plausibly alleged substantial impairment to his contract, it recognizes that the case law in this Circuit affords "substantial deference" to those policymakers making good-faith efforts to act in the public interest. *See Elmsford Apt. Assocs.*, 2020 U.S. Dist. LEXIS 115354 at *36. For this reason, while the Court is cognizant of the burden this law puts on landlords, it

concludes that Plaintiff has not plausibly pled that the Guaranty Law violates the Contract Clause..

A. The Guaranty Law Substantially Impairs Plaintiff's Contracts

The substantiality of a contract's impairment depends upon "the extent to which reasonable expectations under the contract have been disrupted." *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997). "[T]he reasonableness of expectations depends, in part, on whether legislative action was foreseeable." *Sullivan*, 959 F.3d at 64; *see also Sanitation*, 107 F.3d at 993 ("Impairment is greatest where the challenged government legislation was wholly unexpected."). Here, the Court finds that the imposition of the Guaranty Law, like the pandemic itself, was entirely unforeseeable.

Further, courts are apt to find substantial impairment in instances where the hindered contract provision was a "primary inducement" for the parties to enter the contract or a "central provision [of the contract] upon which it can be said [the parties] reasonably rely." *Buffalo Teachers*, 464 F.3d at 368. Plaintiff asserts—and the Court accepts as true—that the guaranty clause was an essential provision of his commercial lease, averring that he would not have signed the lease without a guaranty clause in it. *See* Bochner Decl. ¶ 14. This renders the clause a "primary inducement."

Lastly, in making an assessment of substantiality, courts consider whether the contractual impairment is temporary or permanent. *See W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 434 (1934); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978). Defendants stress that the contractual impairment is limited, given that it only applies to certain guarantors and only for money owed during a certain period of time. Def. Mem. at 19. This may be true, but the fact remains that for those debts covered by the Guaranty Law, the contractual impairment is

permanent. Bochner will never be able to collect from the personal guarantor money due and owing between March 2020 and March 2021, even after the pandemic ends. *See* Admin. Code § 22-1005.

Taken together, these considerations lead to the conclusion that the Guaranty Law does in fact impose a substantial impairment on Plaintiff's contract. To survive, then, the law must advance a legitimate public interest and be reasonable and necessary to do so. *See Buffalo Teachers*, 464 F.3d at 368, 376; *see also Sullivan* 959 F.3d at 64, 69.

B. The Guaranty Law Advances a Legitimate Public Interest

"[T]he law affords States a wide berth to infringe upon private contractual rights when they do so in the public interest." *Elmsford Apt. Assocs.*, 2020 U.S. Dist. LEXIS 115354 at *36 (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 16 (1977)). A legitimate public purpose is one "aimed at remedying an important 'general social or economic problem' rather than 'providing a benefit to special interests.'" *Sanitation,* 107 F.3d at 993.

Here, the Court finds that the City passed the Guaranty Law to benefit the public interest, not itself or any special interest. While on its face the law directly benefits only commercial tenants, according to a recent report of the New York City Municipal Government, small businesses employ nearly half of New York City's workforce. *See* Dkt. 29 Ex. 44 at 3, SMALL BUSINESS FIRST, Report of the New York City Municipal Government, https://www1.nyc.gov/assets/smallbizfirst/downloads/pdf/small-business-first-report.pdf (last visited November 25, 2020); *see also* Brief of Amicus Curiae Volunteers of Legal Service ("VOLS Br.") (dated Aug. 13, 2020) (Dkt. 41 Ex. 1) at 20 ("Small businesses represent 98% of New York City's employers and provide employment for over 3 million people—about half of the City's workforce."). The Guaranty Law seeks to prevent New York's small business owners

from being "pushed into both business and personal bankruptcy," which would eliminate their ability to "remain[] in or return[] to microentrepreneurship," and would "further exacerbat[e] the ongoing economic crisis" for the entire City. VOLS Br. at 24; *see also* Dkt. 29 Ex. 31 at 29 (testimony of the Guaranty Law's author, Councilmember Rivera, expressing similar concerns).

And critically, there is no allegation that the City passed the Guaranty Law to benefit itself. In *Sullivan*, the court asked whether "the [City] in breaching a contract is acting like a private party who reneges to get out of a bad deal, or is governing, which justifies its impairing the plaintiffs' contracts in the public interest." 959 F.3d at 65. Here, the facts reflect the latter. The law thus advances a legitimate public interest.

C. The Guaranty Law Is Reasonable and Necessary to Advance the Public Interest

The third prong—whether the Guaranty Law is reasonable and necessary to advance the public interest—presents the closest question. What is clear, however, is that the Second Circuit is extremely deferential to the decisions of policymakers seeking to advance a legitimate public interest. "Where social or economic measures are involved, courts will defer to legislative judgment in determining whether particular actions are 'reasonable and necessary.'" *Condell v. Bress*, 983 F.2d 415, 418 (2d Cir. 1993); *see also United States Trust Co.*, 431 U.S. at 22–23 ("As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."); *Sanitation*, 107 F.3d at 994 ("When reviewing a law that purports to remedy a pervasive economic or social problem," a court's analysis must be "carried out with a healthy degree of deference to the legislative body that enacted the measure."). Given that mandated deference, the Court concludes that the Guaranty Law is reasonable and necessary.

In considering a law's necessity, courts have looked to whether the law in question seeks to address a real emergency. *See Allied Structural Steel Co.*, 438 U.S. at 250 (striking down a "law [that] was not even purportedly enacted to deal with a broad, generalized economic or social problem."). For example, in rejecting the Contract Clause challenge raised in *Buffalo Teachers*, the Second Circuit distinguished the facts of that case from those presented in earlier cases like *Association of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991), and *Condell*, 983 F.2d 415, in which "the legislature's justifications of reasonableness and necessity [were] dubious at best" given that whether "there was an emergency or dire need justifying the impairment was in doubt." *Buffalo Teachers*, 464 F.3d at 373. In *Association of Surrogates*, the State of New York cut its judicial employees' salaries by 10% in order "to finance an expansion of its court system." *See* 940 F.2d at 773. In *Condell*, the State enacted a similar payroll lag for executive branch employees in response to a budget deficit. *See* 983 F.2d at 417. In neither case did the government classify the problem as an "emergency."[12] In *Buffalo Teachers*, "no one question[ed] the existence of a very real fiscal emergency." 464 F.3d at 373. Here, Plaintiff does not dispute that a real emergency exists; indeed, there can be no doubt that the City is in crisis—economic and otherwise. *See*, *e.g.*, Dkt. 29 Ex. 37 at 6 (analysis of the NYC Comptroller indicating that hotel occupancy and restaurant sales were expected to drop 80%); *id*. (National Bureau of Economic Research indicating that 57% of businesses in New York have closed). The Court is thus satisfied that the law is "necessary" for the purposes of this analysis.

[12] The Court also notes that in both *Condell* and *Association of Surrogates*, the state was a party to the contract at issue. For this reason, the court in those cases afforded the government less deference than is appropriate here. *See Condell*, 983 F.2d at 418; *Association of Surrogates*, 940 F.2d at 771.

The reasonableness of the Guaranty Law is more difficult to discern. The City's aim seems to be to protect small business owners from personal financial ruin on the heels of the pandemic-related closure of their businesses. *See* Dkt. 29 Ex. 31 (the Guaranty Law's sponsor explaining that the law was passed to "pre[v]ent commercial landlords from going after business owners[']personal assets"); Dkt. 29 Ex. 37 (small business owner explaining that enforcement of a personal liability provision "may leave him 'personally bankrupt' and 'at risk of losing the entirety of [his] life savings'"). Given that the City has publicly reported that small businesses employ nearly half of its workforce, *see* Dkt. 29 Ex. 44 at 3, SMALL BUSINESS FIRST, Report of the New York City Municipal Government, https://www1.nyc.gov/assets/smallbizfirst/downloads/pdf/small-business-first-report.pdf (last visited November 25, 2020), ensuring the financial survival of their owners seems criticial to City's economic recovery from this pandemic, *see* Dkt. 29 Ex. 31 at 29. Nonetheless, the Court recognizes why Plaintiff views it inequitable for the City to shift the pandemic's financial burden from small business owners to their landlords, many of whom are also struggling financially during this difficult time. *See* Bochner Decl. ¶ 18 (Plaintiff Bochner alleging that the Guaranty Law leaves him unable to recover $110,000 in rental income).

It is not the role of this Court, however, to opine on the wisdom of the policy decision at issue here—that is, the decision to shift the economic impact of the pandemic from commercial tenants and their guarantors to landlords. *See Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 447–48 (1934) ("Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned."); *see also Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 54 (2d Cir. 1998) ("[I]t is not the province of this Court to substitute its judgement for that of . . . a legislative body."). Well established law in this Circuit mandates that

such policy decisions be left to the policymakers. *See Buffalo Teachers*, 464 F.3d at 369; *Sanitation*, 107 F.3d at 994. This deference is especially strong in cases like this where the state is not a party to the contract. *See Buffalo Teachers*, 464 F.3d at 369 (noting that "when a law impairs a private contract, substantial deference is accorded," although "[p]ublic contracts are examined through a more discerning lens") .

Instead, in assessing the law's reasonableness, the Court looks to the law's tailoring. In *WB Worthen Co.*, for example, the Supreme Court addressed an Arkansas state law that permanently exempted insurance payments to any Arkansas resident from seizure by the courts. *See* 292 U.S. at 431. Because the law "contain[ed] no limitations as to time, amount, circumstances, or need," the Court found it violated the Contract Clause. *Id.* at 434. In contrast, the law here is tailored in several ways.

First, the Guaranty Law applies to a subset of commercial leases. It is limited to those commercial tenants whose businesses (1) were "required to cease serving patrons food or beverage for on-premises consumption . . . under executive order number 202.3," (2) were "required to close to members of the public under executive order number 202.7," or (3) were deemed "non-essential retail establishment subject to in-person limitations under . . . executive order number 202.6." Admin. Code. § 22-1005(1). Further, the law only prohibits the enforcement of a personal guaranty made by a natural person who is not the tenant—personal guaranties made by tenants or corporate entities are not affected. *Id.* § 22-1005.

Second, although the Guaranty Law permanently extinguishes some personal liability for those to whom it applies, the law is still temporally limited in that it only applies to those debts that arose between March 2020 and March 2021. *See* Admin. Code § 20-1005. In this respect, the law is similar to those upheld in *Buffalo Teachers*, 464 F.3d at 373, and *Sullivan*, 959 F.3d at

69. In those cases, although the challenged wage freezes were only in effect for a short period of time, they permanently deprived plaintiffs of benefits for which they had contracted, because neither law provided for retroactive back pay once the wage freeze was lifted. *See Sullivan*, 959 F.3d at 58–60 (noting that the relevant statute allowed wage freezes "for one year"); *Buffalo Teachers*, 464 F.3d at 366—67, 371 (noting that the wage freeze was "temporary"). The fact that they were only in effect for a relatively short period contributed to the courts' determination in those cases that the law was reasonable. *See Sullivan*, 959 F.3d at 68; *Buffalo Teachers*, 464 F.3d at 371–72. Because the Guaranty Law will expire in March 2021, *see* Admin. Code § 20-1005, it is distinguishable from those wholly unlimited laws that courts have previously struck down, *see*, *e.g.*, *Allied Structural Steel Co.*, 438 U.S. at 250 (noting that the law at issue in that case "did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively").

Third, the Guaranty Law leaves commercial landlords with other means through which they can recoup the rental income they have lost. Here, for instance, Plaintiff remains free to attempt to recover unpaid rent and interest from tenants, charge late payment fees, terminate the tenant's right to possession, evict the tenant, and recover damages. Dkt. 64, Ex. 5, §§ (1)(G). The Court recognizes that, given the reality posed by the pandemic, these alternatives may be more difficult to enforce than a personal liability provision might be. Indeed, for commercial tenants with few to no assets, the money may prove impossible to collect. Nonetheless, landlords are not without the possibility of other recovery, providing another basis for a finding of reasonableness. *See Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.*, 300 U.S. 124, 130 (1937) (noting that a law that "alters and modifies one of the existing remedies for

realization of the value of the" contract, but leaves the parties with other remedies allowing him to obtain the full value of the contract, does not violate the Contract Clause); *see also Elmsford*, 2020 WL 3498456 at *45 (refusing to find a Contract Clause violation where a challenged law left plaintiffs with a "suite of contractual remedies" with which they could recoup the funds for which they contracted).

None of this is said to minimize the Guaranty Law's harm to Plaintiff or others he seeks to represent, which the Court recognizes is substantial. Rather, these facts demonstrate that—under existing case law—the law is reasonable because is not without "limitations as to time, amount, circumstances, or need." *WB Worthen Co.*, 292 U.S. at 434. The Court thus concludes that the Guaranty law is reasonable, necessary, and passed to advance a legitimate public interest. For this reason, despite his showing of substantial impairment, Plaintiff has failed to plausibly plead a Contract Clause violation here.

III. The Challenges Ordinances are Not Preempted by State Law

Plaintiffs next contend that the Harassment Laws and the Guaranty Law are preempted by New York state law under the doctrines of both conflict preemption and field preemption. Pl. Mem. at 28. Under New York law, "[a] local law will be preempted either where there is a direct conflict with a state statute (conflict preemption) or where the legislature has indicated its intent to occupy the particular field (field preemption)." *Eric M. Berman, P.C. v City of New York*, 37 N.E.3d 82, 86 (N.Y. 2015). Plaintiffs assert that the challenged laws are both field and conflict preempted. *See* Amended Compl. at 52. The Court concludes otherwise.

A. Plaintiffs Cannot Establish Field Preemption

In New York, field preemption occurs when: (1) "a declaration of State policy evinces the intent of the Legislature to preempt local laws on the same subject matter" or (2) "the

Legislature's enactment of a comprehensive and detailed regulatory scheme in an area in controversy is deemed to demonstrate an intent to preempt local laws." *Matter of Chwick v. Mulvey*, 81 A.D.3d 161, 169–70 (N.Y. App. Div. 2010). "[W]hen the Legislature has demonstrated its intent to preempt the field, all local ordinances are preempted, regardless of whether they actually conflict with the state law." *Id.* at 172. Plaintiffs assert that the state government has occupied the field of pandemic response. They cite the state legislature's amendment of Executive Law § 29-a, which gave the Governor the power to "issue any directive during a state disaster emergency" that the Governor deemed "necessary to cope with the disaster." Plaintiffs' Memorandum of Law in Support of Their Motion for Preliminary Injunctive and Declaratory Relief ("Pl. Mem.") (dated Jul. 22, 2020) (Dkt. 28) at 30 (citing N.Y. Exec. Law Art. 2-B § 29-a). Plaintiffs assert that "the Governor ha[s] used this authority to issue comprehensive Executive Orders to regulate landlord-tenant relationships during the Pandemic" shows an intent to occupy the field of COVID-19 response. *Id.* at 31.

To be sure, "[t]he more comprehensive a statutory scheme, the less 'room [there is] for local ordinances to operate.'" *Chwick*, 81 A.D.3d at 172 (quoting *Dougal v. County of Suffolk*, 102 A.D.2d 531, 533 (N.Y. App. Div. 1984)). The comprehensiveness of a statutory scheme, however, is not necessarily dispositive. In *Garcia v. N.Y.C. Department of Health & Mental Hygiene*, Plaintiffs challenged a local ordinance mandating influenza vaccines under a theory of field preemption. *See* 106 N.E.3d 1187, 1199–1200 (N.Y. 2018). Plaintiffs there pointed to a provision in the state's health code granting the Commissioner of the New York State Department of Health the power to "establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health," *id.* at 1200 (citing Public Health Law §206(1)), as well as the State's comprehensive

statutory scheme for school vaccinations, *id*. at 1201–02. Despite this evidence, the New York Court of Appeals held that there was no field preemption because the statutory scheme demonstrated "the state legislature's recognition that municipalities play a significant role in vaccination programs." *Id*. at 1202. By contrast, in considering the state's regulatory scheme for handgun possession in *Chwick*, the court found that the state regulations left "'no room for local ordinances to operate.'" 81 A.D.3d at 172.

Here, the Governor's EOs look more like the statutory scheme in *Garcia* than that in *Chwick*. Plaintiffs repeatedly cite the provisions of the EOs that prohibit local governments from "issu[ing] any local emergency order . . . inconsistent with, conflicting with or superseding the foregoing directives." N.Y. Exec. Order No. 202.3 (Mar. 16, 2020), Dkt. 29 Ex. 18; *see* Amended Compl. ¶ 212, 213; *see also* Pl. Mem. at 18; *see also* Pl. Reply at 29. But these provisions leave room for local regulations, such as those at issue here, that do not conflict. Given that the state statutory scheme clearly leaves room for some local legislation, the Court finds that Plaintiffs have failed to plausibly plead field preemption.

B. The Laws Are Not Conflict Preempted

"Under the doctrine of conflict preemption, a local law is preempted by a state law when a right or benefit that is expressly given . . . by . . . State law. . . has then been curtailed or taken away by the local law." *Chwick*, 81 A.D.3d at 167–68 (internal citations omitted). However, the "fact that both the State and local laws seek to regulate the same subject matter does not in and of itself give rise to an express conflict." *Jancyn Mfg. Corp. v County of Suffolk*, 71 N.Y.2d 91, 97 (1987).

Plaintiffs argue that the Harassment Laws conflict with both the TSHA and the ERRA by (1) prohibiting rent collection expressly permitted by these laws and (2) expanding the pool of

persons entitled to relief. *See* Pl. Mem. at 28–29. But the Court has already concluded that the Harassment Laws do not prevent the collection of rent. *See* Section I.a, *supra*. And to the extent they cover more people than the THSA or ERRA do, this does not amount to a conflict because the laws regulate different conduct: the Harassment Laws prohibit harassment by landlords, while THSA and ERRA concern evictions and rental vouchers. Dkt. 29 Exs. 26–27.

In *Garcia*, when the New York Court of Appeals was asked to determine whether a city ordinance mandating influenza vaccines conflicted with a state law setting forth a list of mandatory vaccinations that did not include influenza. 106 N.E.3d at 1200–01. The court held that there was no conflict preemption because "nothing in [the state law] suggests that the list of vaccinations set forth therein is an exclusive one that may not be expanded by local municipalities." *Id.* at 1201 (citing Pubic Health Law § 2164); *see also Patrolmen's Benevolent Ass'n of City of N.Y. v. City of N.Y.*, 142 A.D.3d 53, 61 (N.Y. App. Div. 2016) (finding no conflict preemption when two laws "serve different objectives, and provide for different remedies").

The same is true here. The State's granting of certain protections to persons experiencing financial distress due to the pandemic does not preclude the City from granting additional protections to a wider group of New Yorkers, including those negatively impacted by the pandemic in other ways. Thus, no plausible allegation of conflict preemption has been raised as to the Harassment Laws.

Finally, Plaintiff Bochner also alleges that the Guaranty Law is conflict preempted, but fails to identify with which state law it conflicts. The Court can find no state law prohibiting the temporary limitation of personal guaranties, nor does any of the Governor's pandemic-related

EOs address this issue. Accordingly, Plaintiffs have failed to plausibly plead conflict preemption as to any of the challenged laws.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is granted and Plaintiffs' claims are dismissed. Plaintiffs' motion for a preliminary injunction and preliminary declaratory judgment is also denied.

The Clerk of Court is respectfully directed to terminate the motions pending at docket entries 27 and 37 and to terminate this case.

Dated: November 25, 2020
New York, New York

Ronnie Abrams
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MELENDEZ, et al.,

Plaintiffs,

-against-

20 **CIVIL** 5301 (RA)

JUDGMENT

THE CITY OF NEW YORK, et al.,

Defendants.

----------X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion & Order dated November 25, 2020, Defendants' motion to dismiss is granted and Plaintiffs' claims are dismissed. Plaintiffs' motion for a preliminary injunction and preliminary declaratory judgment is also denied; accordingly, this case is closed.

Dated: New York, New York

November 30, 2020

RUBY J. KRAJICK

Clerk of Court

BY: K. Mango

Deputy Clerk

United States District Court
Southern District of New York

Ruby J. Krajick
Clerk of Court

Dear Litigant:

Enclosed is a copy of the judgment entered in your case. If you disagree with a judgment or final order of the district court, you may appeal to the United States Court of Appeals for the Second Circuit. To start this process, file a "Notice of Appeal" with this Court's Pro Se Intake Unit.

You must file your notice of appeal in this Court within 30 days after the judgment or order that you wish to appeal is entered on the Court's docket, or, if the United States or its officer or agency is a party, within 60 days after entry of the judgment or order. If you are unable to file your notice of appeal within the required time, you may make a motion for extension of time, but you must do so within 60 days from the date of entry of the judgment, or within 90 days if the United States or its officer or agency is a party, and you must show excusable neglect or good cause for your inability to file the notice of appeal by the deadline.

Please note that the notice of appeal is a *one-page* document containing your name, a description of the final order or judgment (or part thereof) being appealed, and the name of the court to which the appeal is taken (the Second Circuit) – *it does not* include your reasons or grounds for the appeal. Once your appeal is processed by the district court, your notice of appeal will be sent to the Court of Appeals and a Court of Appeals docket number will be assigned to your case. At that point, all further questions regarding your appeal must be directed to that court.

The filing fee for a notice of appeal is $505 payable in cash, by bank check, certified check, or money order, to "Clerk of Court, S.D.N.Y." *No personal checks are accepted.* If you are unable to pay the $505 filing fee, complete the "Motion to Proceed *in Forma Pauperis* on Appeal" form and submit it with your notice of appeal to the Pro Se Intake Unit. If the district court denies your motion to proceed *in forma pauperis* on appeal, or has certified under 28 U.S.C. § 1915(a)(3) that an appeal would not be taken in good faith, you may file a motion in the Court of Appeals for leave to appeal *in forma pauperis*, but you must do so within 30 days after service of the district court order that stated that you could not proceed *in forma pauperis* on appeal.

For additional issues regarding the time for filing a notice of appeal, see Federal Rule of Appellate Procedure 4(a). There are many other steps to beginning and proceeding with your appeal, but they are governed by the rules of the Second Circuit Court of Appeals and the Federal Rules of Appellate Procedure. For more information, visit the Second Circuit Court of Appeals website at **http://www.ca2.uscourts.gov/**.

THE DANIEL PATRICK MOYNIHAN
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NY 10007-1312

THE CHARLES L. BRIEANT, JR.
UNITED STATES COURTHOUSE
300 QUARROPAS STREET
WHITE PLAINS, NY 10601-4150

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____

_____
(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

_____

_____
(List the full name(s) of the defendant(s)/respondent(s).)

_____CV_____ ( )( )

NOTICE OF APPEAL

Notice is hereby given that the following parties: _____

_____
(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit from the ☐ judgment ☐ order entered on: _____
(date that judgment or order was entered on docket)

that: _____

_____
(If the appeal is from an order, provide a brief description above of the decision in the order.)

_____ _____
Dated Signature*

_____
Name (Last, First, MI)

_____
Address City State Zip Code

_____ _____
Telephone Number E-mail Address (if available)

* Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

Rev. 12/23/13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____

_____
(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

_____

_____
(List the full name(s) of the defendant(s)/respondent(s).)

_____CV_____( )( )

MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

I move under Rule 4(a)(5) of the Federal Rules of Appellate Procedure for an extension of time to file a notice of appeal in this action. I would like to appeal the judgment entered in this action on _____ but did not file a notice of appeal within the required time period because:
date

_____

_____

_____
(Explain here the excusable neglect or good cause that led to your failure to file a timely notice of appeal.)

_____ _____
Dated: Signature

_____
Name (Last, First, MI)

_____
Address City State Zip Code

_____ _____
Telephone Number E-mail Address (if available)

Rev. 3/27/15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____

_____ _____CV_____ ( )( )
(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

_____

_____
(List the full name(s) of the defendant(s)/respondent(s).)

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

I move under Federal Rule of Appellate Procedure 24(a)(1) for leave to proceed *in forma pauperis* on appeal. This motion is supported by the attached affidavit.

Dated _____ Signature _____

Name (Last, First, MI) _____

Address _____ City _____ State _____ Zip Code _____

Telephone Number _____ E-mail Address (if available) _____

Application to Appeal In Forma Pauperis

_____ v. _____ Appeal No. _____

District Court or Agency No. _____

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

My issues on appeal are: (required):

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$	$	$	$
Self-employment	$	$	$	$
Income from real property (such as rental income)	$	$	$	$

Interest and dividends	$	$	$	$
Gifts	$	$	$	$
Alimony	$	$	$	$
Child support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$
Disability (such as social security, insurance payments)	$	$	$	$
Unemployment payments	$	$	$	$
Public-assistance (such as welfare)	$	$	$	$
Other (specify):	$	$	$	$
Total monthly income:	$ 0	$ 0	$ 0	$ 0

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
			$
			$
			$

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
			$
			$
			$

4. *How much cash do you and your spouse have? $_____*

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	**Type of Account**	**Amount you have**	**Amount your spouse has**
		$	$
		$	$
		$	$

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home	**Other real estate**	**Motor vehicle #1**
(Value) $	(Value) $	(Value) $
		Make and year:
		Model:
		Registration #:

Motor vehicle #2	**Other assets**	**Other assets**
(Value) $	(Value) $	(Value) $
Make and year:		
Model:		
Registration #:		

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**
	$	$
	$	$
	$	$
	$	$

7. *State the persons who rely on you or your spouse for support.*

Name [or, if a minor (i.e., underage), initials only]	**Relationship**	**Age**

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	**Your Spouse**
Rent or home-mortgage payment (including lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$

Transportation (not including motor vehicle payments)	$	$
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's:	$	$
Life:	$	$
Health:	$	$
Motor vehicle:	$	$
Other:	$	$
Taxes (not deducted from wages or included in mortgage payments) (specify):	$	$
Installment payments		
Motor Vehicle:	$	$
Credit card (name):	$	$
Department store (name):	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify):	$	$
Total monthly expenses:	$ 0	$ 0

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

☐ Yes ☐ No If yes, describe on an attached sheet.

10. *Have you spent — or will you be spending — any money for expenses or attorney fees in connection with this lawsuit?* ☐ Yes ☐ No

If yes, how much? $ _____

11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

12. *Identify the city and state of your legal residence.*

City _____ State _____

Your daytime phone number: _____

Your age: _____ Your years of schooling: _____

Last four digits of your social-security number: _____