No. 20-4238

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 OF *AMICUS CURIAE* VOLUNTEERS OF LEGAL SERVICE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, the undersigned counsel of record certifies that amicus curiae is not a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

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PRELIMINARY STATEMENT

Amicus curiae Volunteers of Legal Service submits this brief in support of Defendants-Appellees[1] to address two main points. *First*, the Guaranty Law does not violate the Contracts Clause because it does not substantially impair contractual rights; but even if it does, the district court properly found that the Guaranty Law is reasonable and necessary to serve a legitimate public purpose. *Second*, Appellants lack standing to challenge the Commercial Harassment Law because the Commercial Harassment Law does not arguably proscribe their intended speech and there is no credible threat of prosecution under the Commercial Harassment Law. Accordingly, this Court should affirm the district court's judgment of dismissal.

INTEREST OF AMICUS CURIAE

Volunteers of Legal Service ("VOLS") was established as a non-profit pro bono civil legal services provider in 1984 to fill the gap left by severe federal budget cuts to pro bono civil legal services. The VOLS

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[1] No party, counsel for any party, or person other than amicus curiae, its members, and/or its counsel authored this brief in any part or made any monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Microenterprise Project, one of VOLS' five population-based projects, assists New York City's underserved low- and moderate-income small business owners with the legal issues that arise in connection with starting and operating a business. Since the pandemic first reached New York City, a substantial portion of the VOLS Microenterprise Project's work has been devoted predominantly to assisting in the resolution of commercial landlord-tenant disputes arising as a result of the crisis, as well as keeping small business owners abreast of the rapidly shifting legal landscape.

Through its work at the intersection of commercial law practice, public interest, and advocacy, VOLS has become perhaps uniquely familiar with the challenges facing New York City's underserved small business community and the relief that they require to overcome those challenges, including the laws challenged in this case. VOLS has a substantial interest in ensuring that these issues are adequately presented to this Court because any decision in the above-captioned matter will affect the entire New York City small business community, including many of VOLS' marginalized and underserved clients. For

similar reasons, VOLS also appeared as amicus curiae in the district court.

ARGUMENT

I. The Guaranty Law Does Not Violate the Contracts Clause

The Contracts Clause of the U.S. Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art I, § 10; *see Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 367 (2d Cir. 2006). "Although facially absolute, the Contracts Clause's prohibition 'is not the Draconian provision that its words might seem to imply.'" *Buffalo Teachers*, 464 F.3d at 367 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240 (1978)). Rather, the Contracts Clause must give way to "the police power of a state to protect the general welfare of its citizens, a power which is 'paramount to any rights under contracts between individuals.'" *Id.* (quoting *Allied Structural Steel*, 438 U.S. at 241). Accordingly, without more, the mere fact that a state law affects existing contractual obligations does not give rise to a viable Contracts Clause claim. *Id.* at 368.

In order to determine whether a law impairing contractual obligations passes muster under the Contracts Clause, courts ask, in

turn, whether: (1) the contractual impairment is substantial; (2) the law serves a legitimate public purpose, such as remedying a general social or economic problem; and (3) the means chosen to accomplish this purpose are reasonable and necessary. *Id.* Because the Guaranty Law does not amount to a substantial impairment of contractual obligations, it does not violate the Contracts Clause, and the Court need not inquire as to the legitimacy of the public purpose served by the Guaranty Law or the reasonableness and necessity of the Guaranty Law. Nevertheless, to the extent that the Court concludes that the Guaranty Law substantially impairs contractual obligations, it still survives scrutiny under the Contracts Clause because it is reasonable and necessary to serve a legitimate public purpose.

A. The Guaranty Law Does Not Substantially Impair Contractual Obligations

The Guaranty 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." (Appellant's Br. at SPA-2.) Enacted in response to "the public health and economic devastation wrought" by the COVID-19

pandemic in New York City – "the epicenter of the outbreak within the state" – the Guaranty Law provides *limited*, but *essential*, temporary relief to the City's ailing community of small businesses and small business owners at a time when their survival hangs in the balance. (*See id.* at SPA-1-SPA-2.) Indeed, the Guaranty Law is narrowly tailored in scope, as it "only covers payments due between March 2020 and March 2021," a period indisputably characterized by public emergency unrivaled by any other in modern history.[2] (*See id.* at SPA-2.) While VOLS does not discount the "legitimate concerns" that Appellants have expressed about the Guaranty Law, the Guaranty Law does not *substantially* impair contractual rights, and therefore, does not violate the Contracts Clause. (*See id.* at SPA-3.)

Although "[t]he Contracts Clause restricts the power of States to disrupt contractual relations," courts have long recognized that "not all laws affecting pre-existing contracts violate the Clause." *See Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018) (citing *El Paso v. Simmons*, 379 U.S.

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[2] On March 18, 2021, Int. No. 2243-2021 was introduced in the City Council. *If* enacted into law, the bill would further extend protections under the Guaranty Law through June 30, 2021.

497, 506-07 (1965)); *accord Buffalo Teachers*, 464 F.3d at 368. Indeed, "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear," and "[m]inimal alteration of contractual obligations may end the inquiry at its first stage." *Allied Structural Steel*, 438 U.S. at 245. In assessing the substantiality of a contractual impairment, the Supreme Court "has considered the extent to which [a] law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S. Ct. at 1822. In this Circuit, "the aggrieved party's expectations [are] the touchstone of the analysis . . . ." *Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 169 (S.D.N.Y. 2020) (quoting *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997) ("Impairment is greatest where the challenged government legislation was wholly unexpected.")). All of these factors demonstrate that the Guaranty Law only minimally impairs contractual obligations.

1. The Guaranty Law Does Not Frustrate the Reasonable Expectations of Commercial Landlords in New York City

Most critically, because Appellants' reasonable expectations have not been frustrated by the Guaranty Law, their contractual rights, and those of commercial landlords across New York City, have not been substantially impaired. "[T]he reasonableness of expectations depends, in part, on whether legislative action was foreseeable . . . ." *Sullivan v. Nassau Cty. Interim Fin. Auth.*, 959 F.3d 54, 64 (2d Cir. 2020). As the Southern District of New York recently explained, "[b]ecause past regulation puts industry participants on notice that they may face further government intervention in the future, a later-in-time regulation is less likely to violate the [C]ontracts [C]lause where it covers the same topic [as the prior regulation] and shares the same overt legislative intent to [] protect [the parties protected by the prior regulation]." *Elmsford*, 469 F. Supp. 3d at 169-170 (internal quotations omitted). Indeed, he who purchases "into an enterprise already regulated in the particular to which he now objects, [] purchase[s] subject to further legislation upon the same topic." *Chrysler Corp. v. Kolosso Auto Sales*, 148 F.3d 892, 895 (7th Cir. 1998) (Posner, J.)

(quoting *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 38 (1940)). This principle is now – and has always been – the guiding light of foreseeability, which, in this case, leads in only one direction. The Guaranty Law was a foreseeable regulation of the commercial landlord-tenant relationship during times of public emergency.

The public emergency triggered by the COVID-19 pandemic is far from the first to wreak economic havoc on New York City. "Although an emergency may not call into life a power which has never lived," it may nevertheless "furnish the occasion for the exercise of power." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934). Indeed, just as history illustrates that emergency may strike at any time, it also shows that the states may properly exercise their police powers "to protect the lives, health, morals, comfort and general welfare of the people," in response. *Allied Structural Steel*, 438 U.S. at 241. For example, in responding to prior crises, the New York State Legislature enacted laws regulating the commercial landlord-tenant relationship in New York City in a fashion markedly similar to that chosen by the City Council here in enacting the Guaranty Law, and those laws were sustained by the highest courts of the State and Nation. *See Twentieth*

Century Assocs., Inc. v. Waldman, 294 N.Y. 571, 577-578 (1945), *cert. dismissed*, 326 U.S. 697 (1946). Aside from the fact that these prior legislative acts illustrate how the Guaranty Law is an "exertion of a living power already enjoyed," they also suffice to have placed Appellants and all New York City commercial landlords on notice of the power of the legislature to alter the commercial landlord-tenant relationship, as it did here, during times of exceptional crisis.

Chapter 3 of the Laws of 1945 (the "Commercial Rent Law"), enacted while the United States was at war, took effect on January 24, 1945, and *retroactively* limited commercial rent in New York City to "a level of fifteen per centum above rents charged on March first, nineteen hundred forty-three," in order to "protect and promote the public health, safety, and general welfare . . . ." *Waldman*, 294 N.Y. at 577-578. The New York State Legislature found that the prevailing conditions of the time were "a threat to the successful prosecution of the war and essential civilian activities, and to the public safety, health, and general welfare of the people of the state of New York," and declared the existence of a public emergency. *Id.* at 577-578. The Commercial Rent Law, enacted in response to crisis, *actually* deprived commercial

landlords of the rent to which they were contractually entitled, going even further than the Guaranty Law. *See id.* at 577-578. Nevertheless, the New York Court of Appeals upheld the Commercial Rent Law as "a most reasonable and legitimate remedy, carefully designed as appropriate to the public ends in view and the accomplishment of the legislative purpose to curb serious public evils arising from the emergency." *Id.* at 581.

Because the Guaranty Law "covers the same topic [as the [Commercial Rent Law]] and shares the same overt legislative intent to [] protect [[commercial tenants]]," the Guaranty Law does not substantially impair Appellants' contracts. *See Elmsford*, 469 F. Supp. 3d at 169-170 (internal quotations omitted). While the district court properly found, and VOLS does not dispute, that "the pandemic itself, was entirely unforeseeable," it does not follow that the Guaranty Law was similarly unforeseeable. Although we may not know when it will happen or as a result of what cause, experience makes plain that emergency may strike at any time. Thus, the proper inquiry is whether the legislature's response was foreseeable *in the event of crisis*. And, as already explained, the City Council's response was. This Court should

not allow Appellants to evade the familiar rule that he who purchases "into an enterprise already regulated in the particular to which he now objects, [] purchase[s] subject to further legislation upon the same topic." *Kolosso Auto*, 148 F.3d at 895. The Guaranty Law was a foreseeable regulation of the commercial landlord-tenant relationship during times of public emergency, and therefore, it does not substantially impair Appellants' contractual rights.

2. The Guaranty Law Minimally Impacts the Contractual Bargain and Safeguards Appellants' Rights

While the Guaranty Law temporarily limits a landlord's ability to enforce personal guaranties during the height of a global pandemic, it does not leave commercial landlords without remedies. Indeed, the Guaranty Law has no effect whatsoever on a commercial landlord's right to recover a money judgment from a commercial tenant in the same amount it could have from a personal guarantor during the temporary period of suspension to which it applies. And, as the Supreme Court has long recognized, "[t]he particular remedy existing at the date of the contract *may be altogether abrogated* if another equally effective for the enforcement of the obligation remains or is substituted

for the one taken away." *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 128-129 (1937) (emphasis added).

Appellants' contention that "[f]or 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," mischaracterizes the nature of personal guaranties and the so-called "good guy" provision. (*See* Appellants' Br. at 24.) First, personal guaranties generally provide only for the recovery of money due under a commercial lease and generally do not affect a landlord's right of possession. In that regard, because the Guaranty Law leaves intact a commercial landlord's right to recover rent from and evict a commercial tenant under the commercial lease, it only minimally "undermines the contractual bargain" and preserves Appellants' abilities to "safeguard[] or reinstat[e]" their rights. *See Sveen*, 138 S. Ct. at 1822.

Second, Appellants *assume* that all personal guaranties contain a "good guy" provision. In contrast to an absolute guaranty, a guaranty containing a "good guy" provision typically "limit[s] the guarantor's liability to the date until the tenant of the premises actually vacates or

surrenders the premises," thus providing some incentive for the guarantor to cause the commercial tenant to vacate in the event it cannot meet rental obligations. *See 345 E. 69th St. Owners Corp. v. Platinum First Cleaners, Inc.*, No. 651505/2015, 2016 N.Y. Misc. LEXIS 3341, at *5 (N.Y. Sup. Ct. Sept. 19, 2016). As an initial matter, VOLS regularly encounters small business owners who, without the benefit of counsel, sign absolute guaranties that do not contain such provisions. By way of example, the Real Estate Board of New York Standard Form of Store Lease, which contains a personal guaranty and serves as a model for the vast majority of small business owners, including many encountered by VOLS, *notably omits* a "good guy" provision, providing as follows:

> The undersigned Guarantor guarantees to Owner, Owner's successors and assigns, the full performance and observance of all the agreements to be performed and observed by Tenant in the attached lease, including the "Rules and Regulations" as therein provided, without requiring any notice to Guarantor of nonpayment, or nonperformance, or proof, or notice of demand, to hold the undersigned responsible under this guaranty, all of which the undersigned hereby expressly waives, and expressly agrees that the legality of this agreement and the agreements of the Guarantor under this agreement, shall not be ended, or

> changed by reason of the claims to Owner against Tenant of any of the rights or remedies given to Owner as agreed in the attached lease. The Guarantor further agrees that this guaranty shall remain and continue in full force and effect as to any renewal, change or extension of the lease. As a further inducement to Owner to make the lease, Owner and Guarantor agree that in any action or proceeding brought by either Owner or the Guarantor against the other on any matters concerning the lease or of this guaranty, that Owner and the undersigned shall and do waive trial by jury.

Moreover, most, if not all, of the "good guy" provisions that VOLS has seen, require the commercial tenant to be *in full compliance with the lease* as a condition precedent to the guarantor's exercise of rights under the provision. As such, in the vast majority of circumstances, the "good guy" provision does not, as Appellants allege, "allow[] for guarantors to have tenants 'turn-over the keys' for properties for which neither the tenant nor guarantor want to continue paying." (*Contra* Appellants' Br. at 40.) In practice, the "good guy" provision is a *much narrower* remedy than Appellants admit, and even for those personal guaranties that contain them, the Guaranty Law does not substantially impair contractual obligations.

B. The District Court Correctly Found That the Guaranty Law Serves a Legitimate Public Purpose

Even if the Court finds that the Guaranty Law substantially impairs contractual obligations, the Law nevertheless serves a legitimate public purpose. If, and only if, a law substantially impairs contractual obligations, "the inquiry turns to the means and ends of the legislation." *Sveen*, 138 S. Ct. at 1822; *accord Buffalo Teachers*, 464 F.3d at 368. "When a state law constitutes substantial impairment, the state must show a significant and legitimate public purpose behind the law," such as "one aimed at remedying an important general social or economic problem rather than providing a benefit to special interests." *Buffalo Teachers*, 464 F.3d at 368 (quoting *Sanitation & Recycling*, 107 F.3d at 993). There can be little dispute that, as the district court found, "the City passed the Guaranty Law to benefit the public interest, not itself or any special interest." (Appellants' Br. at SPA-27.)

The Guaranty Law is "aimed at remedying an important general social or economic problem" – the effects of the COVID-19 pandemic on one of New York City's largest employers – "rather than providing a benefit to special interests." *See Sanitation & Recycling*, 107 F.3d at 993-994 (internal quotations omitted). Appellants do not meaningfully

dispute this. While cast in terms of whether the City had a legitimate public purpose in enacting the Guaranty Law, Appellants' assertion that "the record is bereft of any evidence demonstrating that favoring commercial tenants actually benefits the public-at-large," is better addressed to the reasonableness and necessity of the Law. (*See* Appellants' Br. at 30.) Nevertheless, the publicly available statistics about the number of small businesses in the City and the outsized number of people that they employ, which the district court properly considered, directly evidence the legitimacy of the City's purpose in enacting the Guaranty Law. (*Id.* at 31.)

Small businesses are the backbone of the economy. (*See, e.g.*, A-3788; A-3829.) In 2016, for example, small businesses in New York State employed 4.1 million people, or 50.2% of the private work force, and created 139,058 new jobs. (A-3793.) And in New York City, the small business community is no less integral to overall economic health. 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. (*Id.* at A-3798.) Put simply, "small businesses drive economic growth and contribute to the quality of life in communities across New

York and the nation." (*Id.* at 3791.) Nevertheless, "[e]ven the best-managed small businesses are in a very vulnerable position as they try to weather the shutdown of much of the U.S. economy during the coronavirus crises." (*Id.* at A-3823.)

Although they are of paramount importance to both the local and national economies, small businesses lack the resources of their larger counterparts. A report by the Federal Reserve Bank of New York shows that 86% of small businesses would have to take some drastically negative action if faced with a two-month revenue loss, with 47% having to rely on personal funds, and 17% having to close permanently. (*Id.* at A-3829, 3835.) That same report shows that 59% used personal guaranties to secure debt. (*Id.* at A-3837.) With government orders requiring the closure of all non-essential businesses well beyond the two-month revenue-free period triggering action on the part of many small businesses, the repercussions for small businesses, and consequently, all of New York City, are dire. Indeed, many small businesses teeter on the edge of permanent closure but for State laws providing a *temporary* and *partial* moratorium on the execution of

evictions.[3] But even a moratorium on evictions, while delaying a rush to the courts for eviction and nonpayment proceedings, provides no lasting relief for small businesses and those who rely on them – their owners and employees, as well as the general public.

The once bustling Times Square is illustrative of just how badly businesses in New York City were affected by the COVID-19 pandemic. During the earliest days of the pandemic, Times Square—an area that employs 180,000 people, provides 15% of New York City's economic output, and generates $2.5 billion in tax revenue for the City—stood still. (*Id.* at A-3710.) Once populated by 350,000–400,000 people per

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[3] Effective on March 20, 2020, Governor Cuomo's Executive Order No. 202.8 established a *temporary* moratorium on commercial evictions *only* through June 20, 2020. Executive Order No. 202.28, which took effect thereafter, prohibited *only* the initiation of eviction proceedings for the nonpayment of rent by a commercial tenant facing financial hardship. While Executive Order No. 202.28 limited commercial landlords' access to judicial proceedings brought against financially impacted tenants, it did not foreclose commercial landlords from exercising the right of self-help eviction. On March 9, 2021, Governor Cuomo signed into law the COVID-19 Emergency Protect Our Small Businesses Act of 2021, which *temporarily* prohibits commercial landlords from removing certain financially impacted tenants from possession of the leased premises until May 1, 2021. Importantly, that law also protects commercial landlords facing similar financial hardship, including due to the failure of commercial tenants to meet rental obligations, from foreclosure during that same period.

day, foot-traffic declined by over 90% to less than 35,000 people per day throughout the pandemic. (*Id.* at A-3708.) It is hard to overstate just how profoundly the City's business landscape was and remains imperiled. And small businesses remain the hardest hit. Indeed, "small businesses continue to suffer, even as the economy reopens gradually and employment growth resumes." Office of the N.Y. State Comptroller, *New York's Economy and Finances in the COVID-19 Era*, OSC.STATE.NY.US (Mar. 18, 2021), https://www.osc.state.ny.us/reports/impact-covid-19-march-18-2021. A recent report by the Office of the New York State Comptroller shows that, despite how far New York has advanced through the pandemic, four out five small businesses in New York continue to report an overall negative impact from the COVID-19 pandemic. *Id.* Moreover, unemployment levels – a key indicator of the City's economic health – continue to soar high above pre-pandemic levels. *See* Partnership for N.Y. City, *Key Economic Indicators of NYC*, PFNYC.ORG (Mar. 2021), https://pfnyc.org/research/dashboard-key-economic-indicators-of-nyc/. A vast number of the jobs lost to the pandemic – as many as 520,000 - came from the City's small businesses. (*See* A-3947.)

Contrary to Appellants' assertion that "nothing in the[] statistics proves, in any way, that the provisions of the Guaranty Law protect or promote the public interest," providing aid to small businesses directly benefits the public. (*Contra* Appellants' Br. at 31.) First, as the statistics make plain, small businesses employ a disproportionately large segment of the City's general public and ensuring their continued survival is necessary to help New Yorkers retain, or reacquire, their livelihood. Second, small businesses generate substantial sales and use and other tax revenue for the City, and ensuring that they remain open preserves a major source of income for the City, and ultimately, its residents.

Moreover, small businesses reflect the diversity of their owners, and ensuring that they remain open preserves the diversity of neighborhoods from Staten Island to the Bronx, and everywhere in between. This, in turn, ensures preservation of the City's cultural identity, as well as continued access to affordable and culturally essential goods by all New Yorkers. As the Supreme Court of New York recently observed in construing the Guaranty Law: "[t]he [City] Council clearly chose to try to protect the businesses that serve the local

community – so that when [] restrictions are lifted, the stores and restaurants would (hopefully) reopen and some semblance of community would return." *40 X Owner LLC v. Masi*, No. 156181/2020, 2021 N.Y. Misc. LEXIS 51, at *4-5 (N.Y. Sup. Ct. Jan. 7, 2021). Without the Guaranty Law, "neighborhoods would almost certainly be ghost towns with closed storefronts everywhere long after restrictions are lifted." *Id.* at *5. There can be little dispute that the Guaranty Law seeks to, and does, prevent this outcome.

Finally, in addition to providing much-needed relief to ensure that small businesses have a fighting chance at recovery, the Guaranty Law also ensures that small business owners – a critical swath of the City's general public – do not face personal financial ruin, in addition to the loss of their businesses. It is difficult to conceive of a broader societal goal than one that seeks to prevent the widespread bankruptcy of members of the general public. Indeed, "courts have often held that the legislative interest in addressing a fiscal emergency is a legitimate public interest." *Buffalo Teachers*, 464 F.3d at 369. This is especially so where, as here, the fiscal emergency threatens the solvency of the people themselves, rather than the State in its sovereign capacity.

Widespread bankruptcy compounds the threat of the pandemic by leaving those affected without the means to properly respond and protect themselves, which would otherwise exacerbate the current crisis. The Guaranty Law, which serves to prevent this outcome, plainly serves a legitimate public interest.

C. The District Court Correctly Found that the Guaranty Law is Reasonable and Necessary

The Guaranty Law is reasonable and necessary to serve the legitimate public purpose of protecting New York City small businesses and small business owners from the devastating effects of the COVID-19 pandemic. First, the district court properly deferred to the legislature in assessing the reasonableness and necessity of the Law. Second, no other law, local or otherwise, adequately, or even remotely, addresses the public purpose intended to be served by the Guaranty Law. Accordingly, the Guaranty Law is reasonable and necessary.

1. The District Court Properly Deferred to the Legislature in Analyzing the Reasonableness and Necessity of the Guaranty Law

At the outset, the district court properly deferred to the policy judgment of the legislature in analyzing whether the Guaranty Law is reasonable and necessary to serve a legitimate public purpose. (*See*

Appellants' Br. at SPA-28-SPA-31.) Indeed, it is well-settled that "[w]hen 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." *Sanitation & Recycling*, 107 F.3d at 994. Where, as here, legislation is not self-serving, "*substantial deference* is accorded to the legislature's 'judgment[s] as to the necessity and reasonableness of a particular measure." *Buffalo Teachers*, 464 F.3d at 369 (emphasis added) (internal citations omitted). On that basis alone, the district court properly found that the Guaranty Law is reasonable and necessary to serve a legitimate public purpose.

Contrary to Appellants' assertion that "[a] more searching review [by the district court] [] would have revealed that the Guaranty Law is so categorical in nature and so wide sweeping in its coverage, that it far overreaches its stated objectives and is hardly reasonably drawn," the district court was not required to engage in such a "searching review." *See Buffalo Teachers*, 464 F.3d at 371. This Court's precedent makes plain that less deferential review is appropriate only where "the contract-impairing law is self-serving," and the Guaranty Law *clearly* is

not because, as explained above, the City Council was "genuinely acting for the public good," rather than "self-interest." *See Buffalo Teachers*, 464 F.3d at 370. Thus, less deference is not appropriate. Indeed, "[s]uch a high level of judicial scrutiny of the legislature's actions would harken a dangerous return to the days of *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), *overruled*, *see Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952), in which courts would act as super legislatures, overturning laws as unconstitutional when they believe[d] the legislature acted unwisely." *See Buffalo Teachers*, 464 F.3d at 371 (internal quotations omitted). Appellants' contention that "the District Court's decision [] misapplies *Buffalo Teachers* and underestimates the impact of a permanent forfeiture of a year's rent for a small landlord in the City," is without merit because in *Buffalo Teachers*, this Court analyzed the reasonableness and necessity of the challenged law under *less deferential scrutiny*. As already explained, substantial deference is appropriate here because the Guaranty Law is not self-serving.

Although the district court was not required to walk through each step of less deferential review articulated in *Buffalo Teachers*, the

district court nevertheless carefully scrutinized the reasonableness of the Guaranty Law. In doing so, the district court properly found that the Guaranty Law is "reasonable because [it] is not without 'limitations as to time, amount, circumstances, or need." (Appellants' Br. at SPA-33.) Indeed, as the district court found, the Guaranty Law is: (1) limited to a subset of commercial leases; (2) temporally limited to debts arising between March 2020 and March 2021; and (3) leaves commercial landlords with other means through which to recoup the rental income they have lost. *Id.* at *45-47. Appellants' contention that the City's failure to consider a "substantial injury requirement to avoid well-capitalized tenants taking advantage of the Guaranty Law . . . dooms the Guaranty Law," is inconsistent with its own recognition that "landlords generally look to the personal guarantor *only after* . . . seeking payment from the tenant [becomes] futile . . . ." (Appellants' Br. at 39, 42 (emphasis in original).) If the Guaranty Law applies to well-capitalized tenants, as Appellants suggest, landlords still remain free to pursue all remedies and recover as against the commercial tenant once temporary restrictions on eviction and nonpayment proceedings are lifted. The district court properly deferred to the legislature.

2. No Law Other Than the Guaranty Law Adequately Serves the City's Legitimate Public Purpose

Finally, VOLS emphasizes that, while the State has enacted several measures over the course of the pandemic providing aid to certain *residential tenants* affected by the pandemic, many of those measures were never made applicable to *commercial tenants*. Appellants improperly conflate the relief available to commercial tenants with that available to residential tenants. For example, contrary to Appellants' assertion that "the Guaranty law is unnecessary because there are already a plethora of legislative protections designed to mitigate the pandemic's impact," there is absolutely no law requiring commercial landlords to provide any rent relief to commercial tenants facing financial hardship. (*See* A-91-92 ¶¶ 39, 40-42; *contra* Appellants' Br. at 44.) Moreover, no law has ever prohibited commercial landlords from making demands for the payment of fees or charges for the late payment of rent. (*See* A-91-92 ¶¶ 39, 40-42; *contra* Appellants' Br. at 44.) As the district court correctly found, Appellants remain "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." (Appellants' Br. at SPA-32.) Because no other law adequately serves the public purpose intended to be served by the Guaranty Law, the district court properly found that the Guaranty Law is both reasonable and necessary to serve a legitimate public purpose.

II. Appellants Lack Standing to Challenge the Commercial Harassment Law

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,'" imposing restraints on the cases that they may adjudicate. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014); *see* U.S. CONST. art III, § 2. The doctrine of standing effectuates the limitations placed on federal courts by Article III by "identify[ing] those disputes which are appropriately resolved through the judicial process." *Driehaus*, 573 U.S. at 157 (internal quotations omitted). In order to demonstrate standing, a plaintiff must show: (1) an injury-in-fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *Id.* at 157–158. In the context of a pre-enforcement suit, "[a] plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of

conduct arguably affected with a constitutional interest, *but proscribed by a statute*, and *there exists a credible threat of prosecution thereunder*.'" *Id.* at 159 (emphasis added). Because Appellants have failed to allege an intention to engage in a course of conduct arguably proscribed by the Commercial Harassment Law and a credible threat of prosecution thereunder, they lack standing and this Court should affirm the district court's dismissal on that basis.

A. The Commercial Harassment Law Does Not Arguably Proscribe Appellants' Desired Speech

The Commercial Harassment Law is codified at N.Y.C. ADMIN. CODE § 22-902 and provides in relevant part:

> a. A landlord shall not engage in commercial tenant harassment. *Except as provided in subdivision b of this section*, commercial tenant harassment is any act or omission by or on behalf of a landlord that (i) would *reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property*, and (ii) includes
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> * * *
>
> 11. *threatening* a commercial tenant *based on . . .* (ii) *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 . . . .*[4]
>
> * * *
>
> b. *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 for purposes of this chapter.*
>
> N.Y.C. ADMIN. CODE § 22-902 (emphasis added).

Appellants allege that the Commercial Harassment Law "restrict[s] Appellants' lawful speech and force[s] them to avoid routine, lawful rent demands for fear of litigation." (Appellants' Br. at 54.) Even a cursory review of the text of the Law, however, makes plain that it does not even arguably proscribe Appellants' desired speech. As the district court properly found, Appellants' interpretation of the Commercial Harassment Law "is unsupported by the text of the [L]aw[] and the relevant case law." (Appellants' Br. at SPA-17.) First, and perhaps most fundamentally, a threat of eviction based on a tenant's failure to pay rent is *not even arguably* a threat on the basis of a

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[4] The Commercial Tenant Harassment Law also sets forth detailed definitions for "the COVID-19 period" and "impacted by COVID-19."

tenant's status as a person or business impacted by COVID-19, as that term is defined. The two are simply not one and the same even though a commercial tenant's status as a person or business impacted by COVID-19 may be the cause of its inability to pay rent. As the district court properly held with respect to the Residential Harassment Law, "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." (Appellants' Br. at SPA-21.) This holding is equally applicable to the Commercial Harassment Law because, as relevant here, the Commercial Harassment Law proscribes essentially the same threats as the Residential Harassment Law.

Second, the Commercial Harassment Law contains an express safe harbor for the Appellants' desired speech: "[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." N.Y.C. ADMIN. CODE § 22-902(b). As Appellants conceded before the district court, "before landlords can even commence non-payment proceedings in court, they must first make rent demands." (Dist. Ct.

Dkt. 28 at 19 n. 9.) It follows that, in order to give meaning and effect to N.Y.C. ADMIN. CODE § 22-902(b), lawful rent demands made in furtherance of a lawful lease termination cannot be prohibited by the Commercial Harassment Law. That the Commercial Harassment Law does not proscribe routine rent demands finds even further support in N.Y.C. ADMIN. CODE § 22-903(b), which provides that "[t]he commercial tenant shall not be relieved of the obligation to pay any rent for which the commercial tenant is otherwise liable." Because the Commercial Harassment Law does not even arguably proscribe Appellants' desired speech, Appellants lack standing to challenge the Commercial Harassment Law.

During the pendency of the district court proceedings, Appellants cited to this Court's opinion in *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 384 (2d Cir. 2000) for the proposition that the injury-in-fact requirement is satisfied "even if there 'may be other, perhaps even better' constructions of a law, as long as the plaintiff's interpretation is 'reasonable enough that it [could] legitimately fear that it [would] face enforcement of the statute' pursuant to 'the definition proffered by' the plaintiff." (*See* Dist. Ct. Dkt. 64 at 5.) If

anything, however, *Vermont Right to Life* illustrates exactly why Appellants cannot satisfy the injury-in-fact requirement – the irreducible constitutional minimum of standing. Their strained reading of the statute simply is *not reasonable*. *Cf. id.* at 382-383. Indeed, if anything, it should be setting off all sorts of "[w]arning alarm signals." *See id.* at 392 (Shadur, D.J., dissenting).

The facts of this case more closely parallel those of *Carrico v. City & County of San Francisco*, 656 F.3d 1002 (9th Cir. 2011), where the Ninth Circuit addressed a scenario similar to this one. There, a non-profit association of landlords and a landlord in her individual capacity filed suit against the City of San Francisco alleging that a law prohibiting bad faith attempts to "coerce [] tenant[s] to vacate with offers of payments . . . accompanied with threats or intimidation" violated the First Amendment. *Id.* at 1004. Although the defendant in *Carrico* did not challenge the plaintiffs' standing either in the district court or on appeal, the Ninth Circuit *sua sponte* requested briefing on the issue. *Id.* at 1005.

The Ninth Circuit then held that the plaintiffs lacked standing for several reasons. First, although the landlord had alleged that "she

became embroiled in a dispute" with a holdover tenant who "sued, claiming that [her] 'communications regarding his status, threats to invoke legal process to resolve the situation, [etc.],'" violated the law, she did not allege that she engaged in the conduct prohibited by the Law, and thus, she could not demonstrate that her conduct was even "arguably . . . proscribed." *Id.* at 1007-1008. Second, "and more fundamentally, [that] suit concerned *the City's* ability to enforce [the law]," not a private party's. *Id.* at 1008 (emphasis in original). Both of these considerations apply with equal, and perhaps even greater, force here. Appellants have not alleged that they seek to engage in conduct arguably proscribed by the Commercial Harassment Law. Therefore, they lack standing to challenge that Law.

B. There Is No Credible Threat of Prosecution Under the Commercial Harassment Law

"An allegation of future injury may suffice [to establish standing] if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Driehaus*, 573 U.S. at 158. As the district court concluded – and the City concurred – the Commercial Harassment Law does not proscribe Appellants' desired speech. On that basis alone, Appellants cannot show any credible threat

of prosecution for the speech in which they desire to engage. More critically, however, the only facts that Appellants have alleged that could support the existence of a credible threat of prosecution – an issue upon which they bear the burden of proof – shows that no such credible threat exists. *See id.* ("The party invoking federal jurisdiction bears the burden of establishing standing." (internal quotations omitted)).

First, although Appellant Melendez alleged that one of her tenants had previously accused her of harassment "for simply demanding rent," the district court properly found that, because this occurred prior to the enactment of the Commercial Harassment Law, "this anecdote is not illustrative of anyone's understanding of" the new Law. (*See* Dist. Ct. Dkt. 64 at 6; Appellants' Br at SPA-23.) Moreover, as the Ninth Circuit observed in *Carrico*, "this suit concerns *the City's* ability to enforce" the Law – "[t]hat a private individual has invoked [the Law] for his own ends does not remotely imply that the City endorses a similarly expansive interpretation." *See Carrico*, 656 F.3d at 1008 (emphasis in original). And, the City has already *expressly disavowed* Appellants' interpretation. (*See* Appellants' Br. at SPA-17.) Second, although Appellants cited a complaint in an unrelated case,

where a commercial tenant alleged harassment on the basis of a landlord's attempt to terminate a lease for nonpayment of rent, the district court properly found that because the court "ultimately ordered the plaintiffs to pay the defendants the rent" they owed without mention of the Commercial Harassment Law, that case "stands for the proposition that landlords are indeed permitted to ask for rent . . . ." (*See* Dist. Ct. Dkt. 64 at 6; Appellants' Br. at SPA-23-SPA-24.) Because Appellants have offered no other facts to support a credible threat of prosecution under the Commercial Harassment Law, Appellants lack standing with respect to this claim.

CONCLUSION

For at least the reasons expressed above, VOLS respectfully requests that this Court affirm the district court's judgment in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that the foregoing "Brief of *Amicus Curiae* Volunteers of Legal Service in Support of Defendants-Appellees and Affirmance" complies with the type-volume limitation in Rules 29(a)(5) of the Federal Rules of Appellate Procedure and Local Rule 29.1. In particular, it contains 6,908 words as reported by the word-processing program Microsoft Word '03. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Century Schoolbook font.

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