CARNEY, *Circuit Judge*, concurring in the result in part and dissenting in part:

In the spring of 2020, New York State and New York City lay at the front lines of the global COVID-19 pandemic. It is undisputed that "New York State was hit early and hard by the pandemic," with New York City alone accounting for one quarter of the nation's COVID-19-related deaths in the early days of the pandemic. Maj. Op. at 7. The public health emergency sparked a severe economic contraction as citizens ceased their typical activities and governments required businesses to suspend or drastically reduce their operations. In New York, the Governor issued shutdown orders that closed or severely limited capacity for large numbers of New York businesses beginning in March 2020. As the pandemic continued, the Governor's shutdown orders were extended, in various forms, until June 15, 2021.

In the context of this public health and economic emergency, over the course of that spring, the New York City Council introduced, debated, and enacted several pieces of legislation to address related economic, housing, and health and safety issues. Among those that the City Council enacted are three laws affecting the rights and obligations of the City's commercial and residential tenants and landlords that are challenged in this lawsuit, which is brought against Defendants-Appellees the City of New York and certain City officers (together, the "City"). Two of the laws, together known as the "Harassment Laws," prohibit landlords from threatening commercial and residential tenants based on their status as persons or businesses affected by COVID-19. The third law, known as the "Guaranty Law," makes certain personal guarantees of commercial lease obligations unenforceable if three conditions apply: the guarantor is a natural person; the business was subject to certain shutdown orders or capacity restrictions; and the relevant sums became due between March 7, 2020, and June 30, 2021, and went unpaid. The guarantor in such agreements is typically an owner or other principal of the business that has signed a commercial lease with the landlord.

I concur with the Majority that the District Court's judgment dismissing the challenge to the Harassment Laws should be affirmed. But I respectfully disagree with the Majority's decision to reverse the District Court's judgment rejecting the Contracts Clause challenge brought by Plaintiffs-Appellants Elias Bochner and his company (together, "Bochner") against the Guaranty Law.

Since the 1980s, the Supreme Court and our Court have articulated and applied a strongly deferential standard to legislation facing Contracts Clause challenges, particularly when—as here—the legislation does not involve public contracts or the government's financial self-interest. The Supreme Court has "repeatedly held that unless the State is itself a contracting party, courts should properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[1] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987). We have "emphasize[d] that whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned" if the "governmental action [was] intended to serve the public good, as the government saw it." *Sullivan v. Nassau Cty. Interim Fin. Auth.*, 959 F.3d 54, 69 (2d Cir. 2020). Applying this deferential standard to the City Council's judgment in enacting the Guaranty Law, I would affirm the District Court's dismissal of Bochner's Contracts Clause challenge to the law.

In its decision to reverse and remand this portion of the District Court's decision, the Majority resists a straightforward application of our precedents. Instead, it undertakes a lengthy and unnecessary review of superseded case law and highlights one perspective that is critical of modern Contracts Clause jurisprudence. On this basis, it articulates an exacting standard of review for assessing the legislature's judgment—a

[1] Unless otherwise noted, in text quoted from caselaw, this dissent omits all alterations, citations, footnotes, and internal quotation marks.

standard that is consistent with its emphasis on viewpoints critical of the modern approach to Contracts Clause challenges, but inconsistent with the approach the Supreme Court and our Court have actually adopted and applied. As a result, the Majority's analysis of whether the Guaranty Law is a reasonable and appropriate measure bears a greater resemblance to an application of strict scrutiny than to the substantial deference that case law instructs us to accord the legislative judgment.

For these reasons and others discussed below, I respectfully dissent from the Majority's decision to reverse the District Court's judgment as to Bochner's Contracts Clause challenge to the Guaranty Law.

I. Contracts Clause standard of review

The Contracts Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. Art. I, § 10, cl. 1. Notwithstanding that the Contracts Clause is "facially absolute, its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people." *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983). It is well established that the Contracts Clause "does not trump 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." *Buffalo Tchrs. Fed'n v. Tobe*, 464 F.3d 362, 367 (2d Cir. 2006).

Contracts Clause challenges, as the Majority correctly describes, are now evaluated using a three-part test. *See Energy Rsrvs. Grp.*, 459 U.S. at 411–13; *Buffalo Tchrs. Fed'n*, 464 F.3d at 368. Under the modern test, we must first determine whether the law at issue has "operated as a substantial impairment of a contractual relationship." *Energy Rsrvs. Grp.*, 459 U.S. at 411. At the second step, the inquiry turns to whether the legislation has "a significant and legitimate public purpose . . . , such as the remedying of a broad and general social or economic problem." *Id.* at 411–12. Third, and finally,

"[o]nce a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption."[2] *Id.* at 412.

I part ways with the Majority with respect to the level of scrutiny to be applied at the third step of this analysis, when determining whether the legislation is a reasonable and appropriate means for serving the identified public purpose. In my view, the standard articulated by the Majority is too exacting and is not in keeping with the weight of recent authority establishing that the legislative judgment should receive substantial deference at the third step.

A. Under the modern Contracts Clause analysis, substantial deference is owed to the legislative judgment of whether a law is a reasonable and appropriate means to address a legitimate public purpose

In *Energy Reserves*, the Supreme Court explained that "[u]nless the State itself is a contracting party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 412–13. A few years later, in *Keystone Bituminous Coal*, the Supreme Court emphasized that it had "repeatedly held" that, when private contracts

[2] The Supreme Court recently described this approach as a "two-step test" in which the court first determines if there is a "substantial impairment of a contractual relationship," and, if so, then asks "whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen v. Melin*, 138 S. Ct. 1815, 1821–22 (2018). I agree with the Majority when it explains that the Supreme Court's varying characterization of the number of steps in the test does not affect the substance of the inquiry. I use the three-step analysis derived from *Energy Reserves* in this dissent to mirror how the Majority evaluates the Contracts Clause challenge to the Guaranty Law in three parts, with separate sections addressing whether the law (1) substantially impairs a contract; (2) serves a significant and legitimate public purpose; and (3) is a reasonable and appropriate means of serving that public purpose.

are at issue, courts "properly defer to legislative judgment" at the third step. 480 U.S. at 505. In upholding the law at issue there, the Court "refuse[d] to second-guess the Commonwealth's determinations" that the legislative choices were "the most appropriate ways of dealing with the problem." *Id.* at 506.

Building on the Supreme Court cases handed down in the past forty years, our Court has consistently held that "[w]hen a law impairs a private contract, substantial deference is accorded to the legislature's judgments as to the necessity and reasonableness of a particular measure." *Buffalo Tchrs. Fed'n*, 464 F.3d at 369; *see Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 54 (2d Cir. 1998) ("We must accord substantial deference to the Town's conclusion that its approach reasonably promotes the public purposes for which the ordinance was enacted."); *see also CFCU Cmty. Credit Union v. Hayward*, 552 F.3d 253, 266 (2d Cir. 2009) ("Unless the state is a party to the contract, courts generally should defer to legislative judgment as to the necessity and reasonableness of a particular measure."); *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 994 (2d Cir. 1997) ("When reviewing a law that purports to remedy a pervasive economic or social problem, our analysis is carried out with a healthy degree of deference to the legislative body that enacted the measure."). The deference that the judiciary owes to the legislative judgment of whether a measure is reasonable and necessary is especially strong when evaluating legislative action during an emergency. *See, e.g.*, *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22–23 n.19 (1977); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934); *Buffalo Tchrs. Fed'n*, 464 F.3d at 373; *see also* Constitutional Law Scholars' Amicus Brief at 6 ("The Judiciary's deferential approach in this field has encompassed a special solicitude for state authority to respond to emergency situations.").[3]

[3] The law professors who signed this amicus brief are Nikolas Bowie, Erwin Chemerinsky, Leah Litman, Bernadette Meyler, Laurence H. Tribe, and Laura Weinrib.

Our Circuit precedents have not explained in great detail what it means to "properly defer" or accord "substantial deference" to the legislative judgment. To some extent, this reticence may follow from our recognition of the Supreme Court's caution that "[e]very case must be determined upon its own circumstances." *Buffalo Tchrs. Fed'n*, 464 F.3d at 373 (quoting *Blaisdell*, 290 U.S. at 430). Still, we have established boundaries.

On one end, the level of deference that is owed the legislative judgment in cases involving private contracts must be more deferential than so-called "less deference" scrutiny, which we apply when evaluating legislation that involves public contracts or is otherwise "self-serving" to the government's direct financial interest.[4] *See Buffalo Tchrs. Fed'n*, 464 F.3d at 370 ("[A]ssuming the state's legislation was self-serving to the state, we are less deferential to the state's assessment of reasonableness and necessity than we would be in a situation involving purely private contracts[.]").

To survive a Contracts Clause challenge at step three under less-deference scrutiny, "it must be shown that the [legislature] did not (1) consider impairing the contracts on par with other policy alternatives or (2) impose a drastic impairment when an evident and more moderate course would serve its purpose equally well, nor (3) act

[4] The difference in the level of deference owed to the legislative judgment in Contracts Clause cases involving private contracts, as opposed to public contracts, is an important and enduring theme in the Supreme Court's and this Court's modern case law. As the Supreme Court has explained, when a State modifies its own financial obligations, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust*, 431 U.S. at 26. Because "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised," the "Contract Clause would provide no protection at all" if "a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose." *Id.*; *see also Buffalo Tchrs. Fed'n*, 464 F.3d at 369 ("Public contracts are examined through a more discerning lens."). We have extended that rationale for applying less-deference scrutiny to situations in which legislation impairs a contract to which the State is not a direct party, but the legislation is nonetheless "self-serving" to the State because it "welches on [the State's] obligations as a matter of political expediency." *Id.* at 370.

unreasonably in light of the surrounding circumstances." *Id.*; *accord Sullivan*, 959 F.3d at 65. Less-deference scrutiny does not, however, "require courts to reexamine all of the factors underlying the legislation at issue and to make a *de novo* determination whether another alternative would have constituted a better statutory solution to a given problem." *Buffalo Tchrs. Fed'n*, 464 F.3d at 370. Less deference "does not imply no deference," and it is not to be confused with strict scrutiny. *Id*. at 370–71.

At the other end, the substantial-deference standard is not so entirely deferential as to constitute rational basis review.[5] Under rational basis review, a legislature "need not actually articulate at any time the purpose or rationale supporting its classification," and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller v. Doe by Doe*, 509 U.S. 312, 320–21 (1993). Unlike rational basis review, for a law to survive a Contracts Clause challenge under the substantial-deference standard, the legislature must actually articulate a significant and legitimate public purpose and the public record must support a finding that the legislature's chosen means are reasonable and appropriate.

Even so, it is telling that the modern standard of review for Contracts Clause challenges when private contracts are at issue is so deferential as to bear a resemblance

[5] In one instance, our Court explicitly equated the third step of Contracts Clause challenges to rational basis review. *See Ass'n of Surrogates & Supreme Ct. Reps. Within City of New York v. New York*, 940 F.2d 766, 771 (2d Cir. 1991) ("Generally, legislation which impairs the obligations of private contracts is tested under the contract clause by reference to a rational-basis test; that is, whether the legislation is a reasonable means to a legitimate public purpose."). But we have not equated the two standards in our more recent Contracts Clause cases, and doing so would appear to run counter to the Supreme Court's statements that it has "never held . . . that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing contracts" and that the due process standard is "less searching." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984).

to rational basis review. *See, e.g.*, Constitutional Law Scholars' Amicus Brief at 15 ("Analysis under the Contracts Clause is most closely analogous to deferential rational basis review."); Erwin Chemerinsky, *Constitutional Law: Principles & Policies* 689 (6th ed. 2019) ("As to the second and third prongs of the test, state and local laws are upheld, even if they interfere with contractual rights, so long as they meet a rational basis test."); James W. Ely, *The Contract Clause: A Constitutional History* 242 (2016) (The Supreme Court's "test is little different than rational basis review of economic legislation under the due process norm."); Geoffrey R. Stone, et al., *Constitutional Law* 986 (7th ed. 2013) (explaining that "[m]odern review under the contract clause is substantially identical to modern rationality review under the due process and equal protection clauses" and that, under this standard, "the fit between the legitimate interest and the measure under review need not be close."). As these comparisons suggest, our inquiry into the legislature's chosen means must be carefully limited under the substantial-deference standard. Rational basis review therefore represents the outermost boundary on the deference that we may accord the legislative judgment at step three.

We have also circumscribed our review at the third step in other important ways, particularly related to potential policy disagreements with legislative action. We have "emphasize[d] that whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned" if the "governmental action [was] intended to serve the public good, as the government saw it." *Sullivan*, 959 F.3d at 69; *see also Colon de Mejias v. Lamont*, 963 F.3d 196, 202 (2d Cir. 2020) ("[W]e must respect the wide discretion on the part of the legislature in determining what is and what is not necessary to safeguard the welfare of its citizens."). Furthermore, our precedents are clear that "it is not the province of this Court to substitute its judgement for that of . . . a legislative body" in Contracts Clause cases. *Sal Tinnerello & Sons*, 141 F.3d at 54.

B. The Majority makes an unwarranted departure from the substantial-deference standard

The Majority departs from these precedents without citing any Supreme Court or Second Circuit case that has repudiated the deferential approach to legislation established in these authorities. In doing so, it relies too heavily, in my view, on certain phrases drawn from the Supreme Court's 1978 decision in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234. The Majority describes *Allied Structural Steel* as pronouncing a standard intended "to ensure the continued vitality of the Contracts Clause" in the context of private contracts. Maj. Op. at 70. In particular, the Majority emphasizes the Supreme Court's statements there that "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear" and that "[s]evere impairment . . . will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Allied Structural Steel*, 438 U.S. at 245.

This language provides the foundation for the Majority's sliding-scale approach to the level of scrutiny to apply at the third step based on the severity of the Guaranty Law's impairment. But it is far from clear that the Supreme Court intended it to have any such effect. In my view, the Supreme Court's statements are better read as simply confirming the straightforward and established proposition that "[m]inimal alteration of contractual obligations may end the inquiry at its first stage," *id.*, while more severe impairments must then satisfy the second and third prongs to survive a Contracts Clause challenge. *See Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018) (stopping the inquiry after step one because the challenged statute did "not substantially impair pre-existing contractual arrangements"); *Castellano v. Bd. of Trustees of Police Officers' Variable Supplements Fund*, 937 F.2d 752, 757 (2d Cir. 1991) ("[S]ince we find absolutely no impairment of the city's obligations . . . , there is no contract clause 'hurdle' to leap, and our inquiry ends.").

The sliding-scale approach to the level of scrutiny that the Majority derives from *Allied Structural Steel* is absent from more recent Supreme Court decisions involving private contracts. Contrary to the Majority's claim that the "substance of the [Contracts Clause] inquiry has remained the same" as what it draws from *Allied Structural Steel*, Maj. Op. at 76, in neither *Energy Reserves* (1983) nor *Keystone Bituminous Coal* (1987) did the Court renew the "careful examination" or "height of the hurdle" language referenced in *Allied Structural Steel* and relied on as foundational by the Majority. True, the Supreme Court stated in those cases that the "severity of the impairment" affects the "level of scrutiny," *Energy Reserves*, 459 U.S. at 411, *Keystone Bituminous Coal*, 480 U.S. at 504 n.31, but upon examination, those statements do not support the Majority's sliding-scale approach, which applies exacting scrutiny at the third step. In *Energy Reserves*, when introducing the "threshold inquiry" into "whether the state law has, in fact, operated as a substantial impairment," the Supreme Court stated that "[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." 459 U.S. at 411. It then explained factors relevant to determining at the first step whether a private contract has been substantially impaired—that is, whether it clears the "threshold inquiry." *Id.* If there is a substantial contractual impairment, then the state law receives further scrutiny through the application of the second and third steps: "the State, in justification, must have a significant and legitimate public purpose behind the regulation." *Id.*

Likewise, in *Keystone Bituminous Coal*, the Supreme Court explained that the record did not provide a basis "to determine the severity of the impairment, which in turn affects the level of scrutiny to which the legislation will be affected." 480 U.S. at 504 n.31. It then explained that "[w]hile these dearths in the record might be critical in some cases, they are not essential to our discussion here because the Subsidence Act withstands scrutiny even if it is assumed that it constitutes a total impairment." *Id.* Under the Majority's sliding-scale approach, a "total impairment" would have

necessarily led to the most exacting analysis at the third step. But that is not how the Supreme Court analyzed the challenged legislative action. Instead, the Court reiterated that, at the third step, it should "properly defer to legislative judgment" and "refuse to second-guess" that judgment. *Id.* at 505–06. After providing no more than a short paragraph of analysis, it concluded that the challenged law was reasonable and appropriate. *See id.* at 506. In my view, it is difficult to reconcile this approach with the exacting analysis that the Majority submits is required by *Allied Structural Steel*.

Thus, regardless of whether the "extent of impairment" is a "relevant factor in determining [the legislation's] reasonableness" in cases involving *public* contracts, *United States Trust*, 431 U.S. at 27, the Supreme Court has not adopted that reasoning or applied sliding-scale scrutiny in its modern cases involving private contracts. In sum: the "sliding-scale approach mischaracterizes the law" because "[t]here is simply no authority for the proposition that laws alleged to impose an extra-substantial impairment receive extra-demanding scrutiny under the Contracts Clause."[6] Constitutional Law Scholars' Br. at 9.

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[6] The Majority declares that such an interpretation is, in its view, "contrary . . . to common sense." Maj. Op. at 85 n.65. But there are good reasons for the Supreme Court to have not adopted the Majority's approach for Contracts Clause challenges involving private contracts—not least of which is that the sliding-scale approach is inherently in tension with the Court's repeated instruction that courts "properly defer to legislative judgment" at the third step. *Keystone Bituminous Coal*, 480 U.S. at 505. Varying the intensity of the inquiry at the third step invites second-guessing the legislature's policy decisions, which the Supreme Court has explained is inappropriate in private contracts cases, even when "assum[ing] that [a government action] constitutes a total [contractual] impairment." *Id.* at 504 n.31, 506; *cf. Donohue v. Cuomo*, 980 F.3d 53, 84 (2d Cir. 2020) (certifying question because "[a]n inquiry—even a deferential one—into whether a state legislature's potential impairment of its own contracts violated the U.S. Constitution is a delicate matter for a federal court to undertake and risks second-guessing, with the security of hindsight, difficult choices made by the legislature under demanding circumstances"), *certified question accepted*, 36 N.Y.3d 935 (2020). Indeed, the risk of second-guessing the legislative judgment under a sliding-scale approach materializes in the Majority's exacting analysis of the Guaranty Law as discussed *infra* at 33–36.

Scholars—including several the Majority cites for their criticisms of modern Contracts Clause jurisprudence—recognize that instead of adopting the Majority's exacting approach, after *Allied Structural Steel*, the Supreme Court "soon retreated to a more permissive standard in reviewing claims under the clause." Ely, *The Contract Clause: A Constitutional History* 245; *see also, e.g.*, Chemerinsky, *Constitutional Law: Principles & Policies* 691 (observing that, in *Allied Structural Steel*, "it seems that the Court was applying heightened scrutiny that is not usually used in evaluating government regulation of private contracts" and subsequent Supreme Court cases "have distinguished or ignored *Allied Structural Steel*"); Stone, *Constitutional Law* 984 ("*United States Trust* and *Spannaus* suggested that the Court might revive the contracts clause as a substantive constraint on legislation. But shortly thereafter the Court returned to its previous, more deferential approach."); Douglas W. Kmiec, *Contracts Clause*, *in The Oxford Companion to the Supreme Court of the United States* 224, 224 (2d ed. 2005) ("In modern times, the Court has all but forgotten the [contracts] clause as a consequence of its substantial deference to state legislative judgment in economic matters."); Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 552 (1987) (concluding that, after *Keystone Bituminous Coal*, "the revival of the Contract Clause, which began with *United States Trust* and *Allied Steel*, appears to have ended").

Recognizing this shift in the Supreme Court's jurisprudence after *Allied Structural Steel*, our Court has cautioned, "our older cases may not apply with the same force today as they do not appear to fully employ current Contract Clause jurisprudence to the extent that they fail to accord sufficient deference to state legislative judgments concerning whether a statute advances a significant and legitimate public purpose." *CFCU Cmty. Credit Union*, 552 F.3d at 268; *see also Apartment Ass'n of Los Angeles Cty., Inc. v. City of Los Angeles*, 10 F.4th 905, 912, 916 (9th Cir. 2021) (describing *Energy Reserves* as representing a "shift in the law" in which "the Court clarified the modern approach to

the Contracts Clause post-*Blaisdell*, articulating the flexible considerations courts must consider in a Contracts Clause case"); *State of Nev. Emps. Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1226 (9th Cir. 1990) (explaining that the Supreme Court's decision in *Energy Reserves* only five years later represented a "retreat[] from its holding in [*Allied Structural Steel v.*] *Spannaus*" because it "indicated a renewed willingness to defer to the decisions of state legislatures regarding the impairment of private contracts").[7]

Although the Majority acknowledges that the Supreme Court and this Court have held that review of private contract impairments should be deferential to the legislative judgment, it nonetheless consistently downplays the deference owed to the legislative judgment—often by way of reference to the purported *limits* of any such deference. *See, e.g.*, Maj. Op. at 67 & n.52 (highlighting scholars critical of a "highly deferential standard" for the Contracts Clause); *id.* at 70 n.57 (making brief mention of *Energy Reserves*, *Keystone Bituminous Coal*, and *Buffalo Teachers* before understating the importance that deference played in those cases).[8] The Majority emphasizes the *Allied*

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[7] The Majority questions whether the Supreme Court has "retreat[ed]" from *Allied Structural Steel*, *see* Maj. Op. at 77 n.63, but as the authorities above establish, the characterization reflects an understanding that is shared by scholars and courts alike. Indeed, our Court has approvingly cited *State of Nevada Employees Association, Inc. v. Keating* and *In re Seltzer*, 104 F.3d 234 (9th Cir. 1996), two cases that recognized the "shift in the law created by *Energy Reserves*," for this very proposition. *See CFCU Cmty. Credit Union*, 552 F.3d at 268–69 & n.16 (citing *Seltzer*, 104 F.3d at 236, and *Keating*, 903 F.2d at 1226). In doing so, our Court highlighted the *Seltzer* court's point that "the Supreme Court has 'retreated from its prior case law, and has indicated a renewed willingness to defer to the decisions of state legislatures regarding the impairment of private contracts.'" *CFCU Cmty. Credit Union*, 552 F.3d at 269 n.16 (quoting *Seltzer*, 104 F.3d at 236). Our Court also noted that the *Seltzer* court distinguished a 1980 Ninth Circuit case addressing the same issue on the ground that it "was 'decided before' the Supreme Court's decision in '*Energy Reserves*, and thus did not give appropriate deference to legislative judgments.'" *CFCU Cmty. Credit Union*, 552 F.3d at 269 n.16 (quoting *Seltzer*, 104 F.3d at 236).

[8] The Majority argues that the deference owed to the legislative judgment in cases involving private contracts simply creates "a presumption in favor of social and economic legislation [that] sets the starting balance, but . . . does not end the inquiry." Maj. Op. at 70 n.57. I agree, of course, with the Majority that to accord substantial deference is not to end the inquiry. *See supra*

Structural Steel Court's statement that the multi-pronged Contracts Clause analysis is conducted "[d]espite the customary deference courts give to state laws directed to social and economic problems." 438 U.S. at 244; *see* Maj. Op. at 73–74 & n.60, 85. But, in my view, read in context, this language references the standard for analyzing impairment of *public* contracts set forth in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).[9] In

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at 6–8. But the difference between applying a substantial-deference and less-deference standard does not lie simply in a *presumption* that precedes an otherwise identical inquiry; rather, the difference informs the deference that should infuse the entire third-step analysis. *See Buffalo Tchrs. Fed'n*, 464 F.3d at 369 (explaining that "[p]ublic contracts are examined through a more discerning lens" and "[w]hen a state's legislation is self-serving and impairs the obligations of its own contracts, courts are less deferential to the state's assessment of reasonableness and necessity"). *Sullivan* does not hold to the contrary: it explains that "when the state impairs a public contract the presumption that a passed law is valid and done in the public interest does not immediately apply," so "we must examine the record for indicia of self-serving, privately motivated[] action" to determine what level of deference to accord the legislative judgment. 959 F.3d at 66.

[9] The referenced quote appears in the following section of the Supreme Court's opinion:

> The most recent Contract Clause case in this Court was *United States Trust Co. v. New Jersey*, 431 U.S. 1. In that case the Court again recognized that although the absolute language of the Clause must leave room for "the 'essential attributes of sovereign power,' necessarily reserved by the States to safeguard the welfare of their citizens," *id.*, at 21, that power has limits when its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Id.*, at 22. Evaluating with particular scrutiny a modification of a contract to which the State itself was a party, the Court in that case held that legislative alteration of the rights and remedies of Port Authority bondholders violated the Contract Clause because the legislation was neither necessary nor reasonable.

Allied Structural Steel, 438 U.S. at 243–44; *see also id*. at 244 n.15 ("The [*United States Trust*] Court indicated that impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties, 431 U.S., at 22–23, although it was careful to add that 'private contracts are not subject to unlimited modification under the police power.' *Id.*, at 22.").

any event, the Supreme Court's subsequent decisions in *Energy Reserves* and *Keystone Bituminous Coal* leave no doubt that, at step three, the customary deference is warranted when private contracts are at stake.

Similarly, to the extent that the Majority discusses the more recent Second Circuit cases, it does so mainly in the context of the first, "substantial impairment" prong, or in attempting to distinguish the cases' topline holdings, with little acknowledgement of the deferential standard actually articulated and applied in these cases. For example, the Majority's discussion of *Buffalo Teachers* does not directly refer to or discuss the substantial-deference standard for impairments of private contracts articulated in that decision. Likewise, when discussing *Association of Surrogates and Supreme Court Reporters*, the Majority focuses on one consideration that weighed against a finding that the legislature acted reasonably in that case involving impairment of public contracts, without acknowledging that the Court there distinguished its "more searching analysis" from the highly deferential standard properly applied in the context of private contracts. *Ass'n of Surrogates & Supreme Ct. Reps. Within City of New York v. New York*, 940 F.2d 766, 771 (2d Cir. 1991).

The Majority's departure from the well-established substantial-deference standard is all the more disquieting, in my view, because of the considerable space that it devotes to and emphasis that it places on centuries-old case law that is unnecessary to resolve this appeal. In the same way, the Majority highlights one distinct school of judicial and scholarly criticism of modern Contracts Clause jurisprudence, while largely choosing to ignore countervailing (and, so far as our cases reflect, currently predominating) views.[10] *See, e.g.*, *Buffalo Tchrs. Fed'n*, 464 F.3d at 371 (suggesting that

[10] Several of the dissenting opinions and academic articles that the Majority cites—while critical of modern Contracts Clause jurisprudence and supportive of a change of course—at the same time recognize that the Supreme Court's current doctrine does not reflect the level of increased scrutiny they advocate for and that the Majority appears to adopt here. *See, e.g.*, *Sveen*,

"heightened scrutiny under the Contracts Clause [is a] backdoor to *Lochner*-type jurisprudence" that "has long since been discarded") (citing Laurence H. Tribe, *Constitutional Choices* 182 (1985)); Constitutional Law Scholars' Amicus Brief.

I would not take the Majority's exacting approach. Instead, I would follow *Energy Reserves*, *Keystone Bituminous Coal*, and this Court's precedents, and accord substantial deference to the legislative judgment at step three of the Contracts Clause test—assessing whether the measure is reasonable and appropriate—when evaluating the Guaranty Law.

II. Application to the Guaranty Law

To determine whether the District Court correctly dismissed Bochner's Contracts Clause claim, I apply the three-step test described above and the well-established standard of review for evaluating a motion to dismiss under Federal Rule of Civil

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138 S. Ct. at 1827 (Gorsuch, *J.*, dissenting) (recognizing that "the Court has charted a different course" in its modern cases than its prior interpretation of the Contracts Clause as a categorical prohibition on laws "destroy[ing] substantive contract rights"); Ely, *The Contract Clause: A Constitutional History* 247 (After *Keystone Bituminous Coal*, "any judicial inquiry on [the third prong] is evidently to be purely nominal."); Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 Case W. Rsrv. L. Rev. 597, 598 (1987) ("Today, the contract clause is but a pale shadow of its former self. . . . Although the Court has never formally equated contract clause analysis with the 'rationality review' it applies to economic legislation under the due process and equal protection clauses, the tone of recent contract clause decisions approaches this same degree of extreme deference."); Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. at 549, 552 (suggesting that, after *Allied Structural Steel*, "the Court relaxed its standard of review" and lamenting that "*Keystone* demonstrates that the Court believes it can now dispose of a serious contract clause claim in a few conclusory paragraphs"); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 750 (1984) (arguing that "we can be certain that the Supreme Court's present interpretation is both wrong and indefensible" because it "reduces the clause to yet another emaciated form of substantive due process," but recognizing that "[i]t would take a major change in constitutional doctrine to adopt the [author's] views" and that "[n]o court could be expected to adopt the [author's] position . . . within the compass of a single decision").

Procedure 12(b)(6). I accept as true the nonconclusory allegations in the complaint, draw reasonable inferences in Bochner's favor, and also consider materials incorporated into the complaint or properly subject to judicial notice. *See Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 854 (2d Cir. 2021). To survive dismissal, Bochner must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.*

Applying these principles, I agree with the Majority and the District Court that Bochner has plausibly alleged that the Guaranty Law imposes a substantial impairment on his contract, and so I will proceed to the second and third steps of the Contracts Clause analysis without further elaboration. At the second step, I also agree with the Majority that the Guaranty Law advances a legitimate public purpose, although I believe the record fairly supports a more expansive rendering of the public purpose that the legislature aimed to serve than the one suggested by the Majority. My main disagreement with the Majority, however, comes at the third step: in my view, the record adequately establishes, even at the motion to dismiss stage, that the Guaranty Law is a reasonable and appropriate measure to serve its public purpose, and Bochner has therefore failed to state a plausible Contracts Clause claim.

A. The second step: The Guaranty Law has a significant and legitimate public purpose

I agree with the Majority that the City has professed a legitimate public purpose, although I would define it somewhat more broadly than "society's larger interest in maintaining the small businesses necessary for functioning neighborhoods." Maj. Op. at 88–89.

The record reflects that the City Council was squarely focused on mitigating the economic crisis in New York City, and for its small businesses in particular, when it enacted the Guaranty Law. Many of those businesses were experiencing sharp declines

in revenue as continued operations were prohibited by the Governor's shutdown orders, which had been in effect for about one month, starting between March 16 and March 22, 2020. Specifically, the Governor's executive orders required restaurants and bars to cease in-person sales; nonessential businesses to cease in-person work; and gyms, fitness centers, movie theatres, barbershops, hair salons, tattoo or piercing parlors, and similar personal care–services businesses to close completely to the public.[11]

The Guaranty Law was introduced as part of a package of proposed legislation intended to support these small businesses, their owners, their employees, and the City's economy. Over a period of several weeks, the City Council considered the Guaranty Law at two full City Council hearings as well as two committee hearings.[12] The City Council also produced reports on the impact of the public health and economic crisis on the City's small businesses and the proposed legislation.[13] It received

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[11] Under Executive Order 202.3, beginning March 16, 2020, at 8:00 p.m., restaurants and bars were required to cease serving patrons food or beverages on premises, and gyms, fitness centers, and movie theaters were required to close completely. App'x at 1375–76. Under Executive Order 202.6, all nonessential businesses were required to reduce their in-person workforce by 50% by March 20 at 8:00 p.m. *Id.* at 1383. The in-person workforce reduction was soon increased to 100% for these nonessential businesses, effective March 22 at 8:00 p.m., under Executive Order 202.8. *Id.* at 1389. Under Executive Order 202.7, beginning March 21 at 8:00 p.m., barbershops, hair salons, tattoo or piercing parlors, and related personal care–services businesses were required to close completely to the public. *Id.* at 1386.

[12] The Guaranty Law was introduced at a City Council hearing on April 22, 2020. *See* App'x at 1521, 1570–71. On April 29, the City Council's Committee on Small Business and Committee on Consumer Affairs and Business Licensing held a joint hearing on the proposed legislation related to small businesses, including the Guaranty Law. *See id.* at 2092–2380. The Committee on Small Business unanimously voted to approve a revised version of Guaranty Law at a hearing on May 13. *See id.* at 3435–36. At a hearing later that day, the full City Council voted to enact the Guaranty Law by a vote of 44 to 6. *See id.* at 3498. The New York City Mayor signed the Guaranty Law on May 26. *See id.* at 3517–18.

[13] On April 29, 2020, as the City Council began consideration of the proposed Guaranty Law and other small business legislation, its Governmental Affairs Division published a briefing

written input from hundreds of stakeholders, including "countless small business owners" affected by personal guaranty provisions, according to Guaranty Law co-sponsor Council Member Carlina Rivera. App'x at 3467. The hearing transcripts, written submissions, and reports constitute a substantial part of the 16-volume joint appendix before us on appeal.

When announcing the introduction of the Guaranty Law on April 21, 2020, the City Council announced that, "while the state of emergency is in effect," the law would "ensur[e] that City business owners don't face the loss of their businesses and personal financial ruin or bankruptcy." *Id.* at 521. Member Rivera reiterated that purpose when introducing the legislation on April 22. She also explained that "businesses are closing and losing weeks of income through no fault of their own and allowing small business owners to keep their spaces will be integral to the city's ability to recover[] after the virus." *Id.* at 1571.

A week later, on April 29, the City Council's Committee on Small Business and Committee on Consumer Affairs and Business Licensing held a more than five-hour joint public hearing on the legislation. *See id.* at 2092. When introducing the Guaranty Law, Member Rivera explained:

> This pandemic has already left a profound impact on our city. One that will be felt for years if not decades. No where will this long term effect be felt more than in our small business community where countless owners are facing the very real possibility that their stores may never return.
>
> We must do everything in our power through legislation and advocacy to help these pillars of our communities and the thousands of New Yorkers they employ. My bill will ensure that business

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paper and Committee report entitled "OVERSIGHT: The Impact of COVID-19 on Small Businesses in New York City" (the "April 29 report"). *See* App'x at 1907–84. On May 13, the Governmental Affairs Division published an updated report in conjunction with the Small Business Committee's vote on the legislation (the "May 13 report"). *See id.* at 3369–3424.

> owners, should they be forced to walk away or temporarily shutter their stores, through no fault of their own[,] can do so without facing personal liability, ensuring that one day they may be able to return and relaunch or create a new thriving business in our neighborhoods.

Id. at 2120–21.

Other City Council Members emphasized similar themes when speaking about the legislative package that included the proposed Guaranty Law. City Council Speaker Corey Johnson, also a co-sponsor of the Guaranty Law, explained, "[W]e have no choice but to make sure [small businesses] are able to [weather] this unbelievably painful storm." App'x at 2101. If they are unable to, he warned:

> [H]undreds of thousands of workers will permanently lose their jobs and the city loses out on billions of dollars in sales tax, property tax and income tax revenue. Our economy runs on small businesses and now they are facing unprecedented losses. This could be the worst economic disaster that New York City has seen since the great depression.
>
> Many businesses will be forced to shut down for good if they don't get more help. That won't just devastate business owners and their workers, it will further destabilize our economy, our neighborhoods, and the lives of so many New Yorkers.

Id.[14]

[14] Council Members' statements regarding the scope and magnitude of the economic crisis and small businesses' importance to the City's overall economy were corroborated by research the City Council published in conjunction with hearings on the Guaranty Law as well as public statements by stakeholders. The Governmental Affairs Division's April 29 report stated that businesses were having to "severely reduce their capacities," with City restaurant sales "expected to drop by a staggering 80 percent" and hotels "projected to only maintain an occupancy rate of 20 percent." App'x at 1915–16. The report detailed the "massive reduction in the number of small businesses operating." *Id.* at 1916. It highlighted research by the National Bureau of Economic Research, which found that, in the Mid-Atlantic region including New York, over half of small businesses were closed, and staff employment had decreased by 47 percent since January 2020. *Id.* Both figures were more severe than the national average. *Id.* Among restaurant workers in New York State, 80 percent had lost their jobs. *Id.*

Speaker Johnson further expressed doubt that the federal Paycheck Protection Program ("PPP") would "end up helping the vast majority of New York City small businesses" because it was "too hard to access."[15] *Id.* at 2102. He declared, "We absolutely need more federal support here but there are some things that the city can do," including enact the Guaranty Law. *Id.*

Council Member Mark Gjonaj, the Chair of the Small Business Committee, explained that the committee was acting because the "COVID-19 crisis perhaps presents the greatest threat to our economy and small businesses in modern history." *Id.* at 2104. Businesses that were shut down "must now decide whether they can continue paying their staff rent, debt, real estate taxes, sewer and water charges throughout the duration of this crisis," and the legislative package was designed accordingly to "prevent mass retail vacancies," "save mom and pop shops," and "ensure small businesses are

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Stakeholders also made similar statements in hearing testimony and written submissions to the City Council. *See, e.g.*, *id.* at 2298 (Karen Narefski of the nonprofit Association for Neighborhood and Housing Development stating that, "[a]s the Speaker noted at the beginning of the meeting, 26 percent of all jobs in New York City are at [a] business with 20 or fewer employees. So, the result in closures and layoffs ripple through the community and have a broad economic impact."); *id.* at 2503 (Volunteers of Legal Service statement that "[i]t is beyond dispute that small businesses are the backbone of the American economy, and yet, existing relief does not go nearly far enough to save New York City small businesses from the detrimental effects of the COVID-19 pandemic").

[15] The Governmental Affairs Division's April 29 report also emphasized shortcomings of federal relief efforts like PPP. The report explained that "[t]he manner in which PPP was offered to the public and the complexity of its terms and conditions may have contributed to a lack of success for many small business owners." App'x at 1922. It further explained that PPP was poorly suited to small businesses in the City because it required 75 percent of funds to be spent on payroll expenses to qualify for forgiveness as grants rather than loans, leaving "less for businesses to spend on obligations such as rent and utilities, which may be disproportionately higher in our City." *Id.* at 1925; *see also id.* at 3809 (article in *The Wall Street Journal* on May 1, 2020, explaining that PPP's 25-percent cap on non-payroll expenses was "proving to be a deal breaker for many small businesses with modest payrolls and high rent costs, such as restaurants, salons and shops in urban areas including New York").

protected." *Id.* at 2104, 2108. Similarly, Council Member Andrew Cohen, the Chair of the Consumer Affairs and Business Licensing Committee, described the legislation as "geared toward reducing the burden on small business to help you maintain your operation and get through this crisis." *Id.* at 2110.

Council Members reiterated these points when the City Council voted to enact the Guaranty Law and other small business–related legislation on May 13, 2020. *See, e.g.*, *id.* at 3487 (Member Rivera explaining her vote for the Guaranty Law because "we all know that our small businesses have taken a major hit" and "we have to do everything in our power to make sure that they survive[] this virus and that they continue to provide for their own families. I know that they desperately want to bring their workers back on to the payroll and they want to be there with that extended family of all of their employees."); *id.* at 3454–55 (Speaker Johnson elucidating that "we are voting on bills to help small businesses and restaurants survive this crisis" and that the Guaranty Law "will benefit all kinds of business owners in our city"); *id.* at 3430 (Chair Gjonaj stating the legislation will "protect[] our small businesses during this pandemic" and enable them to "re-emerge strong after stay at home orders are lifted and the city begins to reopen").[16]

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[16] The Majority suggests that it is "questionable" whether some unspecified portions of the legislative record discussed in this section can be taken as true at this stage of the litigation. Maj. Op. at 87 n.66. As do the Majority and the parties, when evaluating the Guaranty Law's public purpose, I consider the documents and transcripts drawn from the legislative record materials that were submitted by the parties to the Court in their joint appendix. The Majority cites the legislative record from the joint appendix (and materials outside the record), including by drawing from the same record materials that I cite in this dissent. *See, e.g.*, Maj. Op. at 6–14 (describing COVID-19 pandemic and state and federal response); *id.* at 22–30 (reviewing the Guaranty Law's legislative history); *id.* at 86–89 (referencing legislative history when evaluating the law's public purpose). A review of the legislative record is necessary, as the Majority recognizes, because determining whether Bochner states a plausible Contracts Clause claim "require[s] us to consider the Guaranty Law's 'purpose'" at the second step. *Id.* at 24. And the legislative record provides the appropriate materials from which to ascertain that purpose; as our Court has explained, "the record of what and why the state has acted is laid out in

When the City Council extended the Guaranty Law in September 2020 and March 2021, the legislative text reaffirmed that the City's goal by extending the law was to prevent the widespread closure of small businesses and the economic harm to the City that it would cause: "If these individual owners and natural persons are forced to close their businesses permanently now or to suffer grave personal economic losses like the loss of a home, the economic and social damage caused to the city will be greatly

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committee hearings, public reports, and legislation, making what motivated the state not difficult to discern." *Buffalo Tchrs. Fed'n*, 464 F.3d at 365.

The Guaranty Law's legislative history is composed of materials that are properly subject to judicial notice. *See, e.g.*, *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226–27 (1959). Moreover, the parties cite the legislative record extensively and urge us to examine it closely to determine the Guaranty Law's purpose. *See, e.g.*, Appellants' Br. at 28 (submitting that the district court "should have engaged [in] a closer analysis [of the law's purpose] aided by the record"); Appellees' Br. at 7, 20–21, 26–28 (citing legislative history materials in the appellate record); Appellants' Reply Br. at 7–10 (arguing that the record support for the law's public purpose is insufficient to have warranted the law's enactment but not arguing that the record itself is insufficient to evaluate the Guaranty Law's purpose or is not properly before this Court). The parties have not raised any doubts as to the authenticity of the legislative record or any objections to considering the materials submitted in their joint appendix as reflective of what the Council considered in enacting the Guaranty Law.

Nor is there any question that Bochner had ample notice of the materials in the legislative record: the complaint refers to the City Council proceedings in at least two places, and plaintiffs themselves offered many of the legislative materials in the record—including hearing transcripts and committee reports—in their motion for a preliminary injunction, which was filed before the City's motion to dismiss. *See* App'x at 516–1113, 4308, 4319; *cf. Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("A finding that plaintiff has had notice of documents used by defendant in a 12(b)(6) motion is significant since . . . the problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered; it is for that reason—requiring notice so that the party against whom the motion to dismiss is made may respond—that Rule 12(b)(6) motions are ordinarily converted into summary judgment motions."). Under these circumstances, it is appropriate for the Court to consider the legislative history to ascertain the City Council's purpose when enacting the Guaranty Law. Unlike the Majority, however, I see no obligation to end that inquiry after reaching a "limited determination of purpose on this appeal." Maj. Op. at 87 n.66.

exacerbated and will be significantly worse than if these businesses are able to temporarily close and return or, failing that, to close later, gradually, and not all at once." N.Y.C. Local L. 2020/98; N.Y.C. Local L. 2021/50. Furthermore, the City Council explained that the extensions were designed to provide the businesses "with an opportunity to not only survive but also to generate sufficient revenues to defray owed financial obligations." N.Y.C. Local L. 2020/98; N.Y.C. Local L. 2021/50.

Based on all of these statements, it is fair to conclude that the City Council's purpose in enacting the Guaranty Law was to address the dire circumstances for small businesses and to support their owners, employees, and the City's economy overall, both during and after the pandemic. That purpose is certainly related to society's "interest in maintaining the small businesses necessary for functioning neighborhoods," as the Majority characterizes the City Council's purpose. Maj. Op. at 88–89. But it also reflects the City's broader short-term and long-term interests in keeping small businesses operating because of their substantial contribution to the City's economy more generally, including the economic growth they bring to the City, the tax revenue they generate, and the jobs they provide to City residents—as articulated in the Council Members' statements.

These interests that the City Council sought to advance by enacting the Guaranty Law in the face of an economic emergency are undoubtedly "a significant and legitimate public purpose . . . , such as the remedying of a broad and general social or economic problem." *Energy Rsrvs. Grp.*, 459 U.S. at 411–12. The City's professed fundamental economic interest in promoting the survival of its small businesses by passing the Guaranty Law is sufficient to satisfy this, the second step of the modern Contracts Clause analysis. *See Sal Tinnerello & Sons*, 141 F.3d at 54 ("The Supreme Court has held that the economic interest of the state alone may be sufficient to provide the necessary public purpose under the Contract Clause.").

B. The third step: The Guaranty Law is a reasonable and appropriate measure to serve a legitimate public purpose

The Guaranty Law is a reasonable and appropriate measure to address the City's significant and legitimate public purpose of improving the dire circumstances of small businesses in order to support their owners, their employees, and the City's economy overall, both during and after the pandemic.

To start, it is undisputed that Bochner's Contracts Clause challenge involves private contracts; it does not relate to a public contract with the City. It is also uncontested that the City's purpose in enacting the Guaranty Law was not financially self-serving.[17] Finally, it is not contested that the City enacted the Guaranty Law in the context of an extraordinary health and economic emergency.

Under these circumstances, the legislature's "police power . . . to protect the general welfare of its citizens, a power which is paramount to any rights under contracts between individuals," is at its apex. *Buffalo Tchrs. Fed'n*, 464 F.3d at 367. We therefore must accord "substantial deference" to the "legislature's judgments as to the necessity and reasonableness of a particular measure." *Id.* at 369.

[17] Bochner suggests that the Guaranty Law is self-interested insofar as it is a political act by the City Council, but he does not point to any case holding that political interest can affect the deference properly accorded to the legislative judgment. Instead, as he concedes, the type of self-interest that influences the level of deference owed to the challenged legislative judgment is one in which the "legislature welches on its [own] obligations as a matter of political expediency," such as in cases involving impairments to public contracts. *Buffalo Tchrs. Fed'n*, 464 F.3d at 370. Likewise, regardless of whether Bochner believes "there is no need for the distinction" between public and private contracts and "scholarship supports putting them on equal footing," Appellants' Reply Br. at 20 n.9, the distinction is a well-established and well-founded aspect of the Supreme Court's and this Court's case law. *See, e.g.*, *Energy Rsrvs. Grp.*, 459 U.S. at 412–13 & n.13; *United States Trust*, 431 U.S. at 25–26; *Buffalo Tchrs. Fed'n*, 464 F.3d at 369–70.

1. The City Council's legislative record

Here, the City Council enacted the Guaranty Law during the early days of an unprecedented emergency. Amid a burgeoning death count, sharp economic contraction, spiking unemployment, and the particularly dire circumstances for small businesses described above, the City Council began considering a package of proposed legislation—including the Guaranty Law—intended to support small businesses, their owners, and the City's economy. Despite the City Council's recognition of the urgency of the situation, it solicited public input and revised the Guaranty Law over a three-week period before enactment. The legislative record is replete with support from small business owners and other stakeholders describing how the Guaranty Law would serve those purposes.

Numerous small business owners wrote to the City Council or made remarks at the Small Business Committee's public hearing about how the Guaranty Law would enable them to survive the pandemic and continue to employ workers.[18] For example:

- The owner of a food hall wrote, "I very much hope to re-open the food hall when the COVID dust settles, but uncertainty about my rent obligations is a huge barrier to my business's ability to survive." App'x at 2406. In the owner's view, the Guaranty Law would facilitate renegotiating leases with landlords; without it, "a large swath of us will go out of business for sure." *Id.*; *see also id.* at 2527 (same owner stating "I can guarantee that my business, along with so many other independently-owned hospitality and retail businesses in NYC, will NOT survive if we cannot completely renegotiate our leases post-COVID").

[18] I take these statements not for their truth—although I see no reason to question their veracity—but rather for the fact that they were offered to the City Council when it was considering whether to enact the Guaranty Law. The statements therefore represent an important part of the legislative record on the Guaranty Law's potential impact and are appropriate to consider when evaluating at the third step whether the law is a reasonable and appropriate measure.

- The owner of eight restaurants employing 270 people before the pandemic predicted that the Guaranty Law would make the difference between keeping his restaurants open and permanently closing them. According to this owner, each of his businesses was tens of thousands of dollars "in the red," and he had "done everything in [his] power to mitigate these circumstances directly with my landlords," but "most of [his] landlords remain unmoved." *Id.* at 2487–88. While he would reopen under almost any circumstance, he stated, still, "[i]f I am still personally liable for a failed business to my landlord – that I can't justify and I can't give a go." *Id.* at 2490. That would even be the case if he received PPP support because, although 75 percent of funding would keep his workers employed by covering payroll expenses, the remaining 25 percent would not be enough to cover rent expenses. *See id.* at 2489; *see also id.* at 3401 (Government Affairs Division's May 13 report highlighting this business owner's concern about the "hopelessness of relief efforts such as PPP"). As a result, the owner argued, the proposed Guaranty Law "is instrumental to [his] existence and that of most small businesses in this City." *Id.* at 2488.

- Another restaurant owner described how the Guaranty Law "would mean the difference between survival and bankruptcy for my small business specifically, a tried and true NYC restaurant company" that employed 80 workers before COVID. *Id.* at 2399. The owner expressed his view that "[s]uspending guarantees is the only way to force [a] fair and earnest [negotiation]" with landlords and is "absolutely essential to the survival of small businesses in our city." *Id*. at 2400.

- The owner of two stores told the City Council that she had "decided to give up and move out by April 31st" because her landlord demanded rent and refused to negotiate, and she would not be able to cover the more than $10,000 rent she would owe if she stayed open. *Id.* at 2368–69. She had applied for PPP and emergency loans but not received that support. *Id.* at 2368. This business owner implored the City Council to "pass a bill to protect tenants from the landlord" as soon as possible to help her "survive as a business owner." *Id.* at 2369.

- Another small business owner wrote, "The measures you have proposed with regard to tenants having large commercial rents would be very helpful to us and may have the effect of saving our business." *Id.* at 2418.

These sentiments were echoed by hundreds of other small business operators who wrote to the City Council to convey that the Guaranty Law was "critical legislation" to give them "a fighting chance to survive." *Id*. at 2528. The concerns of these operators about their businesses' ability "to survive" conveyed their views that they would face an increased risk of permanent closure—and the workers they employ would lose their jobs—if the Guaranty Law was not enacted.

Other supporters detailed the urgent need for the City Council to enact the Guaranty Law and other legislation to support small businesses and prevent wider economic damage to the City. Robert Bookman, counsel to the NYC Hospitality Alliance, explained that "the small business community . . . is in historic trouble," with a risk of "an unprecedented closing of thousands of neighborhood businesses forever." *Id.* at 2451. He urged the City Council that it "[m]ust act now" because "May rent is coming due and business owners are deciding should they give the keys back and permanently go out of business or risk another month of personal liability." *Id.* at 2452; *see also id.* at 224–45 (Bookman's hearing testimony). Similarly, Karen Narefski, a senior organizer at the nonprofit Association for Neighborhood and Housing Development ("ANHD"), stressed that "closures and layoffs ripple through the community and have a broad economic impact." *Id.* at 2298. She stated that "we really need swift and comprehensive action to protect commercial tenants from displacement and permanent closure." *Id.* at 2299.

Andrew Riggie, Vice Chair of Community Board 7, a citizen advisory board in Manhattan, emphasized that "businesses are in crisis," owners "are going to lose their livelihood," and they are "laying off all of their employees." *Id.* at 2229. When asked how many of his members had been impacted by the personal liability clauses, he stated that he did not know the precise number, but estimated that "we're talking about numbers in the thousands." *Id*. at 2231–32. He stated that the Guaranty Law and other legislation would be a "great step" toward addressing the small business crisis and

cautioned that "every minute we waste, we're losing more businesses and more jobs." *Id*. at 2234.

The nonprofit Volunteers of Legal Service ("VOLS") reported that, based on a survey of small business clients it conducted, 57 percent "reported that their businesses were completely closed as a result of government orders" and 88 percent reported decreased revenue as a result of the pandemic. *Id.* at 2503. Of those with commercial leases, 40 percent indicated they had already missed commercial rent payments, and 89 percent anticipated that they would in the future. *Id.* Yet, nine out of ten of clients who had "initiated conversations with their commercial landlords about the possibility of receiving a rent abatement, deferment, or cancellation for the period of the pandemic were either still negotiating, received no response, or received a negative response." *Id.* VOLS cautioned that, without support including the Guaranty Law, "we have no doubt that many of New York City's small businesses will face permanent closure." *Id.* at 2504.

Several organizations, while supportive of the Guaranty Law, urged the City Council to extend the law's provisions to cover a longer period of time, expand the definition of personal liability provisions, or provide funding for rent forgiveness. *See, e.g.*, *id.* at 2422–23 (United for Small Business NYC); *id.* at 2504 (VOLS); *id.* at 2299–2300 (ANHD).

Over the course of its deliberations, the City Council also heard opposition to the proposed Guaranty Law from landlords, trade groups, and others. *See, e.g.*, *id.* at 1810–11, 2402, 2411–12 (landlords opposed to Guaranty Law); *id.* at 2413 (building manager); *id.* at 1866–67, 2374–76 (Queens and Bronx Building Association and Building Industry Association of New York City); *id.* at 2309–10, 2397 (Real Estate Board of New York); *id.* at 2334 (New York City Bid Association); *id.* at 2478–79 (Building Owners and Managers Association of Greater New York). One Council Member, Kalman Yeger, expressed his opposition and his view that the proposed Guaranty Law was unconstitutional. *Id.* at 2180–82, 3496.

2. *The Guaranty Law is a reasonable and appropriate measure under the substantial-deference standard*

Ultimately, the City Council passed legislation that was most responsive to the concerns raised by the small business owners directly affected by the Governor's shutdown orders and the economic crisis. As enacted, the Guaranty Law is tailored to protect guarantors who are natural persons and whose businesses "were impacted by mandated closures and service limitations in the Governor's executive orders" that became effective between March 16 and March 22, 2020. *Id.* at 3351 (City Council's "plain language summary" of Guaranty Law). These businesses included "(1) businesses that were required to stop serving food or beverages on-premises (restaurants and bars); (2) businesses that were required to cease operations altogether (gyms, fitness centers, movie theaters); (3) retail businesses that were required to close and/or subject to in-person restrictions; and (4) businesses that were required to close to the public (barbershops, hair salons, tattoo or piercing parlors and related personal care services)." *Id.*

The numerous written submissions and public statements offered by owners and operators of these types of small businesses—and other supporters—about the importance of the Guaranty Law to their ability to survive the pandemic, to continue to employ workers, and to contribute to the City's overall economic well-being supports the City Council's decision to make personal guarantees unenforceable for obligations arising during the public health and related economic crisis. The supporters described how the Guaranty Law in particular would help to keep small businesses open, and how important the provision is despite the potential availability of other assistance such as PPP. The extensive statements of support in the record therefore weigh heavily in favor of a finding that, in enacting the Guaranty Law, the City Council adopted a reasonable and appropriate means to serve its stated public purposes.

The Guaranty Law is also closely tied to the time periods during which the Governor's shutdown orders and capacity restrictions were in place. The Guaranty Law initially applied to personal liabilities arising from March 7, 2020, through September 30, 2020. With the pandemic persisting and the Governor's shutdown orders extending past September, the City Council twice extended the Guaranty Law, first through March 31, 2021, and then through June 30, 2021. *See* N.Y.C. Local L. 2020/98; N.Y.C. Local L. 2021/50. Each time the City Council extended the law, it made specific findings as to how the "operational limitations" have "contributed to the severe economic damage suffered by the City," and included job-loss statistics in sectors affected by the capacity restrictions. N.Y.C. Local L. 2020/98; N.Y.C. Local L. 2021/50. After the Governor's capacity restrictions were fully lifted on June 15, 2021, the City Council allowed the Guaranty Law to expire on June 30, 2021.

This calibration to the ongoing crisis—rather than enacting the Guaranty Law without a sunset provision, for example—suggests that the City Council was closely monitoring the City's needs as the crisis evolved and that it determined on two occasions that extending the Guaranty Law for six- and three-month periods, respectively, would continue to provide vital support for the City's small businesses and its economic recovery. Likewise, the Guaranty Law does not permanently repudiate contracts between landlords and guarantors, but instead applies to guarantors' obligations that arose during a fixed period. This temporal limitation weighs in favor of a finding that the law is a reasonable and necessary measure to achieve its purpose. *See Energy Rsrvs. Grp.*, 459 U.S. at 418 (reasoning that the legislation challenged there is reasonable and appropriate in part because it "is a temporary measure that expires when federal price regulation of certain categories of gas terminates").

Other circumstances further support a finding that the Guaranty Law is a reasonable and appropriate measure. The City Council treated the Guaranty Law as

part of an overall package to support small businesses impacted by the pandemic. In addition to the policies it eventually enacted, including the Guaranty Law, the City Council considered alternative policies and policy designs. After public hearings and debate, the City Council narrowed eligibility for the law's relief from the initial proposal so that the enacted law shielded only guarantors whose businesses were directly impacted by the Governor's capacity restrictions.[19] *See* App'x at 3492–93 (Council Member Paul Vallone announcing his vote in favor of the Guaranty Law by thanking Member Rivera "for listening to both sides of the story with her legislation" and "making some changes" to it). While the City Council ultimately did not adopt the position of the landlords and others who opposed the Guaranty Law, it did not limit landlords' other remedies to enforce commercial tenants' obligations through the Guaranty Law, and it later passed legislation to provide tax relief to certain property owners adversely impacted by COVID-19. *See* App'x at 3534–35 (reproducing NYC Local L. 2020/62). The City Council's consideration of alternative policy designs and other possible legislative provisions further weighs in favor of a finding that the Guaranty Law is reasonable and appropriate, even if it were to be evaluated under the

[19] As initially proposed, the law would have prohibited enforcement of guaranty provisions against guarantors whose businesses were "impacted by COVID-19," a group that the proposal defined to include businesses for which "revenues during any three-month period within the COVID-19 period were less than 50 percent of its revenues for the same period in 2019 or less than 50 percent of its aggregate revenues for the months of December 2019, January 2019, and February 2020." App'x at 1041–43. The enacted Guaranty Law does not include that provision and instead provides relief only to guarantors whose businesses were (1) "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"; (2) "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 (3) "required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020." *Id.* at 3872–73.

less-deference scrutiny that applies to public contracts. *See Buffalo Tchrs. Fed'n*, 464 F.3d at 370–71; *Sullivan*, 959 F.3d at 65.

Under the totality of the circumstances, I conclude that the Guaranty Law passes the low threshold posed by step three of the modern Contracts Clause analysis for laws impairing private contracts. Because the record amply demonstrates that, under our precedents, the Guaranty Law is a reasonable and appropriate means to serve a legitimate public purpose, Bochner has not stated a plausible Contracts Clause claim.[20] Accordingly, I would affirm the District Court's dismissal of Bochner's challenge to the Guaranty Law.

C. The Majority fails to accord the requisite deference to the City Council's judgment

The Majority takes a different approach that does not "properly defer to legislative judgment." *Energy Rsrvs. Grp.*, 459 U.S. at 413. Because it adopts a searching, sliding-scale standard for Contracts Clause challenges, as discussed above, its evaluation of whether the Guaranty Law is a reasonable and appropriate measure in Section III.B.3 is exacting and skeptical. The Majority suggests the City Council was

[20] Although in some cases remand might be appropriate for further factual development, that is not necessary here, where the "record of what and why the [City] has acted is laid out in committee hearings, public reports, and legislation." *Buffalo Tchrs. Fed'n*, 464 F.3d at 365. Because the parties do not dispute that such a record is properly before us, and because we can conclude based on that record that the Guaranty Law is a reasonable and appropriate means to serve a legitimate public purpose, dismissal is appropriate at this stage. *Cf. United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuño*, 633 F.3d 37, 45 (1st Cir. 2011). That is particularly true here, where the briefing of the City's motion to dismiss before the District Court was done in tandem with plaintiffs' motion for a preliminary injunction, generating the voluminous record in the parties' joint appendix before us on appeal. Plaintiffs did not argue to the District Court that additional factual development was needed to determine whether the Guaranty Law was reasonable and appropriate at the third step. Nor do plaintiffs argue before this Court that any further development of the record is necessary for a fair and complete adjudication of their claims.

insufficiently focused on guarantors' needs, despite the expansive record support showing small business owners' needs, as described above, and the understanding—acknowledged by Bochner—that these business owners or other principals are often the guarantors. *See* Appellants' Br. at 15. It faults the City Council for failing to use "empirical evidence," Maj. Op. at 102, and engaging in insufficiently "intensive study," *id.* at 104, even when acting rapidly to respond to a public health and economic emergency.[21] This approach is at odds with the "substantial deference" we must accord the legislative judgment. *Buffalo Tchrs. Fed'n*, 464 F.3d at 369. Indeed, the Majority engages in a much more demanding review at step three than our Court has explained is appropriate even for public contracts subject to less-deference scrutiny. *Id.* at 371.

Much of the Majority's analysis of whether the Guaranty Law is reasonable and appropriate focuses on policy concerns with the City Council's chosen means. The Majority criticizes the City Council's decision to permanently exempt, rather than defer, guarantors' obligations to the extent they arose during the period from March 7, 2020, until June 30, 2021.[22] It emphasizes what the law does *not* do, including that it does not

[21] To the extent that the Majority suggests that such requirements are implied by *East New York Savings Bank v. Hahn*, 326 U.S. 230, 234–35 (1945), I disagree. As the Majority recognizes elsewhere, the *East New York Savings Bank* court articulated a "governing constitutional principle" that "when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State to safeguard the vital interests of its people is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment." *Id.* at 232. The Supreme Court elaborated on this principle as follows: "Once we are in this domain of the reserve power of a State we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary." *Id.* at 233. The Majority's suggestion that the legislature must engage in certain types of analysis is inconsistent with the Supreme Court's conclusion that, "[s]o far as the constitutional issue is concerned, the power of the State when otherwise justified is not diminished because a private contract may be affected." *Id.*

[22] To the extent that the Majority might be read to suggest that the repudiation of debt, destruction of contract, or denial of enforcement could not—as a categorical matter—be justified by police power, *see* Maj. Op. at 91, the Supreme Court has explained—long after *Blaisdell*—that,

require that guarantors reopen their businesses, does not condition relief on demonstrated need, and does not provide compensation to affected landlords—even though the City Council went on to enact separate legislation to provide tax relief to certain property owners affected by COVID-19. And the Majority questions the legislature's policy decisions by drawing comparisons to the design features of other pandemic-related relief enacted at the federal and state levels.

To be sure, the policy concerns that the Majority highlights may be legitimate. The legislature's choice to permanently excuse guarantors from liability on commercial lease defaults accrued during a defined period may reasonably be questioned. As the District Court acknowledged, the Guaranty Law may lead to a harsh outcome for some commercial landlords because, if their tenants have few to no assets, "the money may prove impossible to collect" without an enforceable guaranty. *Melendez v. City of New York*, 503 F. Supp. 3d 13, 36 (S.D.N.Y. 2020). And the Majority's suggestions now for how the City Council could have more effectively targeted relief when it acted in response to the public health and economic emergency might indeed have improved the law.

Ultimately, however, "whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned." *Sullivan*, 959 F.3d at 69. We are bound to "refuse to second-guess the [City's] determinations that these are the most appropriate ways of dealing with the problem." *Keystone Bituminous Coal*, 480 U.S. at 506; *see also Apartment Ass'n of Los Angeles Cty.*, 10 F.4th at 914 ("Under current doctrine, we must refuse to second-guess the City's determination that the eviction moratorium constitutes the most appropriate way of dealing with the problems identified. That is

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"even in such cases" involving legislation "designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy," the Court has "refused to give the [Contracts] Clause a literal reading," *Keystone Bituminous Coal*, 480 U.S. at 503.

particularly so, based on modern Contracts Clause cases, in the face of a public health situation like COVID-19."). It is simply "not the province of this Court to substitute its judgement for that of . . . a legislative body," *Sal Tinnerello & Sons*, 141 F.3d at 54, even if we question the policy path the legislature chose to follow.

CONCLUSION

The City Council enacted the Guaranty Law during an unprecedented economic and health emergency that was devastating to the City's small business community. The City Council's stated purpose was to support the owners and employees of small businesses impacted by pandemic-related shutdown orders, as well as the City's economy overall, both during and after the pandemic. It enacted the Guaranty Law after holding several hearings related to the legislation and after receiving input from hundreds of stakeholders—supporters and opponents alike.

Under our precedents, the City Council's action deserves substantial deference. It is not our role to second-guess the City Council's policy decisions; rather, we must conduct a carefully limited inquiry into whether the Guaranty Law is a reasonable and appropriate measure to serve a substantial and legitimate public purpose. In light of the considerable support for the Guaranty Law's design in the record, the ongoing economic and public health emergency in the City when it was enacted, and the substantial deference we owe the legislative judgment, I conclude that the Guaranty Law was a reasonable and appropriate measure to serve the City Council's stated purpose. I therefore would affirm the District Court's dismissal of the Contracts Clause challenge to the Guaranty Law.

I am concerned that the Majority's opinion strays from our precedents by articulating a far less deferential standard of review for Contracts Clause challenges involving private contracts. In my view, its analysis of whether the Guaranty Law is reasonable and appropriate takes an exacting approach that more closely resembles

strict scrutiny than the substantial-deference standard we must apply under our modern precedents. Although I disagree with the approach that the Majority takes and the conclusion that it reaches, I do not understand it to overrule our established precedents regarding the deference owed to the legislative judgment. Nor do I interpret the Majority to pre-determine that plaintiff Bochner has a likelihood of success on the merits. My understanding is that the Majority and I agree that, on remand, the District Court is bound to apply this Court's and the Supreme Court's precedents to determine whether the Guaranty Law withstands the Contracts Clause challenge that Bochner brings.

In the aspects discussed above, I respectfully dissent from the Majority's decision.