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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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*, *v.* THE CITY OF NEW YORK, *a municipal entity*, BILL DE BLASIO, *as Mayor of the City of New York*, LOUISE CARROLL, *as Commissioner of New York City Department of Housing Preservation & Development*, *and* JONNEL DORIS, *as Commissioner of New York City Department of Small Business Services*, *Defendants*.	)	C.A. No. 1:20-CV-05301-RA

SUPPLEMENTAL BRIEF OF AMICUS CURIAE VOLUNTEERS OF LEGAL SERVICE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Amicus curiae, Volunteers of Legal Service ("VOLS"), hereby submits this supplemental amicus brief in opposition to Plaintiffs' Motion for Summary Judgment, seeking a declaration that New York City Administrative Code § 22-1005 (the "Guaranty Law") is unconstitutional under the Contracts Clause, U.S. CONST. art I, § 10. For the reasons given herein, the Guaranty Law was reasonable and appropriate to serve the City's legitimate interest in mitigating the economic emergency triggered by the COVID-19 pandemic. Accordingly, the Guaranty Law does not violate the Contracts Clause, Plaintiffs' Motion should be denied, and Defendants' Cross-Motion for Summary Judgment should be granted.[1]

I. STATEMENT OF INTEREST OF AMICUS CURIAE

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 Microenterprise Project, one of VOLS' several 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

[1] This brief was written by the undersigned amicus curiae and its counsel, and was produced and funded exclusively by the undersigned amicus curiae and its counsel. No party, or counsel for any party, made a monetary contribution intended to fund the preparation or submission of this brief.

challenges, including the Guaranty Law. 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 opposition to Plaintiffs' earlier Motion for Preliminary Injunctive and Declaratory Relief in this matter (ECF No. 41-1, VOLS' Br.; *see also* ECF Nos. 28, 48), as well as on appeal at the Court of Appeals for the Second Circuit.

II. THE GUARANTY LAW WAS REASONABLE AND APPROPRIATE TO SERVE THE CITY'S LEGITIMATE INTEREST IN MITIGATING THE ECONOMIC EMERGENCY TRIGGERED BY THE COVID-19 PANDEMIC

In determining whether a law impairing contractual obligations survives scrutiny under the Contracts Clause, courts ask, in turn, whether (i) the contractual impairment is substantial, (ii) the law serves a legitimate public purpose, and (iii) the means chosen to accomplish that purpose are reasonable and necessary. *See, e.g.*, *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006). In this case, both the Court of Appeals for the Second Circuit and this Court found that the pleadings record plausibly suggests that the Guaranty Law substantially impairs contractual obligations, and serves a significant and legitimate purpose. *Melendez v. City of New York*, 503 F. Supp. 3d 13, 32-33 (S.D.N.Y. 2020), *aff'd in part*, 16 F.4th 992, 1032-1038 (2d Cir. 2021). While Plaintiffs may "disagree" with the latter finding, the record is replete with evidence establishing the City's significant and legitimate purpose of mitigating the economic emergency experienced in New York City as a result of the COVID-19 pandemic. Thus, the sole genuine issue before this Court is whether the means chosen to accomplish the City's significant and legitimate purpose, were reasonable and appropriate. *See Melendez*, 16 F.4th at 1036, 1038-1047.

While Plaintiffs contend, on the one hand, that "the Second Circuit concluded that the Guaranty Law was neither a reasonable nor appropriate means to achieve the City's professed

public purpose," the record more accurately reflects Plaintiffs' contention on the other hand, that the Second Circuit left it to this Court "to decide the issue in the first instance." (ECF No. 92, Pls.' Br. at 1). Indeed, while the Second Circuit identified what it characterized as "serious concerns" regarding the reasonableness and necessity of the Guaranty Law, the Second Circuit nevertheless held that the City is "entitled to an opportunity to develop the record with respect to some of the points of concern identified in [its] opinion." *Id.* at 1046-1047, n.83; *see also id.* at 1042, 1046, n.82. Moreover, because it is the "totality" of the circumstances that dictate the reasonableness and necessity of the Guaranty Law, the Second Circuit specifically instructed that the parties may "identify still other circumstances relevant to determining whether the Guaranty Law is a reasonable and appropriate means to serve the City's professed public purpose." *Id*. at 1038, 1046. Thus, the Second Circuit's opinion does not "pre-determine" Plaintiffs' claim. *See id.* at 1070 (Carney, J., dissenting in part). Instead, this Court is required to faithfully "apply [the Second Circuit's] and the Supreme Court's precedents to determine whether the Guaranty Law withstands the Contracts Clause." *Id*.

Applying the applicable precedent, including *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934), on the record before this Court, the Guaranty Law is reasonable and appropriate to serve the City's legitimate interest in mitigating the economic emergency triggered by the COVID-19 pandemic. *First*, that the Guaranty Law permanently impairs personal guaranties during the height of a pandemic that devastated small business commercial tenants alone is not dispositive of the matter, and warrants little relative weight in its overall assessment. *Second*, the Guaranty Law appropriately serves its professed public purpose of helping shuttered businesses survive the pandemic and the absence of a "reopening" or "continuing operation" condition does not counsel otherwise. *Third*, when properly viewed in context, the Guaranty Law equally

distributes the economic burdens of the pandemic between landlords and tenants. *Fourth*, the Guaranty Law is, in the vast majority of instances, need-based, and cannot be taken advantage of by well-capitalized tenants. And *fifth*, the Guaranty Law was enacted in conjunction with other federal, state, and local laws that adequately compensate landlords for any damage inflicted by the Guaranty Law. For all of these reasons, the Guaranty Law survives constitutional scrutiny.

A. The Permanency of the Guaranty Law, Even if Weighing Heavily Against a Finding of Reasonableness on Its Own, Warrants Little Relative Weight When Viewed in the Totality of the Circumstances

In holding that the question of whether the Guaranty Law is reasonable and necessary to serve its legitimate public purpose could not be decided as a matter of law on a motion to dismiss, the Second Circuit first observed that "the Guaranty Law is not a 'temporary' or 'limited' impairment of contract," but instead "destroys [personal] guaranties by rendering them forever unenforceable for up to sixteen months of rent obligations." *Melendez*, 16 F.4th at 1038-1039. Nevertheless, the Court reached "no categorical conclusion" that "the repudiation of debt, destruction of contract, or denial of enforcement could not—as a categorical matter—be justified by police power." *Id.* at 1038-1039, n.68. Indeed, the Court specifically noted that it "d[id] not [] hold that, under the balancing test dictated by *Blaisdell* and its progeny, a permanent impairment of contract can never be deemed reasonable or appropriate." *Melendez*, 16 F.4th at 1040. Instead, the Court found that, while such an impairment might "weigh heavily against a finding of reasonableness, *particularly at the pleadings stage*," it is the "totality" of the circumstances, as developed by the evidentiary record, that determines whether the Guaranty Law passes constitutional muster. *Id.* at 1038, 1040 (emphasis added). For that reason, the Second Circuit remanded to this Court to "allow the parties to develop the record further on [the] issues identified in [its] opinion as well as any other matters relevant to [Plaintiffs'] claim." *Id.* at 1047.

As originally enacted, the Guaranty Law prohibited the enforcement of personal guaranties for defaults occurring between "March 7, 2020 and September 30, 2020, inclusive." N.Y.C. LOCAL L. 2020/55. Thus, as originally conceived, the Guaranty Law applied only as to defaults occurring during the six-month period that followed the initial arrival of the COVID-19 pandemic in New York, when small businesses were forced by government orders to close their doors. On September 28, 2020, the City extended the Guaranty Law through March 31, 2021. N.Y.C. LOCAL L. 2020/98. And, on March 25, 2021, rightly perceiving the need for still further relief, the City once more extended the Guaranty Law through June 30, 2021. N.Y.C. LOCAL L. 2021/50. Each of these enactments was the product of careful deliberation, hurried only to respond with like force to the continuing challenges rapidly imposed by the COVID-19 pandemic. And, the continuing challenges imposed by the COVID-19 pandemic, together with the additional circumstances set forth *infra* Sections B-E, warrant careful consideration, because they demonstrate why the permanence of the Guaranty Law, even if by itself weighing heavily against a finding of reasonableness, warrants little relative weight under the "totality" of the circumstances.

The COVID-19 pandemic has "caused more damage to the United States than could have been foreseen prior to its arrival in the United States." (ECF No. 41-2, Kats Decl. ¶ 2). Indeed, at its outset, "[m]uch about the coronavirus remain[ed] unclear," and it was "far from certain that the outbreak [would] reach severe proportions in the United States or affect many regions at once." (ECF No. 41-3, Kats Decl. ¶ 2, Exhibit 1). And yet, "[o]nly three weeks after the first coronavirus infection was detected in New York, the City accounted for roughly 5% of the world's confirmed coronavirus cases." (ECF No. 41-2, Kats Decl. ¶ 4). As the City quickly became the epicenter of the pandemic, all stages of government necessarily responded with extreme measures intended to stymy further destruction. On March 20, 2020, for example, Governor Cuomo issued Executive

Order No. 202.8, requiring the closure of all non-essential businesses throughout the State "until at least June 8, 2020, when New York City officially entered Phase 1 of the Governor's Four Phase New York Forward Reopening Plan." (ECF No. 41-2, Kats Decl. ¶ 6, Exhibit 5; *see also* Kempner Decl.[2] ¶ 1). While New York City remained "bright and sunny" during this time, eerily, "commercial streets [were] largely deserted [as] restaurants and most stores [] closed to curb the coronavirus." (ECF No. 41-2, Kats Decl. ¶ 4, Exhibit 3).

"Of all the shutdown scenes, there [was] perhaps no sight as strange as an empty Times Square." (ECF No. 41-2, Kats Decl. ¶ 7, Exhibit 6). In May 2020, just before the enactment of the Guaranty Law, Times Square, "an area that employ[ed] 180,000 people, provide[d] 15% of New York City's economic output, and generate[d] $2.5 billion in tax revenue for the City," stood still. (ECF No. 41-2, Kats Decl. ¶ 7, Exhibit 6). Indeed, "foot-traffic declined by over 90% to less than 35,000 people per day during the pandemic," decimating an area that "reli[es] on tourists and office workers" for its commercial success. (ECF No. 41-2, Kats Decl. ¶ 7, Exhibit 6). And, the effects of the pandemic stretched far beyond Times Square. On "the other Fifth Avenue" in Brooklyn, for example, only 60 of 520 small businesses remained open by the first week of April 2020. (ECF No. 41-2, Kats Decl. ¶ 14, Exhibit 13). With widespread closures causing significant declines in revenue, small businesses were left with limited means to meet financial obligations. According to the Federal Reserve Bank, for example, "only about 20% of 'healthy' small businesses had sufficient cash reserves to continue normal operations if faced with a two-month revenue loss." (ECF No. 41-2, Kats Decl. ¶ 17, Exhibit 17). As a result, many small businesses

[2] "Kempner Decl." refers to the Declaration of Peter Kempner, Esq., in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment, filed concurrently herewith.

were incapable of meeting commercial rent obligations both during and after their government-mandated closure. (ECF No. 41-2, Kats Decl. ¶ 15, 22; *see also* Kempner Decl. ¶¶ 1-3).

It was against this backdrop that the Guaranty Law was enacted. After careful consideration, the City Council rightly determined that, as originally enacted, a six-month impairment of personal guaranties was warranted to combat the extreme challenges posed by the pandemic. In arriving at that decision, the City Council considered ample testimony both in support of and in opposition to the Guaranty Law, as well as empirical evidence of the impact of the pandemic on small businesses. (*See* ECF No. 41-2, Kats Decl. ¶ 20; *contra* ECF No. 92, Pls.' Br. at 5). For example, "VOLS submitted testimony in support of the [Guaranty Law] while [it was] pending in the City Council," which included empirical "[d]ata obtained from a VOLS survey of 51 small businesses located throughout New York City in April 2020." (*See* ECF No. 41-2, Kats Decl. ¶ 20, 22, Exhibit 21). That data showed, among other things, that "88% of [VOLS'] clients reported decreases in revenue as a result of the COVID-19 pandemic," "40% of [VOLS'] clients with commercial leases indicated that they had already missed commercial rent payments, and 89% indicated that they anticipated missing commercial rent payments in the future." (*See* ECF No. 41-2, Kats Decl. ¶ 20, 22, Exhibit 21). Rightly recognizing the very real and detrimental impact of the COVID-19 pandemic and government-mandated closures on small businesses, as well as the potential impact on personal guarantors, the City Council properly concluded that a permanent, six-month impairment of personal guaranties was warranted under the circumstances.

Similarly, the City Council properly extended the Guaranty Law to combat those challenges posed by the pandemic, which showed no signs of alleviating. In enacting its first extension, the City Council set forth the findings that justified the permanent impairment of personal guaranties through September 30, 2020. *See* N.Y.C. LOCAL L. 2020/98. The City Council

rightly recognized that, as originally enacted, the Guaranty Law was justified because New York City was "in the midst of a local, state, and federally declared disaster emergency," and, while many government measures intended to slow the progress of the COVID-19 pandemic were effective, "many [had] also contributed to a catastrophic impact on the city's economic and social livelihood." *Id*. And, in extending the Guaranty Law first through March 31, 2021, the City Council rightly recognized that "the so-called first wave of the COVID-19 crisis ha[d] not yet fully subsided and there [was] substantial risk of a second wave of the disease beginning in the fall or winter of 2020, particularly as the city enter[ed] its normal flu season." *Id*. Thus, in furtherance of the purpose of the Guaranty Law, the City Council properly concluded that a six-month extension was justified "to provide [small] businesses a reasonable recovery period with a duration that [was] comparable to the period of time that these businesses were forced to close or operate with significant limitations on indoor occupancy and thereby to provide them 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. Those findings were echoed in the second extension of the Guaranty Law through June 30, 2021, which was justified for similar reasons. *See* N.Y.C. LOCAL L. 2021/50.

The City Council rightly determined that both extensions of the Guaranty Law were warranted under the circumstances of the COVID-19 pandemic, which continues to impact small businesses and society to this very day. In fact, the extensions of the Guaranty Law were especially warranted to address the disproportionate impact of the COVID-19 pandemic on brick-and-mortar small businesses, which, in New York City, largely rely on in-person operations to generate revenue and meet financial obligations, including commercial rent. (*See* Kempner Decl. ¶ 2). Although "[e]ven before the COVID-19 pandemic and economic crisis, brick-and-mortar retailers

had been fighting a fierce battle against Amazon and other e-commerce players," the pandemic "accelerated" those challenges at "staggering speed." Denise L. Yohn, *The Pandemic Is Rewriting the Rules of Retail*, HARV. BUS. REV. (Jul. 6, 2020), https://hbr.org/2020/07/the-pandemic-is-rewriting-the-rules-of-retail. Indeed, a survey conducted early in 2021 showed that 60% of consumers were "visiting brick-and-mortar stores less than before the pandemic" and 43% were shopping "more often online for products they would have previously bought in stores." Kathy Gramling, Jeff Orschell, & Joshua Chernoff, *How E-Commerce Fits into Retail's Post-Pandemic Future*, HARV. BUS. REV. (May 11, 2021), https://hbr.org/2021/05/how-e-commerce-fits-into-retails-post-pandemic-future. And, well into 2021, "small businesses continue[d] to suffer," with 78% of small businesses surveyed by the Office of the New York State Comptroller reporting "an overall negative impact on their business." 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.

The State "possess[es] authority to safeguard the vital interests of its people," and "[i]t does not matter that legislation appropriate to that end 'has the result of modifying or *abrogating* contracts already in effect.'" *Blaisdell*, 290 U.S. at 434-435 (emphasis added). The Second Circuit inherently recognized as much in declining to reach a "categorical conclusion" that a law, such as the Guaranty Law, can never survive constitutional scrutiny merely because of its permanency or duration of effect. *Melendez*, 16 F.4th at 1038, n.68. Instead, this Court is required to consider the "totality" of the circumstances, including, for example, "the exigency which called [] forth" the legislation. *See Blaisdell*, 290 U.S. at 447. And, here, that exigency, together with still further circumstances set forth below, demonstrates clearly that, whatever weight the permanency of the

Guaranty Law should be given on its own, it is relatively insignificant when viewed in the totality of the circumstances.

B. The Guaranty Law Appropriately Serves Its Professed Public Purpose of Helping Shuttered Small Businesses Survive the Pandemic

Turning to the next feature informing its analysis, the Second Circuit held that it could not conclude, as a matter of law, "that the Guaranty Law is an appropriate means for achieving its professed public purpose: to help shuttered small businesses survive the pandemic so that they can reopen after the emergency, ensuring functioning neighborhoods throughout the City." *Melendez*, 16 F.4th at 1040. The Second Circuit observed that three assumptions informed the City's enactment of the Guaranty Law, namely, (i) that shuttered small businesses are usually owned by the individuals guaranteeing their leases, (ii) that these owner-guarantors would be financially ruined if required to pay their businesses' rent arrears, and (iii) that financially ruined owners would be unlikely to reopen shuttered businesses. *Id.* at 1040-41. The problem, the Second Circuit observed, was that "the law does not condition the relief it affords on guarantors owning shuttered businesses or, even if they do, on their ever reopening those businesses." *Id.* at 1041. Nevertheless, the Second Circuit "express[ed] no view on how [] continuing operation conditions might inform challenges" to the Guaranty Law, concluding only that their absence from the Guaranty Law "call[ed] into question" its appropriateness. But the record obviates the concerns expressed by the Second Circuit, demonstrating the link it deemed "missing," *id.* at 1041, and establishing beyond any genuine dispute that the Guaranty Law appropriately serves its professed public purpose.

As an initial matter, the record establishes that the relief afforded by the Guaranty Law is, in the vast majority of circumstances, conditioned on the guarantor owning a shuttered business. In fact, Plaintiffs admit that the Guaranty Law applies only to those "required to cease serving

members of the public," and that "[o]ften, the guarantor is an owner or other principal of the business entity who agrees to be personally liable for the obligations of the tenant." (ECF No. 92, Pls.' Br. at 8-9). Moreover, the "overwhelming majority of VOLS' small business tenant clients" seeking relief related to the COVID-19 pandemic are owned by those who "are personally obligated under personal guaranties that provide[] no recourse or relief for them in the event of a forced government shutdown in the context of a pandemic." (*See* ECF No. 41-2, Kats Decl. ¶ 25; *see also* Kempner Decl. ¶¶ 4-5). That much is a reality, not just for VOLS' clients, but for the vast majority of small businesses, because, in practice, "the disparity in negotiating power in favor of a commercial landlord versus a small business tenant in new lease negotiations, renewals, or dispute resolution on existing leases[,] is stark." (*See* ECF No. 41-2, Kats Decl. ¶ 27; *see also* Kempner Decl. ¶ 6). For similar reasons, commercial rent obligations in New York City are often exorbitant, and would no doubt leave the vast majority of owner-guarantors, who rely on revenue generated by the business, in financial ruin. (*See* Kempner Decl. ¶¶ 2-5).

Numerous accounts demonstrate this reality. For example, the owner of d'mai Urban Spa on Brooklyn's Fifth Avenue said that "there [was] no way she [could] keep paying her rent of about $30,000 a month." (*See* ECF No. 41-2, Kats Decl. ¶ 14, Exhibit 11). Likewise, the owner of Fitness Evolved, another Brooklyn small business, said he would be forced to close his business because "he couldn't get a cut off his $17,500 monthly rent." (*See* ECF No. 41-2, Kats Decl. ¶ 14, Exhibit 11). Moreover, in April of 2020, "40% of [VOLS'] clients with commercial leases indicated that they had already missed commercial rent payments, and 89% indicated that they anticipated missing commercial rent payments." (ECF No. 41-2, Kats Decl. ¶ 22). For the vast majority of small business owner-guarantors, particularly VOLS' clients, for whom starting a business represents a path out of poverty, financial ruin is the only outcome of being left to

individually account for exorbitant New York City rents, particularly where the business has stopped generating revenue. (*See* Kempner Decl. ¶¶ 2-5). And, there is no doubt that a small business owner in financial ruin could not reopen a shuttered business.

That the Guaranty Law does not contain a "continuing operation" or "reopening" condition simply does not demonstrate that the Guaranty Law fails to serve its intended purpose. While other forms of relief may have had such conditions, they served different purposes than the Guaranty Law. For example, the "primary goal" of the Paycheck Protection Program, described further *infra* Section E, was "to ensure that the millions of American[s] who work for small companies continue to get a paycheck." (ECF No. 41-2, Kats Decl. ¶ 14, Exhibit 12). While a business would have had to continue to operate, or at least maintain its staff, at all times in order to serve that goal, by contrast, the purpose of the Guaranty Law is served whether or not a business continues to operate at all times. The City Council itself recognized that small businesses might need to "temporarily clos[e] and later reopen[]" in order to ultimately survive the pandemic. *See* N.Y.C. LOCAL L. 2021/50; N.Y.C. Local. L. 2020/98. Moreover, the absence of a reopening condition serves the purpose of the Guaranty Law for the very reasons its sponsor, Council Member Carlina Rivera, stated on the record at a hearing during its consideration:

> My bill will ensure that business 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.

(ECF No. 29-34, Younger Decl., Exhibit 34). In the event that a small business is not able to survive the pandemic, its owner-guarantor may nevertheless remain financially protected so that he or she may later reinvigorate the City's small business landscape with a relaunched or new small business. (*See* Kempner Decl. ¶ 10). For at least these reasons, the Guaranty Law appropriately serves its professed public purpose.

C. When Viewed in Context, the Guaranty Law Maintains the Equal Division of the Economic Burdens Imposed by the Pandemic Between Commercial Landlords and Tenants

Continuing on in its assessment of the Guaranty Law, the Second Circuit next observed that "the Guaranty Law's allocation of its economic burden" heightened concerns regarding its reasonableness and necessity, noting that the burden imposed by the Guaranty Law came "not at City expense," but, rather, "at the expense of a discrete group of private persons: commercial landlords." *Melendez*, 16 F.4th at 1042. Echoing these views, Plaintiffs contend that "the Guaranty Law directly foists the entire economic responsibility for the pandemic's impact on commercial landlords." (ECF No. 92, Pls.' Br. at 18). But, the Guaranty Law was not enacted in isolation. Rather, it was enacted against the backdrop of other government orders requiring the closure of brick-and-mortar small businesses which, like commercial landlords, were "not responsible for the circumstances warranting relief." *Cf. Melendez*, 16 F.4th at 1042. And, when considered in that broader context, it is clear that the Guaranty Law evenly distributes the economic burdens imposed by the pandemic as between commercial landlords and tenants.

At the outset, it is important to recall that the Guaranty Law was enacted against the backdrop of government orders, which prevented small businesses from accessing their bargained for commercial premises throughout the pandemic. As the City Council itself recognized, those government orders had a "catastrophic impact on the city's economic and social livelihood," most notably, in that they required the closure of or limited access to commercial premises that small businesses rely on for revenue generation necessary to sustain their operations. *See* N.Y.C. LOCAL L. 2020/98; N.Y.C. LOCAL L. 2021/50. As Plaintiffs' lease itself makes plain, possession of the premises is the primary consideration for which a commercial tenant, and its guarantor, agrees to pay rent. For example, Plaintiff's lease provides:

> TENANT shall have possession of the PREMISES as of the Commencement Date for all purposes.
>
> * * *
>
> [I]f the PREMISES is partially damaged by Casualty, the damage shall be repaired by OWNER and, during the period from the day following the Casualty until such repair is substantially completed, the Basic Rent and Additional Rent shall be equitably reduced, taking into account the portion of the PREMISES which remains usable except that if TENANT reasonably determines that the Casualty effectively prevents TENANT from operating in a commercially reasonable manner and TENANT closes for business as a result of the Casualty, none of the PREMISES shall be deemed usable until the Casualty is repaired.

(ECF No. 64-5, Bochner Decl., Exhibit A). Thus, Plaintiff 's lease itself evidences what is, in practice, a reality – that the bargained for exchange for the vast majority of, if not all, commercial tenants, is the right to possess the premises for use for its intended purpose. (*See* ECF No. 64-5, Bochner Decl., Exhibit A; *see also* Kempner Decl. ¶ 8). Government orders that predated the Guaranty Law disrupted that bargained for exchange.

Despite these circumstances and calls for rent relief from small business owners and advocates (*see, e.g.*, ECF No. 41-2, Kats Decl. ¶ 20, Exhibit 21), the City Council did not enact such an extreme measure. (*See* Kempner Decl. ¶ 9). Instead, perhaps recognizing that "small landlords must be taken into account," (ECF No. 29-34, Younger Decl., Exhibit 34), the City Council enacted the Guaranty Law, which properly distributes the burdens of the pandemic between commercial landlords and tenants. Notably, the Guaranty Law does not, as Plaintiffs contend, "permanently eliminate[] the landlord's ability to recoup uncollected rent payments owed by defaulting tenants, or to re-let commercial premises." (*Contra* ECF No. 92, Pls.' Br. at 8). Quite to the contrary, the Guaranty Law leaves intact all "other lawful remedies that a landlord may be able to seek against a commercial tenant itself, such as bringing suit against that tenant for damages; collecting or offsetting financial obligations by using the revenues, inventory,

equipment, or other assets of that tenant; or evicting or declining to renew the lease or rental agreement of that tenant." *See, e.g.*, N.Y.C. LOCAL L. 2021/50. And, it does so in an environment both where commercial tenants were deprived of the benefit of their bargain and, as explained *infra* Section E, numerous other laws compensated commercial landlords for their potential losses.

In short, the Guaranty Law should be viewed, not in isolation, but as a piece of a much larger puzzle. When so viewed, it is abundantly clear that the Guaranty Law equally divides the economic burdens of the pandemic between commercial landlords and tenants. To illustrate this point, consider what would remain in the absence of the Guaranty Law. Both commercial tenants and their personal guarantors would be equally liable for commercial rents that accrued during periods when government orders either prohibited or severely hampered possession of the commercial premises, again, the primary consideration for which commercial tenants and guarantors enter into these agreements, without any contribution from commercial landlords. Thus, the same concerns that the Second Circuit expressed over the allocation of the burdens would exist in reverse. The great weight of the pandemic and government shutdown orders would fall on the "few shoulders" of the guarantors of commercial tenants. *Cf. Melendez*, 16 F.4th at 1042 (citing *Ass'n of Surrogates and Supreme Court Reporters v. New York*, 940 F.2d 766, 773 (2d Cir. 1991)). The Court should not allow such an inequitable outcome, particularly where, as here, such an outcome would only add further to the substantial injuries already suffered by small business commercial tenants.

D. The Guaranty Law Serves Those in Need and Cannot Be Taken Advantage of by Well-Capitalized Commercial Tenants

The next feature that the Second Circuit concluded added to its reasonableness concerns was "the fact that the Guaranty Law relief is not conditioned on need." *Melendez*, 16 F.4th at 1043. Nevertheless, while Plaintiffs contend that "[t]he failure to include a need or substantial

injury requirement is a fatal defect of the law and it cannot be changed by discovery," the Second Circuit did not so hold. Instead, the Second Circuit specifically noted that the City "can adduce such evidence" as necessary to dispel this concern on remand. *Id.* at 1045. And, as the record makes clear, in the vast majority of circumstances the Guaranty Law is, in fact, conditioned on need, and cannot be taken advantage of by well-capitalized tenants. As such, this feature demonstrates, rather than disproves, the reasonableness and necessity of the Guaranty Law.

As an initial matter, Plaintiffs contention that the City could have included a "substantial injury" or "substantial need" requirement for commercial tenants to avail themselves of the Guaranty Law "to prevent well-capitalized commercial tenants from taking advantage of the Guaranty Law," is a red herring. (ECF No. 92, Pls.' Br. at 20). So too is any concern that the Guaranty Law "may end up helping Louis Vuitton as much as it helps Louise['s] pizza." (ECF No. 92, Pls.' Br. at 6). *First*, and as the City Council itself properly acknowledged, large, well-capitalized businesses are unlikely to even be implicated by the Guaranty Law because "the scale of the financial obligations of larger businesses generally renders having a natural person guarantee those obligations impracticable." *See, e.g.*, N.Y.C. LOCAL L. 2020/98. Plaintiffs themselves admit facts that demonstrate this point. For example, Plaintiffs acknowledge that a personal guaranty "depend[s] on [] credit-worthiness," and they "encourage property owners to lease property to commercial tenants who may not be as creditworthy." (ECF No. 92, Pls.' Br. at 8-9; *see also* Kempner Decl. ¶ 6). There can be no genuine dispute that large corporations – Louis Vuitton, to take Plaintiffs' example – often times do not meet such conditions. *Second*, even if large, well-capitalized commercial tenants were implicated, the Guaranty Law itself does not impair a commercial landlord's right to recover as against that well-capitalized commercial tenant, but instead leaves intact all remedies available under the commercial lease. (*See* Kempner Decl. ¶ 9).

To be absolutely clear, a well-capitalized tenant is still liable for rent due under the commercial lease. (*See* Kempner Decl. ¶ 9).

The only question that remains, then, is whether the Guaranty Law sufficiently conditions a guarantor's resort to Guaranty Law relief on need. The record demonstrates that, in the vast majority of circumstances, it does. As the Second Circuit observed, "the Guaranty Law only affords relief to natural-person guarantors of businesses forced to shutter or reduce operations during the pandemic." *Melendez*, 16 F.4th at 1043. While the Second Circuit concluded that "by itself, [that] does not mean that a particular guarantor cannot pay rent arrears, particularly when temporally cabined by a good-guy provision," record evidence demonstrates that, in the vast majority of circumstances, that is exactly what it means. The same three assumptions that the Second Circuit identified in considering whether the Guaranty Law appropriately serves its professed public purpose, *see id.* at 1040-41, inform that understanding here. As explained *supra* Section B, shuttered small businesses are usually owned by the individuals guaranteeing their leases and, in the vast majority of circumstances, those owner-guarantors would be financially ruined if required to pay their businesses' rent. That there may be some instances where that may not be the case is of no moment, because, as the Second Circuit itself recognized, "legislatures may act based on 'the general or typical situation,' even if 'there are, or may be, individual cases of another aspect.'" *Id.* at 1044 (quoting *Blaisdell*, 290 U.S. at 446).

While the Second Circuit expressed concern that the Guaranty Law improperly placed the burden on commercial landlords without any evidence "that commercial landlords are better positioned financially than guarantors to absorb the economic blows of the pandemic on commercial real estate," the record obviates those concerns. In fact, Plaintiffs themselves illustrate that commercial landlords often are in the best financial position to absorb those blows. For the

six-month period that Plaintiff Bochner alleges that the Guaranty Law rendered Plaintiffs' commercial lease "virtually valueless," for example, Plaintiffs' lease provided for "more than $110,000 in rental income." (ECF No. 52, Bochner Decl. ¶ 18-19). And yet, by comparison, Plaintiff Bochner admits that for the same period of time, only about $35,000 in property taxes came due. (ECF No. 52, Bochner Decl. ¶ 8). Notably, Plaintiff Bochner does not appear to allege any injuries relating to his ability to meet mortgage obligations, or other financial obligations associated with the commercial premises, beyond tax obligations. The disparity between what a commercial tenant often must pay in rent, and the financial obligations of a commercial landlord, such as Plaintiff Bochner, for the same premises over the same period of time, is striking, and reveals the practical reality that not only is commercial rent often exorbitant, but commercial landlords are most often in a much better financial position than their small business tenants. That is especially true for VOLS' clients, the vast majority of whom "have leases including pass-along charges such as real estate and [Business Improvement District] taxes, [Common Area Maintenance] and building improvements, and other expenses paid for the benefit of the fee owner rather than the tenant." (ECF No. 41-2, Kats Decl. ¶ 28; *see also* Kempner Decl. ¶ 6). In short, commercial landlords are, more often than not, in a much better financial position than their small business tenants. (*See* Kempner Decl. ¶ 6).

Finally, as the Second Circuit observed, the "relative availability" of financial assistance to tenants, guarantor-owners, and landlords bears on the reasonableness and necessity of the Guaranty Law. As explained in further detail *infra* Section E, while hundreds of billions of dollars may have been allocated to assist small businesses, including both commercial landlords and tenants, in meeting financial obligations throughout the pandemic, none of this relief was available to natural person guarantors, who, by their very nature, are not small businesses. Thus, the relative

availability of financial assistance favors shifting the financial burdens of the pandemic away from personal guarantors.

E. Other Federal and State Laws Compensate Landlords for Damages Sustained as a Result of the Guaranty Law

Finally, turning to the last feature informing its analysis of the Guaranty Law, the Second Circuit considered "the law's failure to provide for landlords or their principals to be compensated for damages or losses sustained as a result of their guaranties' impairment." *Melendez*, 16 F.4th at 1045. The Second Circuit assumed, without deciding, that such damages can be extensive. *Id.* at 1045. Nevertheless, the Second Circuit did "not [] suggest that compensation is always necessary to defeat a Contracts Clause challenge." *Id.* at 1046. Nor did the Second Circuit hold that this concern "cannot be altered through discovery or supplemented by additional record evidence." (*Contra* ECF No. 92, Pls.' Br. at 23). To the contrary, the Second Circuit explicitly noted that "[t]he availability of other pandemic-related financial assistance to contracting parties may bear on the reasonableness of impairment without compensation, and the parties may [] develop the record on this point further on remand." *Melendez*, 16 F.4th at 1046, n.82. And, because the record reflects that there was ample government assistance available to commercial landlords during the period to which the Guaranty Law applied, this concern does not militate against a finding of reasonableness.

On March 27, 2020, *before* the Guaranty Law was enacted, "the President signed into law the Coronavirus Aid, Relief, and Economic Security Act," which provided "over $2 trillion in relief to Americans and small businesses struggling as a result of the economic crisis provoked by the COVID-19 pandemic." (ECF No. 41-2, Kats Decl. ¶ 12 (citing Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (2020); *see also* Kempner Decl. ¶ 7). That act was unprecedented, in that it created the novel Paycheck Protection Program ("PPP"), "through which

a small business could access 'loans' of the lesser of $10 million or 250% of its average monthly payroll costs for the prior 12-month period." (ECF No. 41-2, Kats Decl. ¶ 12; *see also* Kempner Decl. ¶ 7). As originally conceived, "if a small business spent 75% of the loan on payroll and the remainder on rent, utilities, and the like, within an eight-week period, the loan would be forgiven." (ECF No. 41-2, Kats Decl. ¶ 12; *see also* Kempner Decl. ¶ 7).

Although in its original form, the PPP was available to provide funds to certain small business commercial landlords and tenants alike, the PPP nevertheless proved largely insufficient for New York City commercial tenants, whose exorbitant commercial rents vastly exceeded payroll expenses. (*See* Kempner Decl. ¶ 7). Indeed, that the PPP, as originally enacted, allowed no more than 25% of the funds to be allocated to rent "prov[ed] 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 . . . ." (ECF No. 41-2, Kats Decl. ¶ 14, Exhibit 12; s*ee also* Kempner Decl. ¶ 7). One study conducted by economists at the University of Chicago and the Massachusetts Institute of Technology concluded that "companies that could maintain operations—unlike restaurants and other venues forced to close—could take better advantage of the aid." (ECF No. 41-2, Kats Decl. ¶ 14, Exhibit 12).

Perhaps perceiving these deficiencies and the need for still further relief to enable commercial tenants to meet their commercial rent obligations, "Congress later enacted the Paycheck Protection Program Flexibility Act ("PPPFA"), which was signed into law by the President on June 5, 2020." (ECF No. 41-2, Kats Decl. ¶ 13 (citing Paycheck Protection Program Flexibility Act, Pub. L. No. 116-142 (2020)). The PPPFA "reduced the amount of loan proceeds required to be spent on payroll from 75% to 60%, expanded the period within which the funds [had to] be spent from eight weeks to twenty-four weeks, and increased the repayment term for

the unforgivable portions of loans issued after June 5 from one year to five years." (ECF No. 41-2, Kats Decl. ¶ 13; *see also* Kempner Decl. ¶ 7). Critically, however, while the PPPFA improved upon the PPP, it still placed limits on a small business commercial tenant's use of the funds to satisfy commercial rent obligations. (*See* Kempner Decl. ¶ 7).

Next, on March 11, 2021, Congress enacted the American Rescue Plan Act of 2021, which allocated $28.6 billion to the new Restaurant Revitalization Fund ("RRF") "to help small restaurant businesses meet payroll, mortgage, rent, and other appropriate expenses." *Melendez*, 16 F.4th at 998; *see also* American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 5003(b)(2)(A), (c)(5) (2021). Beyond restaurants, eligible small businesses also included "food stands, food trucks, caterers, bars, and similar places of business that serve food or drink." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-22-105442, RESTAURANT REVITALIZATION FUND (2022) at 6 ("GAO-22-105442"). While the RRF provided much-needed relief to many small businesses in the food industry, only about 40% of eligible applicants received funds. GAO-22-105442 at 16-17. Moreover, the RRF provided no relief for small businesses outside of the food and beverage industry. *See* GAO-22-105442 at 6.

Meanwhile, the State of New York was equally active in regulating in response to the COVID-19 pandemic. *See Melendez*, 16 F.4th at 998-1001. For example, as part of his Executive Order No. 202.8, also issued *before* enactment of the Guaranty Law, Governor Cuomo ordered a ninety-day moratorium on the foreclosure of commercial properties. The next day, Governor Cuomo issued Executive Order No. 202.9, providing still further protections for commercial landlords by providing a forbearance of mortgage payments for any entity suffering financial hardship. "Subsequent executive orders extended and expanded these protections until they were superseded by statute." *Melendez*, 16 F.4th at 1000. Indeed, on March 9, 2021, *before* the

Guaranty Law was extended through June of 2021, the Governor signed into law the COVID-19 Emergency Protect Our Small Businesses Act of 2021, which prohibited mortgage or tax foreclosures relating to commercial properties, where the owner suffered financial hardship, through May 1, 2021. COVID-19 Emergency Protect Our Small Businesses Act of 2021, pt. B, subpart A, §§ 5, 7, subpart B, § 3.

As the Second Circuit observed, compensation is not always necessary to defeat a Contracts Clause challenge. *Melendez*, 16 F.4th at 1046. Nonetheless, the Guaranty Law was enacted and extended against the backdrop of several other legislative enactments and executive orders that adequately compensated commercial landlords for any losses incurred as a result of the Guaranty Law. To be sure, those enactments prevented mortgage and tax foreclosures relating to commercial properties through nearly the same period as that to which the Guaranty Law prohibited the enforcement of personal guaranties. And, it did so at a time where all stages of government made recovery funds available to small businesses – commercial landlords and tenants, but not natural person guarantors – to sustain operations. The City Council quite reasonably concluded that a period of impairment that aligned closely with executive and legislative actions prohibiting foreclosures was appropriate not just to allow small businesses to survive "but also *to generate sufficient revenues to defray owed financial obligations*" and compensate commercial landlords for any losses that remained outstanding. *See* N.Y.C. LOCAL L. 2021/50 (emphasis added). In short, the availability of other pandemic-related financial assistance, together with government actions prohibiting foreclosures relating to commercial properties during a period that closely paralleled that of the Guaranty Law, demonstrates the reasonableness of the Guaranty Law.

III. CONCLUSION

For the foregoing reasons, VOLS respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment, and grant Defendants' Cross-Motion for Summary Judgment.

Dated: New York, NY
September 23, 2022

Respectfully Submitted,

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