

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
COMMUNITY HOUSING IMPROVEMENT
PROGRAM, et al.,

Plaintiffs,

v.

No. 19-cv-4087 (MKB)

CITY OF NEW YORK, et al.,

Defendants

-----X

***AMICUS CURIAE* BRIEF
OF THE NATIONAL ASSOCIATION OF HOME BUILDERS
IN OPPOSITION TO DEFENDANTS' AND INTERVENORS' MOTIONS TO DISMISS**

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PRELIMINARY STATEMENT

“That rent control is an ineffective and often counterproductive housing policy is no longer open to serious question.” *The High Cost of Rent Control*, NAT’L MULTIFAMILY HOUSING COUNCIL, (last visited Dec. 20, 2019)¹. In 1985, Peter Navarro, Ph.D., who now serves as Director of the U.S. Office of Trade and Manufacturing Policy, wrote: “On the subject of rent control, the economics profession has reached a rare consensus: Rent control creates many more problems than it solves.” Peter Navarro, *Rent Control in Cambridge, Mass.*, 78 PUB. INT. 83, 90 (Winter 1985). Twenty-five years later, the conclusion remained the same: “[E]conomic research quite consistently and predominantly frowns on rent control.” Blair Jenkins, *Rent Control: Do Economists Agree?*, 6 ECON. J. WATCH 73, 105 (Jan. 2009).² More recently: “Rent control appears to help affordability in the short run for current tenants, but in the long-run decreases affordability, fuels gentrification, and creates negative externalities on the surrounding neighborhood.” Rebecca Diamond, *What does economic evidence tell us about the effects of rent control?*, BROOKINGS INST., (Oct. 18, 2018).³ In sum, during the past 25 years, “study after study” has confirmed the “profound economic and social consequences of government intervention in the nation’s housing markets.” *The High Cost of Rent Control*, *supra*.

Yet “rent controls are back in fashion.” *Control your instincts: Rent control will make housing shortages worse*, ECONOMIST (Sep. 19, 2019).⁴ In July, Paris reintroduced rent controls after removing them in 2017. *Id.* Sadiq Khan, London’s mayor, has called for rent controls. *Id.*

¹ https://www.nmhc.org/news/articles/the-high-cost-of-rent-control/#N_16_.

² https://econjwatch.org/File+download/238/2009-01-jenkins-reach_concl.pdf?mimetype=pdf.

³ <https://www.brookings.edu/research/what-does-economic-evidence-tell-us-about-the-effects-of-rent-control>.

⁴ <https://www.economist.com/leaders/2019/09/19/rent-control-will-make-housing-shortages-worse>.

In Berlin, legislators recently voted to freeze rents for the next five years. *Id.* In September 2019, California passed a bill capping annual rent increases at five percent plus inflation. *Id.* Senator Bernie Sanders has proposed a nationwide limit of three percent, or 1.5 percent plus inflation. *Id.* In June 2019, the State of New York joined this movement, passing amendments to its rent stabilization laws that have been described by its State Senate Majority leader as “the strongest tenant protections in history.” Compl. ¶ 65, ECF No. 1.

Nonetheless, conclusive economic data demonstrate that these rent control measures harm the very people they purport to protect. Rent control measures do not increase the availability of rental housing, much less more affordable rental housing. These measures end up limiting rents for affluent tenants while offsetting any gains for low-income renters with greater costs, due to lower levels of maintenance. Meanwhile, rent control measures create other pernicious externalities, such as increased racial discrimination, racial segregation, housing market devaluation, governmental costs, homelessness, and decreased rates of home ownership.

Given these empirical realities, New York’s rent control measures are neither rationally related to a legitimate government interest (as needed to survive scrutiny under the Due Process Clause) nor in service of the common good (as related to the “character of the governmental action” component of a regulatory takings claim). Accordingly, this Court should deny the motions to dismiss filed by Defendants and Intervenors.

STATEMENT OF INTEREST

The National Association of Home Builders (“NAHB”) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. One of NAHB’s chief goals is to provide and expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state

and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, constructing about 80 percent of all homes built in the United States. NAHB is a vigilant advocate for property rights, and a guardian against economic misunderstanding in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to protect constitutional and statutory rights, as well as the business interests of its members.

The irrationality of rent control measures threatens housing providers across the United States. Despite an overwhelming body of evidence that demonstrates the negative effects of rent control measures on the housing market, state and local governments continue to enact and re-enact these flawed measures. Rectifying this legislatively-created debacle is vital to the interests of NAHB and its members.

FACTUAL BACKGROUND

In 1969, the City of New York, building upon "the rent control laws then in existence," passed the first iteration of its Rent Stabilization Law ("RSL"). Compl. ¶¶ 3, 44. Throughout this brief, consistent with the Complaint and the various briefs of the parties, the RSL and its subsequent amendments, as well as the related laws of the State of New York, will be referred to, unless otherwise specified as "RSL."

In 1974, the State of New York passed the Emergency Tenant Protection Act of 1974. Compl. ¶ 48. Under the act, a municipality could enact rent stabilization regulations provided the municipality found a "public emergency requiring the regulation of residential rents," namely, a vacancy rate of five percent or lower. Compl. ¶ 54 (quoting N.Y. UNCONSOL. LAW § 8623.a (McKinney)). Since 1974, the City of New York has declared a public emergency every three years, ensuring perpetual rent stabilization. Compl. ¶ 55.

The RSL contains a number of provisions limiting the rights of landlords, including limits on rent increases, restrictions on eviction, obligations to renew leases, and limits on removing rent-stabilized units from the market. *See* Compl. ¶¶ 57-64. Owners of rent-stabilized units may only increase rents for existing tenants by the amount permitted by the Rent Guidelines Board, which averaged 2.7 percent annually between 1999 and 2019. Compl. ¶¶ 57-58. Generally, owners of rent-stabilized units may only evict tenants for reasons within the tenant’s control, *e.g.*, failing to pay rent, violating a substantial obligation of tenancy, committing a nuisance, or using the unit for an illegal purpose. Compl. ¶ 61. Owners of rent-stabilized units are typically required to renew tenant’s leases—a requirement that extends to a variety of “successors” in interest. Compl. ¶¶ 61-62. To that end, owners of rent-stabilized units are restricted from removing the units from the rental market, even if they desire to occupy the unit as a personal residence. Compl. ¶¶ 63-64.

On June 14, 2019, the State of New York enacted its most recent amendments to the RSL, further restricting landlords’ rights. Compl. ¶ 65. In justifying the amendments, the legislature “emphasized the need to ‘protect their regulated housing stock, which provides and maintains affordable housing for millions of low and middle income tenants.’” Compl. ¶ 66.

On November 11, 2019, Plaintiffs filed the instant complaint, challenging the constitutionality of the RSL. Compl. ¶ 1. Plaintiffs argue that the RSL runs afoul of the U.S. Constitution’s Due Process Clause because it is not rationally related to a legitimate government interest. Compl. ¶¶ 367-75. Plaintiffs further argue that the RSL constitutes both a physical taking without just compensation as well as a regulatory taking without just compensation. Compl. ¶¶ 376-86.

BASIS FOR CONSIDERATION OF AMICUS BRIEF

NAHB supports Plaintiffs' Complaint. With respect to due process, this *amicus* brief shows that rent control measures are not rationally related to a legitimate government interest. As to the regulatory taking, NAHB's brief shows that rent control measures are contrary to the common good and thus indicative of a taking under the "character of the governmental action" prong of the regulatory takings analysis.

Assuming that rational basis review applies to Plaintiffs' due process challenge,⁵ the RSL fails constitutional scrutiny if it "is not rationally related to a legitimate government interest." *Winston v. City of Syracuse*, 887 F.3d 553, 566 (2d Cir. 2018). Of course, "[t]his form of review is highly deferential." *Id.* at 560. This said, "[r]ational basis review . . . does require some scrutiny of state and local government activity." *Id.* Though "indulgent and respectful, it is not meant to be toothless." *Id.* (quoting *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013)). For example, in *Winston*, the Second Circuit reversed a district court's dismissal of a city's water termination policy because the plaintiff plausibly alleged that the policy amounted to an irrational effort "to collect payment on landlords' bills by requiring tenants who have no legal obligation for those bills to pay their landlords' accounts." *Id.* Consistent with *Winston*, courts, despite the oft-stated presumption of constitutionality attaching

⁵ NAHB encourages this Court to consider Plaintiffs' suggestion that strict scrutiny, and not rational basis review, applies to Plaintiffs' substantive due process claim. *See* Compl. ¶ 70. Plaintiffs rightly point out that the "protection of property rights is deeply rooted in American history and traditions" and thus "a fundamental right on which America was founded." Compl. ¶ 70. Yet because strict scrutiny would impose a lower burden on Plaintiffs than rational basis review, NAHB assumes *arguendo* that rational basis review applies.

to economic legislation, have repeatedly denied motions to dismiss such rational basis challenges.⁶

In so doing, courts often consider the existence of evidence outside the pleadings that undermine the rationality of the legislation in question. *See, e.g., Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009); *Scope, Inc. v. Pataki*, 386 F. Supp. 2d 184, 197 (W.D.N.Y. 2005); *Bass Plating Co. v. Town of Windsor*, 639 F. Supp. 873, 879-80 (D. Conn. 1986). In *Dias*, for example, the Tenth Circuit reversed the dismissal of a substantive due process claim challenging a municipal ban on pit bull terriers. 567 F.3d at 1183. The “district court could not conclude,” the Tenth Circuit recognized, at such an “early stage in the case,” that the ban “was rational as a matter of law,” citing evidence from the American Kennel Club and United Kennel Club. *Id.*; accord *Frost v. City of Sioux City*, No. 16-CV-4107-LRR, 2017 WL 4126986, at *9 (N.D. Iowa Sept. 18, 2017) (denying motion to dismiss similar claim). Likewise, in *Pataki*, a district court in this circuit acknowledged the “exceedingly strong presumption of constitutionality [that] applies to enactments of the Legislature,” but nevertheless denied a motion to dismiss a rational basis challenge to a state law placing the plaintiff’s name on an

⁶ *See, e.g., Carmichael v. Okla. Dep’t of Corr.*, 336 F. Supp. 3d 1356, 1362 (W.D. Okla. 2018) (denying motion to dismiss substantive due process claim challenging application of law prohibiting sex offenders from residing near parks to patch of grass on plaintiff’s property); *Bokhari v. Metro. Gov’t of Nashville & Davidson Cty.*, No. 3:11-00088, 2012 WL 162372, at *4 (M.D. Tenn. Jan. 19, 2012) (denying motion to dismiss substantive due process claim challenging ordinance restricting motorized, non-taxi passenger vehicles for hire); *Dragovich v. U.S. Dep’t of the Treasury*, 764 F. Supp. 2d 1178, 1191-92 (N.D. Cal. 2011) (denying motion to dismiss substantive due process claim challenging sections of Defense of Marriage Act on rational basis grounds); *Munie v. Koster*, No. 4:10CV01096 AGF, 2011 WL 839608, at *3 (E.D. Mo. Mar. 7, 2011) (denying motion to dismiss substantive due process claim challenging law regulating issuance of certificates for carriers of household goods); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1273 (S.D. Cal. 1997) (denying motion to dismiss substantive due process claim challenging curriculum of California Board of Barbering and Cosmetology).

index of gun owners. 386 F. Supp. 2d at 197. “[I]n order to ascertain the rational basis” for the law, the Court observed, it “would necessarily have to seek information outside the pleadings.” 386 F. Supp. 2d at 197. In *Bass Plating*, another district court in this circuit actually entered judgment for a plaintiff asserting a substantive due process claim challenging a regulation by the Air and Water Pollution Abatement Commission, prohibiting the disposal of waste with more than 50 percent water. 639 F. Supp. at 879-80. Of note, the court relied on “[t]he consensus of expert testimony,” which “indicated that a minimum water content of 70 percent was sufficient to protect against infiltration of leachate into the ground water supply and that the 50 percent requirement was unnecessary, unreasonable, unworkable and, from a practical standpoint, almost impossible to achieve.” *Id.*

Furthermore, “[w]hen considering whether a state had a rational basis to impose a statute, the reviewing court may properly consider the ‘countervailing costs’ to the targets of the challenged statute.” *Yunus v. Robinson*, No. 17-CV-5839 (AJN), 2019 WL 168544, at *9 (S.D.N.Y. Jan. 11, 2019) (quoting *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982)), *appeal withdrawn sub nom. Yunus v. Lewis-Robinson*, No. 19-382, 2019 WL 3814554 (2d Cir. May 15, 2019). As an example, in *Yunus*, the court denied a motion to dismiss a substantive due process claim levying a rational basis challenge to a sex offender designation, emphasizing the “heavy costs imposed by [the plaintiff’s] designation as a sex offender.” *Id.* at *11.

Thus, this legal background provides a clear lane for NAHB’s *amicus* brief, which highlights empirical evidence demonstrating the irrationality of rent control measures. Consistent with this legal background, this Court should consider the following evidence in evaluating whether the Complaint sufficiently alleges that the RSL is rationally related to a legitimate government interest.

This Court should use the same approach in evaluating the regulatory takings claim. In assessing that claim, “[t]he Supreme Court has ‘generally eschewed any set formula’ . . . , instead ‘preferring to engage in essentially ad hoc, factual inquiries’ to determine in each case whether the challenged property restriction rises to the level of a taking.” *1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 264 (2d Cir. 2014) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)). Among other factors, “telling[] is the ‘character of the governmental action,’ particularly ‘whether it amounts to a physical invasion’ or appropriation of property or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good.’” *Id.* (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)).

“Though the precise contours of the ‘character’ factor may be blurry” or “elusive,” the Second Circuit has noted that this factor has a normative component, such that “unfair, unreasonable,” or “bad faith” governmental action would tend to indicate a taking. *Sherman v. Town of Chester*, 752 F.3d 554, 565 (2d Cir. 2014); accord *Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 375 (2d Cir. 2006). For example, in *Sherman*, the Second Circuit found that the plaintiff stated a takings claim after the government “singled out [the plaintiff’s] development, suffocating him with red tape to make sure he could never succeed in developing [a proposed mixed-use community].” 752 F.3d at 565. By contrast, in *Buffalo Teachers Federation*, the Second Circuit found no taking where the governmental action burdened the plaintiffs “in order to promote the common good,” namely, “help[ing] Buffalo obtain fiscal stability.” 464 F.3d at 375.

The character factor in Plaintiffs’ regulatory takings claim, like the rationality component in Plaintiffs’ substantive due process claim, demonstrates the analytical relevance of a

compilation of extra-pleading empirical evidence at the motion to dismiss stage. That is, the extent to which rent control measures actually serve the common good is at the heart of the character factor of the regulatory takings analysis. In short, NAHB's *amicus* brief provides empirical evidence demonstrating that rent control measures do just the opposite.

ARGUMENT

Defendants and Intervenor proffer two interests allegedly served by the RSL. First, the RSL provides suitable rental housing that would otherwise be unavailable. *See* State Defs.' Br. at 25-26; City Defs.' Br. at 14-19; Intervenor's Br. at 24. Second, the RSL provides housing that would otherwise be too expensive. *See* State Defs.' Br. at 25-26; City Defs.' Br. at 15-18; Intervenor's Br. at 24.

As alleged in the Complaint, a plethora of empirical research demonstrates that rent control measures actually *undermine* these legitimate government interests. First, rent control measures decrease the amount of available rental units, likely by inefficiently allocating housing needs and depressing new construction. Second, rent control measures do not increase the affordability of housing, as they primarily benefit affluent individuals residing in controlled units while shifting the costs to those in uncontrolled units and decreasing the quality of housing maintenance to an extent that outweighs any benefit from decreased rent. Third, rent control measures have a number of other negative externalities, like racial discrimination, racial segregation, housing market devaluation, governmental costs, homelessness, and decreased home ownership, undermining their rationality and the extent to which they allegedly serve the common good.

Given this backdrop, it is plausible that Plaintiffs will be able to show that the RSL is neither rationally related to a legitimate government interest (as needed to sustain a substantive

due process claim) nor designed to serve the common good (as related to the “character of the governmental action” factor of the regulatory takings claim). Accordingly, this Court should not dismiss the Complaint.

I. RENT CONTROL MEASURES ARBITRARILY AND IRRATIONALLY DECREASE THE AMOUNT OF AVAILABLE RENTAL UNITS IN A MANNER THAT IS CONTRARY TO THE COMMON GOOD.

Proponents of the RSL have long justified the RSL on the basis of a purported emergency in rental housing, that is, a shortage of available rental units. The problem is, rent control measures *decrease* the amount of available rental units, perpetuating the very emergency that legislatures attempt to use them to solve.

In 1990, the City of Cambridge, Massachusetts, commissioned Rolf Goetze, Ph.D., to review and update the City’s study of rent control measures; and, Dr. Goetze found that rent control measures in Cambridge and Brookline resulted in a comparative decrease in the stock of available rental housing. ROLF GOETZE, RENT CONTROL: AFFORDABLE HOUSING FOR THE PRIVILEGED, NOT THE POOR 7 (1994). During the 1980s, in Cambridge and Brookline, the total number of rental units fell by 8 and 12 percent, respectively, even though both communities “encouraged the development of subsidized housing and . . . imposed regulations restricting owners’ ability to stop renting out their apartments.” *Id.* Meanwhile, in neighboring Boston, “which had a less restrictive form of rent control,” rental housing stock “declined by just 2 percent.” *Id.* “But in virtually all other Boston area communities without rent control, as well as throughout Massachusetts, the rental housing stock increased.” *Id.* The population of tenants in the Boston area “shifted accordingly, declining by 9 percent and 13 percent in Cambridge and Brookline respectively, while growing significantly in virtually all other communities – by an average of over 5 percent.” *Id.* at 8.

When St. John & Associates, a consulting firm in California, analyzed rent control measures in Berkeley and Santa Monica, it found the same result. *See The High Cost of Rent Control, supra*. Between 1980 and 1990, the supply of rental units in Berkeley and Santa Monica dropped by 14 and 8 percent, respectively, while no comparable, neighboring city saw a decrease in the supply of rental units. *See id.*

The United Kingdom imposed rent control measures soon after the Second World War. *Id.* There, “the share of all housing provided through privately owned rental units dropped from 53 percent in 1950 to less than 8 percent in 1986,” *Id.*

At the end of last year, in rent-controlled Stockholm, 636,000 people were waiting to find available rental housing. *Control your instincts: Rent control will make housing shortages worse, supra*. “[T]he average waiting-time for long-term tenancy is ten years and black-market rentals have begun to thrive.” *Id.*

In conjunction with this data collection, economists have identified two likely culprits for the shortage of housing associated with rent control measures. First, rent control measures inefficiently allocate housing needs by encouraging tenants to stay longer in rental spaces that do not fit their rental needs because of artificially reduced pricing. Second, rent control measures disincentivize investment in new construction of rental housing. The RSL address neither culprit.

A. Rent Control Measures Inefficiently Allocate Housing Needs.

Studies of New York City’s rental market just before the enactment of the RSL have shown that the preexisting rent control measures led to discrepancies between housing needs and housing demands. In 1989, one study, using data from 1968, showed that New York’s rent control measures “encourage excessive immobility among controlled sector renters” and

“excessive mobility among families hoping to obtain controlled apartments.” Joseph Gyourko & Peter Linneman, *Equity & Efficiency Aspects of Rent Control: An Empirical Study of New York City*, 26 J. URB. ECON. 54, 72-73 (1989). Other researchers “found that one-quarter of families in New York City consumed at least 25% more housing under rent control than they would if rent control did not exist.” See Kenneth T. Rosen, *The Case for Preserving Costa-Hawkins: Three Ways Rent Control Reduces the Supply of Rental Housing*, UC BERKELEY: FISHER CTR. FOR REAL ESTATE & URB. ECON. 7 (Sept. 2018).⁷ A later study concluded that “the ‘average’ rent control tenant would choose to remain in his or her residence about 18 years longer than an otherwise identical tenant in an identical residence which was not rent controlled” Richard W. Ault, John D. Jackson, & Richard P. Saba, *The Effect of Long-Term Rent Control on Tenant Mobility*, 35 J. URBAN ECON. 140, 156 (1994).

The RSL only exacerbates the problem. A review of data from 1981 showed that residents in controlled units “received[ed] significant rental subsidies” compared to those “uncontrolled” units and “hence remain[ed] in their units significantly longer than they would otherwise be expected in order to realize these subsidies.” Peter Linneman, *The Effect of Rent Control on the Distribution of Income among New York City Renters*, 22 J. URBAN ECON. 14, 22 (1987). A study of data from 1990 likewise demonstrated, “21 percent of New York apartment renters live in apartments with more or fewer rooms than they would if they were living in a free market city.” Edward L. Glaeser & Erzo F.P. Luttmer, *The Misallocation of Housing under Rent Control*, 93 J. URBAN ECON. 1027, 1028-29 (2003).

This phenomenon is not unique to the City of New York or this time period. Between 1913 and 1928, F.A. Hayek reported “that Vienna’s tram traffic doubled . . . primarily because of

⁷ <https://escholarship.org/uc/item/9dn0n4g7>.

inhibited mobility due to rent control.” Navarro, *supra*, at 94. In a study of rent control in Los Angeles, “Rand researchers found a clear ‘trend toward declining mobility of renter households under rent control,’ as measured by the percentage of renters.” *Id.* In 1990, Margery Austin Turner, now the Senior Vice President for Program Planning and Management at the Urban Institute, observed that rent-controlled tenants in the District of Columbia moved less frequently than tenants of other units, contributing to low overall rates of residential mobility. *See* Lisa Sturtevant, *The Impacts of Rent Control: A Research Review & Synthesis*, NAT’L MULTIFAMILY HOUSING COUNCIL RES. FOUND. 12 (May 2018).⁸ In 2005, a study of New Jersey’s rent control measures found a positive correlation between rent control and commute times, concluding that such measures had rendered residents of controlled units immobile, thus increasing commute times. Robert Krol & Shirley Svorny, *The Effect of Rent Control on Commute Times*, 58 J. URBAN ECON. 421, 435 (2005). In 2018, researchers in San Francisco examining the expansion of the city’s rent control law in 1994 found that beneficiaries of the expansion were over 19 percent less likely to move to a new address than a control group after residing in their units for 6-10 years and nearly 13 percent less likely to move to a new address after residing in their units for over ten years. Rebecca Diamond, Tim McQuade, & Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, & Inequality: Evidence from San Francisco* 15-16 (Nat’l Bureau for Econ. Res. Working Paper No. 24181 Mar. 4, 2019).⁹

At least four studies measured this effect in a different way: rent control measures “induced landlords to change the way they recruited tenants.” *See* Sturtevant, *supra*, at 9. In response to rent control measures, landlords targeted older and smaller households, *i.e.*, seniors

⁸ <https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf>.

⁹ <https://web.stanford.edu/~diamondr/DMQ.pdf>.

without children, so as to lessen the possibility that their rental units would remain in the hands of one family for an extended time. *See id.*

In sum, a variety of empirical data demonstrates that rent control measures inefficiently allocate housing needs, which explains the observed decrease in available rental housing following the enactment of rent control measures. Instead of targeting this concern, the RSL irrationally perpetuates it (and thus also the rental housing market) in a manner contrary to the common good.

B. Rent Control Measures Depress New Construction.

Inefficient allocation of housing needs is not the only way that rent control measures decrease the available stock of rental housing. Rent control measures, by virtue of the burden that they place on prospective landlords, depress new construction.

A recent study from California demonstrates this principle. “From 1980 through 1994, San Francisco permitted an average of fewer than 1,200 multifamily units annually, including both apartment and condominium properties”; however, following statutory reforms loosening rent control restrictions, “construction activity increased considerably to an average of nearly 2,200 units per year from 1995 to 2017.” Rosen, *supra*, at 8. “Similar patterns occurred in both Berkeley and Santa Monica, which permitted an annual average of approximately 30 and 180 multifamily units, respectively, from 1980 through 1994, before ramping up construction to an average of nearly 150 and 230 units, respectively, since 1995.” *Id.* at 8-9.

Data from Ontario, Canada surrounding the adoption of rent control measures in 1975 show similar results. *See id.* at 9. “Specifically, during the four-year period preceding the adoption of rent control, rental starts averaged more than 36,800 units.” *Id.* “In contrast, rental starts dwindled to an average of approximately 14,500 units during the five years that followed.”

Id. Afterward, “starts remained depressed, averaging nearly 13,400 units annually from 1980 through 1986.” *Id.*

In 1985, Director Navarro wrote, “the data appear to be generally consistent with the idea that controls reduce construction.” Navarro, *supra*, at 91. “[I]n England, where controls have been in effect for over 60 years, rental housing has shrunk from 61 percent to less than 15 percent of the country’s total housing.” *Id.* “Similarly, New York has seen both the total number of its units and percentage of renters shrink, as has the District of Columbia which now has 8,000 fewer rental units and has experienced a sharp decline in the issuance of multi-family building permits since controls were imposed there.” *Id.*

Like the misallocation of housing needs, the depression of new construction wrought by rent control measures offers a potential explanation for the reason that rent control measures decrease the available stock of affordable housing. But as with misallocation, the RSL does not target the depression of new construction. Instead, the RSL continues the same, irrational rent control measures that have perpetuated the low stock of rental housing in the City. This is neither rational nor in service of the common good. Thus, the RSL should not survive this Court’s scrutiny under the Due Process Clause and amounts to a regulatory taking.

II. RENT CONTROL MEASURES ARBITRARILY AND IRRATIONALLY INCREASE THE OVERALL COST OF RENTAL HOUSING IN A MANNER THAT IS CONTRARY TO THE COMMON GOOD.

Proponents of rent control measures argue that such measures effectively limit rent increases in controlled or stabilized units. The problem is that this ignores the effect that such measures have on the overall rental market, where corresponding increases in rents in uncontrolled units more than offset the decrease in controlled units. To the extent that these proponents may counter that the legislature has simply made a rational economic decision to

favor controlled units at the expense of uncontrolled units, they are wrong, as the data demonstrate that the wealthy, not the poor, most benefit from the decreased rents in controlled or stabilized rental units. Independent of this, a number of studies have shown that even the benefits of decreased rents in controlled units are more than offset by a corresponding decrease in housing quality. Rent control measures also disproportionately harm low-income families and individuals in other ways, *e.g.*, by creating barriers to entry into the rental market. For these reasons, rent control measures are an irrational means to target the cost of rental housing that is contrary to the common good.

A. Rent control measures dramatically increase rents in uncontrolled units, disproportionately benefitting wealthy renters.

The data show two points, yielding one inexorable conclusion. First, rent control measures dramatically increase rents in uncontrolled units. Second, wealthy residents disproportionately receive the benefits from decreased rents in controlled units. Ergo, rent control measures are not increasing the stock of affordable housing for low-income families and individuals; rather, they are providing a subsidy to wealthy renters.

As to the first point: the data make clear that rent control measures balloon the cost of rents in uncontrolled units. Decades later, results from the City of New York in 1968 “suggest[ed] a positive and statistically significant relationship between the fraction of rental units under rent control and the price of rental housing in the free sector.” Dick W. Early, *Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits*, 48 J. URB. ECON. 185, 193 (1998). Similarly, in Los Angeles, after two years of rent controls, “uncontrolled rents had risen an average of 46.2 percent,” a larger increase “than would have occurred in the absence of rent controls.” George Fallis & Lawrence B. Smith, *Uncontrolled Prices in a Controlled Market: The Case of Rent Controls*, 74 AM. ECON. REV. 193, 199 (1984). In San Francisco, a

1994 expansion in rent control measures “was directly responsible for a 5.1 percent citywide rent increase from 1995 to 2012, adding up to an extra \$2.9 billion cost,” Prasanna Rajasekaran, Mark Treskon, & Solomon Green, *Rent Control: What Does the Research Tell Us about the Effectiveness of Location Action?*, URB. INST. 5 (Jan. 2019).¹⁰

Although reallocating rent increases from controlled units to uncontrolled units would be a rational means to provide affordable housing for low-income resident *if* low-income residents actually resided in rent-controlled units, the data show that the opposite is true. In the City of New York, for example, the Citizens Budget Commission found that “rent-controlled households with incomes with incomes greater than \$75,000 received nearly twice the average subsidy of rent-controlled households with incomes below \$10,000.” *See The High Cost of Rent Control, supra*. In New York City, another study stated, “we find that tenant benefits increase with income” Richard W. Ault & Richard P. Saba, *The Economic Effects of Long-Term Rent Control: The Case of New York*, 3 J. REAL ESTATE FIN. & ECON. 25, 38 (1990). Likewise, in Boston, “renters in the bottom quartile of the household income distribution” occupied only 26 percent of rent controlled apartments, whereas “tenants in the top of this distribution” occupied 30 percent of such apartments. David P. Sims, *Out of Control: What Can We Learn from the End of Massachusetts Rent Control?* 61 J. URB. ECON. 129, 148 (2007).

Studies in California yielded the same results. In Los Angeles, “only 48 percent of the households under rent control were occupied by low income tenants, while the remaining 52 percent were occupied by the middle and upper income brackets.” Navarro, *supra*, at 97. “In Berkeley and Santa Monica, data showed that the beneficiaries of rent control are ‘predominantly

¹⁰https://www.urban.org/sites/default/files/publication/99646/rent_control._what_does_the_research_tell_us_about_the_effectiveness_of_local_action_1.pdf.

white, well-educated, young, professionally employed, and affluent,’ and that rent control had substantially increased the disposable income of these tenants while ‘exacerbating’ the problems of low-income families.” *Rent Control Hurts Low-Income Families & Increases Costs For All Renters*, CTR. FOR CAL. REAL ESTATE 6 (Jan. 2018).¹¹ Given the data, the reality is that rent control measures exacerbate, not ameliorate, income inequality.

B. Decreased Housing Quality More Than Offsets Any Benefits of Decreased Rent in Controlled Units.

On this point, the data are overwhelming: rent control measures are associated with a substantial decrease in housing quality. A 1985 nationwide study concluded that “rent controls were associated with a 7.1 percent decrease in quality during 1974, and with a 13.5 percent decrease in 1977.” David L. Mengle, *The Effect of Second Generation Rent Controls on the Quality of Rental Housing* 14 (Fed. Res. Bank of Richmond Working Paper No. 85-5 1985). “The results were similar,” the study noted, “if the analysis is restricted to a low income subsample, indicating that “favorable distributional effects may be partially offset by quality deterioration.” *Id.* A 1990 study in New York City likewise concluded that “a change in the rent control status of the building’s apartments from uncontrolled to controlled reduces the probability of the building being in sound condition.” Joseph Gyourko & Peter Linneman, *Rent Controls and Rental Housing Quality*, 27 J. URB. ECON. 398, 405 (1990). Likewise, data from 1985, 1989, 1993, and 1998, in Boston, demonstrated that “rent control . . . appear[ed] to reduce the maintenance performed on rental units.” Sims, *supra*, at 144.

In 1985, Director Navarro put it this way:

[A]lthough tenants may pay less for their rent-controlled apartment, over time, the regulated landlord provides less. For example, in their analysis of Los Angeles, Rand researchers found that 3.5 percent rent reduction from controls was partially

¹¹ http://centerforcaliforniarealestate.org/publications/CCRE_Rent_Control_report.pdf.

offset by a 2.2 percent deterioration, for a net rent benefit of only 1.3 percent to tenants.

Navarro, *supra*, at 96. He further noted:

While the short-term effects of [the landlord's] strategy [to skimp on expenses to preserve the income lost through rent control] is slight, there is an avalanche of evidence that the long term effects are anything but slight. For example, in separate studies of New York's "30-year rent control emergency," economists John Moorhouse and George Sternlieb found that controlled units had less maintenance, were of lower quality, and had more deterioration than uncontrolled units. Joel Brenner and Herbert Franklin have drawn a similar conclusion about controls in England and France, and in a case study of Boston, Monica Lett estimated that for maintenance alone, landlords spent almost \$50 less per year on each unit of controlled buildings.

Id. at 92. Stated differently: whatever the effect of rent control measures on rent levels in controlled units, it is more than offset by the long-run costs associated with decreased levels of maintenance.

C. Rent Control Measures Increase Income Inequality By Other Means.

Rent control measures do not just exacerbate income inequality by subsidizing the rental expenses of the wealthy and increasing the maintenance costs for the poor. The National Multifamily Housing Council has explained that rent control measures force consumers to "pay substantial finder's fees to obtain a rental unit, due to the scarcity of available housing," or "pay 'key money' or . . . other payments to current consumers or providers to obtain housing." *The High Cost of Rent Control, supra*. "Poor families, single consumers, and young people entering the market are especially hard-hit by these costs." *Id.*

At bottom, the evidence demonstrates that rent control measures exacerbate the problems of income inequality in the housing market by subsidizing wealthy renters, increasing maintenance costs, and creating expensive barriers to entry for the poor. Accordingly, rent control measures are neither a rational method to provide *affordable* housing nor in service of the

common good. As such, this Court should deny the motions to dismiss Plaintiffs' substantive due process and regulatory takings claims.

III. RENT CONTROL MEASURES YIELD OTHER NEGATIVE EXTERNALITIES THAT RENDER THEM ARBITRARY, IRRATIONAL, AND CONTRARY TO THE COMMON GOOD.

The allegations of the Complaint, and the economic literature in support thereof, are sufficient to survive a motion to dismiss because they negate the principle justifications for rent control measures. That said, this Court should also consider that rent control measures impose other negative externalities on communities, namely, racial discrimination, racial segregation, housing market devaluation, governmental costs, homelessness, and decreased home ownership, that render such measures irrational and contrary to the common good.

Initially, empirical evidence shows that rent control measures perpetuate racial discrimination. In New York City, "Blacks and Puerto Ricans in the controlled sector received lower benefits than their white counterparts." Gyourko & Linneman, *Equity & Efficiency Aspects of Rent Control: An Empirical Study of New York City*, *supra*, at 73. Another study of New York City put it plainly: "[W]e find that . . . white families receive larger benefits than do similar minority families." Ault & Saba, *supra*, at 38. In Massachusetts, Hispanics and African-Americans "accounted for a quarter of the population in cities with rent control," but "just twelve percent of the population in rent-controlled units." Rajasekaran, Treskon, & Greene, *supra*, at 7. "In Berkeley, African-American populations declined while they rose in surrounding Alameda County following the enactment of rent control." *Rent Control Hurts Low-Income Families & Increases Costs For All Renters*, *supra*, at 6.

Relatedly, both theory and practice demonstrate that rent control measures exacerbate racial segregation. The National Multifamily Housing Council theorizes that "rent control opens

the door to discrimination based on other factors” by “eliminating rents as the basis of choosing among a pool of potential consumers,” *The High Cost of Rent Control, supra*. Similarly, Edward L. Glaeser, Ph.D., a professor of economics at Harvard University, explains that rent control measures may cause landlords to “allocate apartments on the basis of tenant characteristics,” *i.e.*, select “tenants who resemble the existing stock of tenants,” which “will tend to exacerbate segregation, at least in richer communities.” Edward L. Glaeser, *Does Rent Control Reduce Segregation?*, 10 SWEDISH ECON. POL’Y REV. 179, 187 (2003). Indeed, in a survey of the United States using 1991 data from the Department of Housing and Urban Development, Professor Glaeser found, “when rent control is imposed on declining cities, it seems to make them more, not less segregated.” *Id.* at 199.

Moreover, rent control measures devalue the relevant locale’s housing stock. In 2014, one study in Massachusetts demonstrated this point by looking to the economic effects that followed the removal of rent control measures:

The economic magnitude of the effect of rent control removal on the value of Cambridge’s housing stock is large, contributing \$2.0 billion of \$7.7 billion in Cambridge property appreciation in the decade between 1994 and 2004. Of this total effect, only \$300 million is accounted for by the direct effect of decontrol on formerly controlled units (holding exposure constant), while \$1.7 billion is due to the indirect effect. Notably, the majority of this indirect effect (\$1.1 of \$1.7 billion) stems from the differential appreciation of never-controlled units. When both direct and indirect effects are combined, our estimates imply that more than half (55 percent) of the capitalized cost of rent control was borne by owners of never-controlled properties.

David H. Autor, Christopher J. Palmer, & Parag A. Pathak, *Housing Market Spillovers: Evidence from the End of Rent Control in Cambridge, Mass.*, 122 J. POL. ECON. 661, 668 (2014).

In other words, the primary reason for devaluation in a city affected by rent control measures was not because of the extent to which those measures devalued controlled properties, but because of the magnitude by which those measures devalued *uncontrolled* properties.

Furthermore, rent control measures impose substantial costs on the governments charged with implementing them. In 1988, the accounting firm Peat Marwick estimated that New York City lost approximately \$370 million *per year* in property tax revenue because of devaluation created by rent control measures. *See Sturtevant, supra*, at 17. In 1996, the Santa Monica Rent Control Board “had a budget of more than \$4 million a year to control rents on only 28,000 apartments.” *The High Cost of Rent Control, supra*.

In addition, rent control measures may lead to increased levels of homelessness. A nationwide survey of data from 1990 indicated that “[t]he empirical results, irrespective of the measure of the homeless population, strongly confirm the positive impact of rent control on the level of homelessness.” Paul W. Grimes & George A. Chressanthis, *Assessing the Effect of Rent Control on Homelessness*, 41 J. URB. ECON. 23, 33 (1997).

Finally, rent control measures may decrease the demand for home ownership. In New York, in 1968, one study showed that “consumers with large expected rent control benefits had lower demands for home ownership.” Gyourko and Linneman, *Equity & Efficiency Aspects of Rent Control: An Empirical Study of New York City, supra*, at 71.

These negative externalities—racial discrimination, racial segregation, market devaluation, government costs, homelessness, and decreased home ownership—are substantial costs for a policy with no discernable benefits. They should, at a minimum, be considered in assessing whether Plaintiffs’ have stated claim for a due process violation and a regulatory taking.

CONCLUSION

“The over-regulation of homebuilding in and around thriving cities is one of the great economic-policy failures of recent times.” *Control your instincts: Rent control will make*

housing shortages worse, supra. Rent control measures have existed in metropolitan areas across the country for upwards of half-a-century; and yet, there is “not a single location in the country where someone working a full-time minimum wage job c[an] afford to rent a two-bedroom apartment.” Nathan Miller, *Rent Control: What It Means For The Real Estate Marketplace*, FORBES (May 31, 2018).¹²

Plaintiffs’ Complaint rightly challenges the rationality of the RSL (in their substantive due process claim) and the extent to which these measures serve the common good (in their regulatory takings claim). Given the overwhelming body of empirical evidence against rent control measures, it would be premature to dismiss the Complaint at the pleadings stage. Accordingly, this Court should deny Defendants’ and Intervenors’ motions to dismiss.

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Respectfully submitted,

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¹² <https://www.forbes.com/sites/forbesrealestatecouncil/2018/05/31/rent-control-what-it-means-for-the-real-estate-marketplace/#fbc787176706>.