

20-3366

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

COMMUNITY HOUSING IMPROVEMENT PROGRAM, RENT STABILIZATION ASSOCIATION OF N.Y.C., INC., CONSTANCE NUGENT-MILLER, MYCAK ASSOCIATES LLC, VERMYCK LLC, M&G MYCAK LLC, CINDY REALTY LLC, DANIELLE REALTY LLC, FOREST REALTY, LLC,

Plaintiffs-Appellants,

—against—

CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS, CECILIA JOZA, ALEX SCHWARTZ, GERMAN TEJEDA, MAY YU, PATTI STONE, J. SCOTT WALSH, LEAH GOODRIDGE, SHEILA GARCIA, RUTHANNE VISNAUSKAS,

Defendants-Appellees,

N.Y. TENANTS AND NEIGHBORS (T&N), COMMUNITY VOICES HEARD (CVH), COALITION FOR THE HOMELESS,

Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

The National Association of Home Builders of the United States is a 501(c)(6) not for profit association. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Cases	Page(s)
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<i>Cornwell v. Cal. Bd. of Barbering & Cosmetology</i> , 962 F. Supp. 1260 (S.D. Cal. 1997)	9
<i>Dias v. City & Cty. of Denver</i> , 567 F.3d 1169 (10th Cir. 2009)	8
<i>Dragovich v. U.S. Dep't of the Treasury</i> , 764 F. Supp. 2d 1178 (N.D. Cal. 2011).....	9
<i>Frost v. City of Sioux City</i> , No. 16-CV-4107-LRR, 2017 WL 4126986 (N.D. Iowa Sept. 18, 2017).....	9
<i>Lingle v. Chevron U.S.A., Inc.</i> , 544 U.S. 528 (2005).....	5

	Page(s)
<i>Lucas v. S.C. Coastal Council</i> , 505 U.S. 1003 (1992)	5
<i>Munie v. Koster</i> , No. 4:10CV01096 AGF, 2011 WL 839608 (E.D. Mo. Mar. 7, 2011).....	9
<i>Nashville C. & S. L. Ry. v. Walters</i> , 294 U.S. 405 (1935).....	6, 7
<i>Nashville C. & S. L. Ry. v. Baker</i> , 71 S.W.2d 678 (Tenn. 1934)	6
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	8
<i>Polk Co. v. Glover</i> , 305 U.S. 5 (1938).....	6, 7
<i>Polk Co. v. Glover</i> , 22 F. Supp. 575 (S.D. Fla. 1938).....	7
<i>Progressive Credit Union v. City of New York</i> , 889 F.3d 40 (2d Cir. 2018)	11
<i>Scope, Inc. v. Pataki</i> , 386 F. Supp. 2d 184 (W.D.N.Y. 2005).....	7, 8
<i>Sherman v. Town of Chester</i> , 752 F.3d 554 (2d Cir. 2014)	5
<i>Windsor v. United States</i> , 699 F.3d 169 (2d Cir. 2012)	6
<i>Winston v. City of Syracuse</i> , 887 F.3d 553 (2d Cir. 2018)	6, 7

Page(s)

Yunus v. Robinson,
 No. 17-CV-5839 (AJN), 2019 WL 168544
 (S.D.N.Y. Jan. 11, 2019) 7, 8

Yunus v. Lewis-Robinson,
 No. 19-382, 2019 WL 3814554
 (2d Cir. May 15, 2019) 7

Secondary Sources

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
 (1990)..... 14, 17

Richard W. Ault, John D. Jackson, & Richard P. Saba,
*The Effect of Long-Term Rent Control on Tenant
 Mobility*, 35 J. URBAN ECON. 140 (1994) 22

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 (2014)..... 29

*Control your instincts: Rent control will make housing shortages
 worse*,
 ECONOMIST (Sep. 19, 2019),
<https://www.economist.com/leaders/2019/09/19/rent-control-will-make-housing-shortages-worse>..... 3, 21, 30

Rebecca Diamond,
*What does economic evidence tell us about the effects of rent
 control?*, BROOKINGS INST. (Oct. 18, 2018),
<https://www.brookings.edu/research/what-does-economic-evidence-tell-us-about-the-effects-of-rent-control> 2

	Page(s)
Rebecca Diamond, Tim McQuade, & Franklin Qian, <i>The Effects of Rent Control Expansion on Tenants, Landlords, & Inequality: Evidence from San Francisco</i> 15-16 (Nat'l Bureau for Econ. Res. Working Paper No. 24181 Mar. 4, 2019) https://web.stanford.edu/~diamondr/DMQ.pdf	24
Dick W. Early, <i>Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits</i> , 48 J. URB. ECON. 185 (1998)	27
George Fallis & Lawrence B. Smith, <i>Uncontrolled Prices in a Controlled Market: The Case of Rent Controls</i> , 74 AM. ECON. REV. 193 (1984)	27
Edward L. Glaeser, <i>Does Rent Control Reduce Segregation?</i> , 10 SWEDISH ECON. POL'Y REV. 179 (2003)	18
Edward L. Glaeser & Erzo F.P. Luttmer, <i>The Misallocation of Housing under Rent Control</i> , 93 J. URBAN ECON. 1027 (2003)	23
ROLF GOETZE, RENT CONTROL: AFFORDABLE HOUSING FOR THE PRIVILEGED, NOT THE POOR 7 (1994)	19, 20
Paul W. Grimes & George A. Chressanthis, <i>Assessing the Effect of Rent Control on Homelessness</i> , 41 J. URB. ECON. 23 (1997)	29
Joseph Gyourko & Peter Linneman, <i>Equity & Efficiency Aspects of Rent Control: An Empirical Study of New York City</i> , 26 J. URB. ECON. 54 (1989)	17, 21, 22, 30

	Page(s)
Joseph Gyourko & Peter Linneman, <i>Rent Controls and Rental Housing Quality</i> , 27 J. URB. ECON. 398 (1990)	16
<i>The High Cost of Rent Control</i> , NAT'L MULTIFAMILY HOUSING COUNCIL, https://www.nmhc.org/news/articles/the-high-cost-of-rent-control/#N_16_ (last visited Jan. 22, 2021)	<i>passim</i>
Blair Jenkins, <i>Rent Control: Do Economists Agree?</i> , 6 ECON. J. WATCH 73 (Jan. 2009), https://econjwatch.org/File+download/238/2009-01-jenkins-reach_concl.pdf?mimetype=pdf	2
Robert Krol & Shirley Svorny, <i>The Effect of Rent Control on Commute Times</i> , 58 J. URBAN ECON. 421 (2005)	23
Peter Linneman, <i>The Effect of Rent Control on the Distribution of Income among New York City Renters</i> , 22 J. URBAN ECON. 14 (1987)	22
David L. Mengle, <i>The Effect of Second Generation Rent Controls on the Quality of Rental Housing</i> 14 (Fed. Res. Bank of Richmond Working Paper No. 85-5 1985)	16
Nathan Miller, <i>Rent Control: What It Means For The Real Estate Marketplace</i> , FORBES (May 31, 2018), https://www.forbes.com/sites/forbesrealestatecouncil/2018/05/31/rent-control-what-it-means-for-the-real-estate-marketplace/#fbc787176706	30, 31
Peter Navarro, <i>Rent Control in Cambridge, Mass.</i> , 78 PUB. INT. 83 (Winter 1985).....	<i>passim</i>

Prasanna Rajasekaran, Mark Treskon, & Solomon Green,
Rent Control: What Does the Research Tell Us about the Effectiveness of Location Action?, URB. INST. 7 (Jan. 2019),
https://www.urban.org/sites/default/files/publication/99646/rent_control._what_does_the_research_tell_us_about_the_effectiveness_of_local_action_1.pdf..... 18, 27, 28

Rent Control Hurts Low-Income Families & Increases Costs For All Renters,
 CTR. FOR CAL. REAL ESTATE 6 (Jan. 2018),
http://centerforcaliforniarealestate.org/publications/CCRE_Rent_Control_report.pdf 15, 18

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),
<https://escholarship.org/uc/item/9dn0n4g7> 22, 25, 26

David P. Sims,
Out of Control: What Can We Learn from the End of Massachusetts Rent Control?,
 61 J. URB. ECON. 129 (2007) 14, 16

Timothy Sandefur,
Rational Basis and the 12(b)(6) Motion: An Unnecessary “Perplexity”,
 25 GEO. MASON U. CIV. RTS. L.J. (2014) 10

Lisa Sturtevant,
The Impacts of Rent Control: A Research Review & Synthesis,
 NAT’L MULTIFAMILY HOUSING COUNCIL RES. FOUND. 12 (May 2018),
<https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf>..... 23, 24, 29

INTEREST OF AMICUS CURIAE

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.¹ 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 and local communities, state and local governments continue to enact and re-enact these

¹ The parties consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for NAHB certifies that no counsel for either party authored this brief in whole or in part, and no one other than NAHB and its counsel contributed money to fund the preparation or submission of this brief.

flawed measures. Rectifying this legislatively-created debacle is vital to the interests of NAHB and its members.

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 Jan. 22, 2021).² Economic research “quite consistently and predominantly frowns on rent control.” Blair Jenkins, *Rent Control: Do Economists Agree?*, 6 ECON. J. WATCH 73, 105 (Jan. 2009).³ “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).⁴ 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*.

² https://www.nmhc.org/news/articles/the-high-cost-of-rent-control/#N_16_.

³ https://econjwatch.org/File+download/238/2009-01-jenkins-reach_concl.pdf?mimetype=pdf.

⁴ <https://www.brookings.edu/research/what-does-economic-evidence-tell-us-about-the-effects-of-rent-control>.

Yet “rent controls are back in fashion.” *Control your instincts: Rent control will make housing shortages worse*, ECONOMIST (Sep. 19, 2019).⁵ 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 on rent increases of three percent, or 1.5 percent plus inflation. *Id.* Internationally, the trend is the same: in July 2019, Paris reintroduced rent controls after removing them in 2017; Sadiq Khan, London’s mayor, has called for rent controls; and in Berlin, legislators have voted to freeze rents until 2024. *Id.* In June 2019, the State of New York joined this movement, passing amendments to its rent stabilization laws (heretofore, “RSL”), which were described by its State Senate Majority leader as “the strongest tenant protections in history.” Compl. ¶ 65.

In this action, Plaintiffs alleged that the RSL violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution because it is not rationally related to a legitimate government interest. *See Cmty. Hous. Improvement Program v. City of New York*, No. 19-CV-4087(EK)(RLM), 2020 WL 5819900, at *12 (E.D.N.Y. Sept. 30, 2020). Specifically, Plaintiffs claimed that the RSL actually perpetuates the very housing crisis that it is designed to alleviate, citing a variety of economic evidence in support of this conclusion. *Id.*

⁵ <https://www.economist.com/leaders/2019/09/19/rent-control-will-make-housing-shortages-worse>.

Yet the District Court dismissed Plaintiffs' claim pursuant to Rule 12(b)(6). *See id.* When engaging in rational basis review, the Court observed, it "is bound to defer to legislative judgments, even if economists would disagree." *Id.* "Moreover," the Court continued, the "RSL was also intended to allow people of low and moderate income to remain in residence in New York City—and specific neighborhoods within—when they otherwise might not be able to," which is a "valid basis for government regulation." *Id.* at *13.

The District Court's substantive-due-process rationale misstates the applicable law and neglects the strength of the allegations in the record. Even assuming that rational basis review applies to Plaintiffs' due process challenge,⁶ the District Court's opinion transforms legislative deference under rational basis review from an evidentiary presumption into an insurmountable barrier to relief. In so doing, the District Court ignored the mountain of empirical evidence in the record that the RSL, and rent control measures writ large, harm the very people and markets they purport to protect.

⁶ 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." *Id.* Yet because strict scrutiny would impose a lower burden on Plaintiffs than rational basis review, NAHB assumes *arguendo* that rational basis review applies.

Accordingly, this Court should vacate the judgment of the U.S. District Court for the Eastern District of New York, which dismissed the claims of Plaintiffs Community Housing Improvement Program, *et al.*, and remand for further proceedings.⁷

⁷ Before the District Court, NAHB posited that the evidence undermining the rationality of rent control measures should also be considered in evaluating Plaintiffs' regulatory takings claim. In assessing such a 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). Ultimately, the District Court declined to evaluate the character factor in assessing Plaintiffs' regulatory takings claim, given its conclusions as to the other aspects of that claim. The character factor, however, is central to the regulatory takings inquiry, and the question of whether rent control measures actually serve the common good should be at the heart of assessing the character factor. Empirical evidence demonstrates that rent control measures do *just the opposite*.

ARGUMENT

I. THE DISTRICT COURT WRONGLY CREDITED LEGISLATIVE AND JUDICIAL CONJECTURE REGARDING THE RATIONALITY OF THE RSL OVER THE ALLEGATIONS IN THE COMPLAINT.

Under rational basis review, legislation must be “rationally related to a legitimate government interest.” *Winston v. City of Syracuse*, 887 F.3d 553, 566 (2d Cir. 2018). Though rational basis review “is highly deferential,” it “does require some scrutiny of state and local government activity.” *Id.* at 560. It is “indulgent and respectful”; however, “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)).

This approach—evaluating economic legislation through deferential, yet meaningful, review—is consistent with longstanding Supreme Court precedent. *See Polk Co. v. Glover*, 305 U.S. 5, 9-10 (1938); *Nashville C. & S. L. Ry. v. Walters*, 294 U.S. 405, 414 (1935). In *Nashville C. & S. L. Railway*, the Tennessee Supreme Court held that a trial court erred by engaging a fact-intensive review and striking down a law imposing certain costs on railways, observing that such a law involved a “matter of legislative policy.” *Nashville C. & S. L. Ry. v. Baker*, 71 S.W.2d 678, 680 (Tenn. 1934). Yet the U.S. Supreme Court reversed, explaining that the Tennessee Supreme Court failed to consider the pertinent “facts.” 294 U.S. at 414. “A statute valid as to one set of facts may be invalid as

to another,” the Court explained. *Id.* Just three years later, in *Polk*, a federal district court dismissed a due process challenge to a Florida citrus fruit and juice labeling requirement at the pleadings stage, holding that the law was intended “to prohibit fraud and deception.” *See Polk Co. v. Glover*, 22 F. Supp. 575, 579 (S.D. Fla. 1938). But the Supreme Court reversed, observing that, at the pleadings stage, the district court was “confined” to the allegations in the complaint. 305 U.S. at 9. To that end, the Court remarked, the “salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable.” *Id.* at 10.

These decisions are not vestiges of a bygone era. *See, e.g., Winston*, 887 F.3d at 566; *Yunus v. Robinson*, No. 17-CV-5839 (AJN), 2019 WL 168544, at *9 (S.D.N.Y. Jan. 11, 2019), *appeal withdrawn sub nom. Yunus v. Lewis-Robinson*, No. 19-382, 2019 WL 3814554 (2d Cir. May 15, 2019); *Scope, Inc. v. Pataki*, 386 F. Supp. 2d 184, 197 (W.D.N.Y. 2005). In *Winston*, this Court reversed a district court’s dismissal of a challenge to 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.” 887 F.3d at 566. In *Yunus*, a district court in this Circuit 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.” 2019 WL 168544, at *11. When “considering whether a state had a rational basis to impose a statute,” the court observed, “the reviewing court may properly consider the ‘countervailing costs’ to the targets of the challenged statute.” *Id.* at *9 (quoting *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982)). Similarly, in *Pataki*, another district court in this Circuit denied a motion to dismiss a rational basis challenge to a state law placing the plaintiff’s name on an 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.” *Id.*

Outside of this Circuit, federal courts have reached the same conclusion, denying motions to dismiss rational basis challenges at the pleadings stage as premature. *See, e.g., Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009). 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.*

On at least five occasions in the last decade, other federal courts have denied motions to dismiss substantive due process challenges to economic legislation at the pleadings stage. *See 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 that prohibited sex offenders from residing near parks and thereby prohibited plaintiff from residing at home due to a patch of grass on his property); *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 substantive due process claim challenging municipal pit bull ban); *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); *see also 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).

In summary:

Courts resolving motions to dismiss in rational basis cases should address the 12(b)(6) motion like any other such motion: if it appears on the face of the complaint that the plaintiff could, if given the opportunity, prove that the challenged law is not rationally related to a legitimate government interest, Rule 12(b)(6) entitles her to gather and introduce the evidence to do so. So long as the pleading itself is not flawed, a plaintiff in a rational basis case must have the chance to meet her difficult, but not impossible, burden of proving that the challenged law is irrational.

Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary “Perplexity”*, 25 GEO. MASON U. CIV. RTS. L.J. 43, 45 (2014).

And plaintiffs do meet that burden. *See, e.g., Bass Plating Co. v. Town of Windsor*, 639 F. Supp. 873, 879-80 (D. Conn. 1986). In *Bass Plating*, a district court in this Circuit 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.*

Here, the District Court waved off the consensus of economist opinion and Rule 12's demand that all allegations in the complaint be accepted as true simply by observing that it must defer to legislative judgments. Precedent dictates otherwise. When, as here, plaintiffs specifically allege that legislation fails to accomplish *any* legitimate government interest, they satisfy their burden at the pleadings stage.

It is true that a “court may hypothesize a legitimate, rational governmental purpose”; however, it is also true that a plaintiff's burden is simply to “plead sufficient *facts* that, treated as true, overcome the presumption of rationality that applies to government classifications.” *Progressive Credit Union v. City of New York*, 889 F.3d 40, 50 (2d Cir. 2018) (emphasis added). Ergo, a plaintiff who pleads sufficient facts to overcome the proffered justifications for a statute, whether hypothesized or actual, withstands a motion to dismiss.

The District Court went astray in this case because, at the pleadings stage, it credited legislative and judicial conjecture about the rationality of the RSL over allegations in the complaint that specifically undermine that conjecture. By way of example, the District Court, as an analytical matter, properly hypothesized that promoting residential stability could be a legitimate government purpose sought to be achieved through the RSL, even though the defendants did not advance the promotion of residential stability as a legitimate government interest in their

defense of the RSL. But, when Plaintiffs alleged, with specific support, that the type of stability promoted by rent control measures is one of widening economic inequality, deteriorating housing conditions, and increasing racial discrimination and segregation, the District Court could not, at the pleadings stage, simply credit the legislature or default to its own hypothesis. To hold otherwise transforms rational basis review into rubber stamp review.

II. THE RSL IS NOT RATIONALLY RELATED TO ANY LEGITIMATE GOVERNMENT INTEREST.

The District Court's decision to discredit the allegations of the Complaint in favor of legislative and judicial conjecture is particularly pernicious in this case, in which a plethora of empirical research demonstrates that rent control measures cannot be justified by any legitimate government interest. Initially, to the extent that rent control measures promote stability, as suggested by the District Court, they do so in ways that entrench irrational ends—driving income inequality, decrepit housing conditions, and racial discrimination and segregation. Moreover, rent control measures decrease the amount of available rental units by inefficiently allocating housing needs and depressing new construction. Additionally, rent control measures do not increase the affordability of housing, as they benefit affluent individuals residing in controlled units while shifting the costs to those in uncontrolled units and decreasing the quality of housing conditions to an extent that outweighs any benefit from decreased rent. Finally, rent control measures

devalue the housing market, increase governmental costs, worsen the homelessness crisis, and decrease home ownership.

Given this empirical backdrop, Plaintiffs plausibly alleged that the RSL is not rationally related to a legitimate government interest as needed to sustain a substantive due process claim. Accordingly, this Court should vacate the District Court's dismissal of this claim.

A. Any Residential Stability Achieved Through Rent Control Measures Like The RSL Is Not A Legitimate Government Interest Because That Stability Worsens Inequities In The Housing Market.

The District Court sought to justify the RSL by citing the preservation of residential stability, that is, allowing “people of low and moderate income to remain in residence in New York City—and specific neighborhoods within—when they otherwise might not be able to do so.” 2020 WL 5819900, at *13. The problem with this justification is that stability for stability's sake is not a legitimate government interest when that stability perpetuates deleterious outcomes.

One need only look to the data to reach this conclusion. The “stability” wrought by rent control measures widens economic inequality, deteriorates housing quality in controlled areas, and exacerbates racial discrimination and segregation.

1. *Rent control measures increase income inequality.*

Rent control measures increase income inequality in two ways. First, they are misdirected, such that the wealthy disproportionately receive the benefits of rent control measures. Second, they generate additional housing costs that disproportionately harm those who are impoverished.

As to the benefit to the wealthy: in the City of New York, 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*. Another study in New York City likewise found “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). Similarly, 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). The situation is the same in Los Angeles, where “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.”

Peter Navarro, *Rent Control in Cambridge, Mass.*, 78 PUB. INT. 83, 97 (Winter 1985). “In Berkeley and Santa Monica, data showed that the beneficiaries of rent control are ‘predominantly 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).⁸

To make matters worse, this benefit for the wealthy falls squarely on the backs of the poor. 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.*

In short, rent control measures subsidize the living expenses of the wealthy at the expense of the impoverished. Stabilizing such an outcome is irrational.

⁸ http://centerforcaliforniarealestate.org/publications/CCRE_Rent_Control_report.pdf.

2. *Rent control measures deteriorate housing quality in rent-controlled neighborhoods.*

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 any “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). 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.” Navarro, *supra*, at 92. 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. A different case study of Boston revealed that “landlords spent almost

\$50 less per year on each unit of controlled buildings.” Navarro, *supra*, at 92.

“[I]n their analysis of Los Angeles, Rand researchers found that 3.5 percent rent reduction from controls was partially offset by a 2.2 percent deterioration”

Navarro, *supra*, at 96. Researchers “have drawn a similar conclusion about controls in England and France” *Id.* at 92. As with income inequality, this is not an outcome worthy of stabilization.

3. *Rent control measures exacerbate racial discrimination and segregation.*

Most troubling, perhaps, is that data show that rent control measures perpetuate the insidious history of racial inequity in this country’s housing marketplace. They are yet another cause of discrimination and segregation.

As to discrimination, the evidence is clear. 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*. To that end, in New York City, “Blacks and Puerto Ricans in the controlled sector received lower benefits than their white counterparts.” Joseph Gyourko & Peter Linneman, *Equity & Efficiency Aspects of Rent Control: An Empirical Study of New York City*, 26 J. URB. ECON. 54, 73 (1989). 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.”

Prasanna Rajasekaran, Mark Treskon, & Solomon Green, *Rent Control: What Does the Research Tell Us about the Effectiveness of Location Action?*, URB. INST. 7 (Jan. 2019).⁹ “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.

Discrimination and segregation are often linked, and the data bear this out. 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.

⁹https://www.urban.org/sites/default/files/publication/99646/rent_control._what_does_the_research_tell_us_about_the_effectiveness_of_local_action_1.pdf.

In summary, the District Court’s use of residential stability to justify rent control measures may seem like a legitimate government interest in the abstract; but in reality, such stability exacerbates the very worst aspects of American communities. Residential stabilization through rent control means greater income inequality, deteriorating housing conditions, and further racial discrimination and segregation. Residential stabilization, when attempted through rent control measures, is irrational.¹⁰

B. Rent Control Measures Like The RSL Arbitrarily And Irrationally Decrease The Amount Of Available Rental Units.

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 resulted in a comparative decrease in the

¹⁰ This analysis typifies the problem with adhering to an “any hypothetical justification” means of rational basis review. If any hypothetical justification suffices and courts have no role but to defer to legislative judgments, then there is no room to scrutinize the fit between means and ends. Without such scrutiny, courts are not able to discern whether the type of “residential stability” accomplished through rent control is actually a legitimate government interest.

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 2018, 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.

1. 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.” Gyourko & Linneman, *Equity & Efficiency Aspects of Rent Control: An Empirical Study of New York City*, *supra*, at 72-73. 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).¹¹ 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

¹¹ <https://escholarship.org/uc/item/9dn0n4g7>.

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 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).¹² 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. Robert

¹² <https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf>.

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).¹³

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 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.*¹⁴

¹³ <https://web.stanford.edu/~diamondr/DMQ.pdf>.

¹⁴ Of course, even in the absence of landlord-targeting, in an environment with rent-controlled measures, an equally deleterious result follows: residential entrenchment in the same rent-controlled unit across generations, regardless of housing need. And because, as previously explained, rent-controlled units are likelier to fall in the hands of the white and the wealthy, this sort of residential

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.

2. *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

entrenchment deepens the racial and economic divide inherent in rent-controlled markets.

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 short, “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 not rational and should not survive this Court's scrutiny under the Due Process Clause.

C. Rent Control Measures Like The RSL Arbitrarily And Irrationally Increase The Overall Cost Of Rental Housing.

Proponents of rent control measures argue that such measures effectively limit rent increases in controlled or stabilized units; however, this ignores the effect that such measures have on the overall rental market, where corresponding increases in rents in uncontrolled units disproportionately offset the decrease in controlled units. 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” Rajasekaran, Treskon, & Green, *supra*, at 5.

To be sure, reallocating rent increases from controlled units to uncontrolled units could provide affordable housing for low-income residents *if* such individuals actually resided in rent-controlled units. But the data show that the opposite is true. *See supra* § II-A. In other words, reallocating rent increases from controlled units to uncontrolled units is just another means of widening income inequality.

D. Rent Control Measures Are Associated With Other Negative Externalities That Render Them Irrational And Irrational.

The allegations of the Complaint, and the economic literature in support thereof, were sufficient to survive a motion to dismiss because they, as previously explained, negated the principle justifications for rent control measures. That said, this Court should also consider the other negative externalities that rent control measures impose on communities.

Initially, 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.

In addition, 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*.

Furthermore, rent control measures are correlated with 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 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—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.

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 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).¹⁵

Plaintiffs’ Complaint rightly challenged the rationality of the RSL. Given the overwhelming body of empirical evidence against rent control measures, it was premature to dismiss the Complaint at the pleadings stage. Accordingly, this Court should vacate the District Court’s judgment and remand for further proceedings.

Respectfully submitted,

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¹⁵ <https://www.forbes.com/sites/forbesrealestatecouncil/2018/05/31/rent-control-what-it-means-for-the-real-estate-marketplace/#fbc787176706>.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), (e) and Local Rules 29.1(c) and 32.1(a)(4) because:

[X] this brief contains 6,956 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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