20-3366

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,

– v. –

CITY OF NEW YORK, RENT GUIDELINES BOARD, DAVID REISS,

(*Caption Continued on Inside Cover*)

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Defendants-Respondents,

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

Intervenors.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae National Association of REALTORS® ("NAR") hereby certifies that it is a non-profit, tax-exempt organization incorporated in Illinois. NAR has no parent corporation, and no publicly held company has 10% or greater ownership in NAR.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of REALTORS® ("NAR") is a national trade association, representing 1.4 million members, including NAR's institutes, societies, and councils involved in all aspects of the residential and commercial real estate industries. Members are residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of the approximately 1,200 local and 54 state and territory associations of REALTORS®[2]. Members advocate for private property rights, including the right to own, use, and transfer real property. REALTORS® adhere to a strict Code of Ethics, setting them apart from other real estate professionals for their commitment to ethical real estate business practices.

NAR is interested in this case because rent control measures have a significant impact on private property rights and the real estate industry, which in turn significantly affect its members' real estate businesses. New York's Rent Stabilization Law ("RSL") imposes onerous restrictions on the ability of New York City's landlords to collect a

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

[2] NAR is the exclusive owner of the REALTOR® trademarks. The REALTOR® Mark has one meaning only: a federally registered collective membership mark that identifies a real estate professional who is a member of the National Association of REALTORS® and subscribes to its strict Code of Ethics.

reasonable rate of return from their property and to recover possession of their property. The 2019 Amendments to the RSL impose additional burdens on property owners and are part of a recent trend among states and municipalities across the country to adopt or enhance rent control laws. Rent control laws, if not properly structured, can effect a taking of private property without just compensation in violation of the Fifth Amendment. NAR files this brief to explain why New York's RSL violates the Takings Clause and to provide additional information about the adverse effects of rent control laws like the RSL.

SUMMARY OF ARGUMENT

For more than 50 years, the State of New York has forced landlords to subsidize the government's misguided housing policies. Although intended to improve housing conditions in New York, the RSL—which contains some of the county's most severe restrictions on rental properties—has exacerbated New York City's housing problems. The 2019 Amendments to the RSL make it even harder for landlords to recover their property, decontrol rental units, and offset improvement costs. The RSL so severely infringes landlords' property rights that it effects a taking of private property without just compensation in violation of the Fifth Amendment.

The RSL effects a "physical occupation of an owner's property," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), because it effectively grants tenants and their successors a perpetual right to physically occupy a landlord's property. Tenants and their successors have the legal right to the renewal of leases, and

landlords may decline to renew a lease or evict a tenant only in rare circumstances. Moreover, the RSL makes it practically impossible for landlords to recover their property and make alternate use of it, even limiting a landlord's right to recover possession for personal use. That landlords voluntarily participate in the rental market does not mean they willingly acquiesced to a physical taking of potentially limitless duration. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015).

The RSL also forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Pennell v. City of San Jose*, 485 U.S. 1, 19 (1988) (Scalia, J., concurring in part and dissenting in part) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The RSL permits the Rent Guidelines Board ("RGB") to set rent increases that are below a commercially reasonable amount to account for factors related to tenant income and cost of living. Thus, the RSL imposes the costs of the government's welfare policies solely on landlords who happen to own rent-stabilized apartments. But the costs of the government's effort to promote housing affordability should be borne by the public as a whole, not passed off solely to landlords.

New York's RSL not only violates the Constitution, it also highlights the harmful effects of misguided housing policies. Simply put, rent control laws exacerbate housing supply and affordability problems because they invariably reduce the quantity of available housing. They also reduce housing quality, decrease consumer mobility and entry into the housing market, and are an inequitable solution to housing affordability

issues. Requiring New York to eliminate the unconstitutional burdens it imposes on landlords will ultimately improve housing affordability and quality in New York, in contrast to the broken status quo that works against those objectives.

For these reasons, the Court should reverse the district court's judgment.

ARGUMENT

I. THE RSL EFFECTS A TAKING OF PRIVATE PROPERTY.

New York's RSL effects both a physical and regulatory taking of private property without just compensation in violation of the Fifth Amendment. The RSL allows for a government-mandated physical occupation of rent-stabilized apartments. It also requires one group—landlords—instead of the public as a whole to bear the costs of the government's housing policies. Under either theory, the RSL constitutes a taking.

A. The RSL Effects a Physical Taking.

The RSL requires landlords to submit to the physical occupation of their property by third parties. The law confers on tenants in rent-stabilized apartments a right of possession that is essentially unlimited in duration, one that they can even pass on to their successors. The RSL makes it nearly impossible for landlords to decline to renew the leases of tenants in rent-stabilized apartments or recover possession of their property for other uses, including personal use. Thus, the RSL can impose generations of unwanted physical occupation of landlords' property without just compensation from the government.

1. Landlord-Tenant Laws Requiring Landlords to Acquiesce to the Continued Physical Occupation of Property Can Effect a Taking.

It is black-letter law that the "physical occupation of an owner's property authorized by [the] government constitutes a 'taking.'" *Loretto*, 458 U.S. at 421. This is because a physical occupation of property deprives an owner of each of the rights "to possess, use and dispose of" the property. *Id.* at 435 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)). A physical occupation, at its core, infringes an owner's "right to exclude, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* at 433 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

In the landlord-tenant context, the Supreme Court has explained that statutes regulating landlord-tenant relations can constitute physical takings when a law severely curtails an owner's right to recover possession of his or her property. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court held that a rent control ordinance, when viewed in conjunction with a state law limiting evictions of tenants in mobile home parks, did not constitute a physical taking because it did not "require[] the landowner to submit to the physical occupation of his land." *Id.* at 527 (emphasis omitted). Critical to the Court's conclusion was the fact that the government did not "compel[]" property owners, "once they have rented their property to tenants, to continue doing so." *Id.* at 527–28. Rather, the law expressly allowed property owners to change the use of the property and evict their tenants. *Id.* at 528.

But the Court made clear that landlord-tenant regulations can effect a physical taking if a landlord is required to acquiesce to a tenant's continued possession of his or her property. In *Yee*, the Court cautioned that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* Thus, compelling a landlord to rent his or her property or refrain from terminating a tenancy meets this element of required acquiescence.

2. The RSL Requires Landlords to Submit to the Physical Occupation of Their Property and Makes It Practically Impossible For Landlords to Recover Possession.

The RSL differs from the regulation upheld in *Yee* because the RSL "compel[s] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. at 528. Indeed, the RSL effectively grants tenants a permanent right to occupy rent-stabilized apartments, even when the landlord would prefer to make other uses of the property, and allows those tenants to pass their possessory interests on to successors. The RSL contains numerous provisions that, taken together, effect a physical taking.

First, the RSL makes it nearly impossible to decline to renew leases for tenants in rent-stabilized apartments. The RSL *requires* property owners to provide tenants the option to renew their lease at rent-stabilized rates, with few exceptions, such as nonpayment of rent or use of the property for criminal purposes. N.Y.C. Admin. Code § 26-511(c)(9); N.Y. UNCONSOL. LAWS § 26-511(c)(9); 9 NYCRR § 2524.4. Moreover,

the RSL entitles tenants in rent-stabilized apartments to pass on their tenancy (and all its attendant rights) to their successors. 9 NYCRR § 2523.5(b)(1). These successors may likewise pass on their right to occupy rent-stabilized apartments to *their* successors, creating what is effectively a permanent possessory interest in the landlord's property. As a result, the landlord must "refrain in perpetuity from terminating" a tenancy, *Yee*, 503 U.S. at 528, even when it is inherited by strangers to whom the landlord never consented to lease the property.

Second, even in the limited circumstances where a tenant is subject to eviction, the RSL's limitations on and procedures for eviction can effectively require landlords to submit to continued physical occupation of their property. Under New York law, the state housing courts are permitted to stay the eviction for up to twelve months if it would cause the tenant "extreme hardship." N.Y. RPAPL § 753. In making this determination, courts are required to "consider serious ill health, significant exacerbation of an ongoing condition, a child's enrollment in a local school, and any other extenuating life circumstances affecting the ability of the applicant or the applicant's family to relocate and maintain quality of life." *Id.* In other words, a landlord may be required to provide housing to a tenant who is subject to eviction for up to a year after obtaining an eviction order to avoid affecting the tenant's quality of life.

Third, the RSL has long restricted landlords' rights to recover possession of their property for personal use, which the 2019 Amendments made even more difficult. Under the 2019 Amendments, owners may only recover a single unit in an apartment

building for their personal use, regardless of the number of units in the building. Chapter 36 of the Laws of 2019, Part I, § 2. And this personal-use exception is subject to strict limitations. For example, the personal-use option may only be exercised if a landlord has an "immediate and compelling necessity" to use it as his or an immediate family member's *primary* residence. *Id.* And even under these limited circumstances, the landlord must bear the burden to secure equivalent nearby housing at the same rent-stabilized price for some displaced tenants. *Id.* If more than one individual owns the building, still only one unit may be recovered for personal use. *Id.* And a person may not recover any rent-stabilized units for personal use that he or she owns through a business entity, including one closely-held. *See* 9 NYCRR § 2524.4; N.Y. UNCONSOL. LAWS § 26-511(c)(9)(b).

Fourth, it is extremely difficult for landlords to remove their property from RSL coverage. The 2019 Amendments eliminated two significant decontrol provisions, Luxury Decontrol and High Income Decontrol, which previously allowed for the decontrol of apartments where tenants no longer plausibly required rent stabilization. Chapter 36 of the Laws of 2019, Part D. The Amendments also made it much more difficult for owners to convert a building to a cooperative or condominium. Compl. ¶¶ 257–59. Importantly, the RSL further prohibits owners from withdrawing their buildings from the residential rental market to convert them to most non-housing uses, including commercial rentals or vacant units. 9 NYCRR § 2524.5(a)(1). *Id.* Nor may the owner demolish the building unless they secure every regulated tenant suitable

housing, pay their relocation expenses, and pay each a stipend, which, in some circumstances, must cover any increased rent over a period of six years. *Id.* § 2524.5(a)(2). Thus, unlike in *Yee*, where landlords could change the use of their property and evict their tenants simply by providing sufficient notice, the RSL effectively eliminates a landlord's opportunity to use her property in a new way or to even cease being a landlord, if she so desires.

The experience of one of the Plaintiffs in this case, Constance Nugent-Miller, illustrates the heart-breaking burdens imposed by the RSL. Nugent-Miller lives on the second floor of a six-unit, rent-stabilized building that she owns. Compl. ¶ 228, *Cmty. Hous. Improvement Program v. City of New York*, No. 1:19-cv-04087-EK-RLM (E.D.N.Y. July 15, 2019). In 2013, she sought to move into one of her first-floor apartments, because her husband was terminally ill and had difficulty climbing the stairs. *Id.* ¶ 229. She offered her own second-floor unit to the existing tenant, who declined. *Id.* Her husband died shortly after the housing court denied her request to gain possession of the apartment. Two years later, Nugent-Miller underwent surgery to repair a severely torn meniscus. *Id.* ¶ 230. Since that time, she has required a cane to walk and was advised she would eventually need a total knee replacement. *Id.* In light of her physical condition, she again sought to recover possession of one of her first-floor units for personal use. *Id.* Again the housing court denied her request, concluding that Nugent-Miller had not "demonstrated that her condition is such to warrant her recovery of the subject premises for her own use from a rent stabilized tenant that has resided there for

more than 20 years." *Id.* As of the filing of this lawsuit, Nugent-Miller was qualified as "disabled" by the Social Security Administration and continued to reside in her second-floor apartment. *Id.* ¶ 231.

In sum, the RSL effectively requires property owners to acquiesce to the physical occupation of their properties—even against their wishes to put the property to other uses, including their own personal use—without any meaningful avenue to recover their properties or convert them to other legitimate and compelling uses. These extraordinary limitations on landlords' use of their property are precisely the kinds of required acquiescence to physical occupation that the Supreme Court said could render a landlord-tenant regulation a physical taking. *Yee*, 503 U.S. at 528.

3. Landlords' Consent to Renting Their Property Does Not Foreclose a Takings Claim.

The fact that landlords voluntarily choose to participate in the rental market does not preclude a physical takings claim. In *Loretto*, the Court rejected the government's argument that landlords could avoid the law's requirements by exiting the rental market because "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. The contrary argument "proves too much," the Court explained, because it would allow the government to deprive landlords of physical space for all manner of uses, including the requisition of apartments for permanent government offices. *Id.*

Similarly, the Court recently rejected an argument that an administrative order requiring raisin growers to give a percentage of their crop to the government was not a physical taking because raisin growers "voluntarily [chose] to participate" in a regulated market. *Horne*, 576 U.S. at 365. The Court described the argument that voluntarily entering a regulated market subjects a participant to uncompensated takings as "wrong as a matter of law." *Id.* In both *Loretto* and *Horne*, the Court admonished that "property rights 'cannot be so easily manipulated'" as to allow for uncompensated takings under the guise of false acquiescence. *Id.* (quoting *Loretto*, 458 U.S. at 439 n.17).

So too here. The fact that landlords chose to participate in New York's rental market does not mean that they voluntarily acquiesced to uncompensated physical takings of potentially limitless duration. As the Court has made clear, government may not condition participation in the market on property owners' willingness to suffer uncompensated physical takings.

B. The RSL Effects a Regulatory Taking.

The RSL also effects a regulatory taking because it uniquely burdens landlords with the costs of the government's misguided welfare policies. Under our constitutional framework, the costs of public assistance efforts must be shared by the public as a whole. Because the RSL singles out landlords to reduce the burdens on low-income tenants, it effects a regulatory taking.

1. The Takings Clause Prohibits the Government From Solely Burdening Landlords With the Costs of Its Welfare Policies Without Just Compensation.

The central purpose of the Takings Clause is to prohibit the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. It "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). In other words, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The Supreme Court has, time and again, reaffirmed this principle. *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001).

Rent control laws present a significant risk that the government will—as the RSL here does—impose on landlords the costs of social welfare and housing policies that, "in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. Although state and local governments can regulate landlord-tenant relations, the government may not "us[e] the occasion of rent regulation . . . to establish a welfare program privately funded by" particular landlords. *Pennell*, 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in part). The state's basic authority to regulate landlord-tenant contract terms "does not magically transform general public welfare,

which must be supported by all the public, into mere 'economic regulation,' which can disproportionately burden particular individuals." *Id.* In other words, while landlord-tenant relations "may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415. Courts must therefore carefully assess the particulars of a rent control law to protect property owners from regulations that go "too far."

Rent control laws require particular scrutiny because governments have every incentive to burden landlords alone in order to achieve their social welfare goals. In his opinion in *Pennell*, Justice Scalia (joined by Justice O'Connor) explained that the traditional way in which government addresses "the problem of those who cannot pay reasonable prices for privately sold necessities" is "the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps)." 485 U.S. at 21. He noted that the "politically attractive feature" of rent control is that it permits wealth transfers "to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes." *Id.* at 22. Thus, governments are often tempted to pursue their social welfare policies by shifting the costs entirely on to landlords instead of the politically less palatable task of raising money through general taxation.

Without a meaningful constitutional check, as Justice Scalia explained, the government's incentive is to follow the temptation to burden landlords with more of

the costs of its social welfare policies. Indeed, recent trends across the country reveal new and increasingly strict rent control laws. In 2019, Oregon became the first state in the country to impose statewide rent control.[3] California followed soon after.[4] Three states (New York, New Jersey, and Maryland) expressly permit municipalities to enact rent control measures, and at least six other states' laws are silent on the matter.[5] Several other states—including Massachusetts, Illinois, and Washington—have considered legislation in recent years that would impose statewide rent control or repeal restrictions on municipal authority to adopt rent control.[6] And some prominent national elected officials have endorsed a *nationwide* rent control.[7] Thus, an increasing number of jurisdictions are passing the costs of their welfare policies on to landlords.

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[3] Mihir Zaveri, *Oregon to Become First State to Impose Statewide Rent Control*, N.Y. Times (Feb. 26, 2019).

[4] Conor Dougherty & Luis Ferré-Sadurní, *California Approves Statewide Rent Control to Ease Housing Crisis*, N.Y. Times (Nov. 4, 2019).

[5] National Multifamily Housing Council ("NMHC"), *Rent Control Laws By State* (Sept. 2, 2020), https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/.

[6] Tim Logan, *Bill to allow rent control in Mass. takes a step forward on Beacon Hill*, Boston Globe (May 29, 2020); Alexandra Silets, *Will Illinois Become the Next State to Pass Rent Control Laws?*, WTTW (Sept. 12, 2019); Hanna Scott, *Local leaders from Seattle to Spokane eye rent control*, MyNorthwest (Aug. 15, 2019).

[7] Sophie Kasakove, *AOC's Plan to Decommodify Housing*, The Nation (Sept. 25, 2019).

2. The RSL Uniquely Burdens Landlords With the Costs of New York's Misguided Housing Policies.

The RSL effects the type of regulatory taking that Justice Scalia warned of in *Pennell*, because it saddles owners of rent-stabilized apartments with the costs of providing housing benefits to low-income tenants. The RSL requires the RGB to consider factors such as cost of living, tenant income, and housing affordability in setting a maximum rent increase. Because the consideration of such factors results in rent increases that are less than the commercially reasonable amount, the effect of the RSL is to make landlords of rent-stabilized apartments bear the cost of the difference between a commercially reasonable rent and the lower rent allowed by the RGB. This is precisely the type of general welfare policy that must be paid for through general taxation, not passed off to a small subset of property owners.

The RSL requires the RGB, in setting an annual maximum rent increase, to consider a set of factors related to the economic condition of the residential real estate market, including real estate taxes, utility rates, gross operating maintenance costs, and financing costs. N.Y.C. Admin. Code § 26-510(b)(1). These are similar to the objective factors of the rent-control ordinance at issue in *Pennell*, 485 U.S. at 20–21 (cost of debt servicing, market value rents for similar units, etc.). The RSL, however, also requires the RGB to consider general cost-of-living data, which the RGB has interpreted to include consideration of factors related to tenant income and housing affordability. N.Y.C. Admin. Code § 26-510(b)(2), (3); N.Y.C. Rent Guidelines Board, *2020 Income*

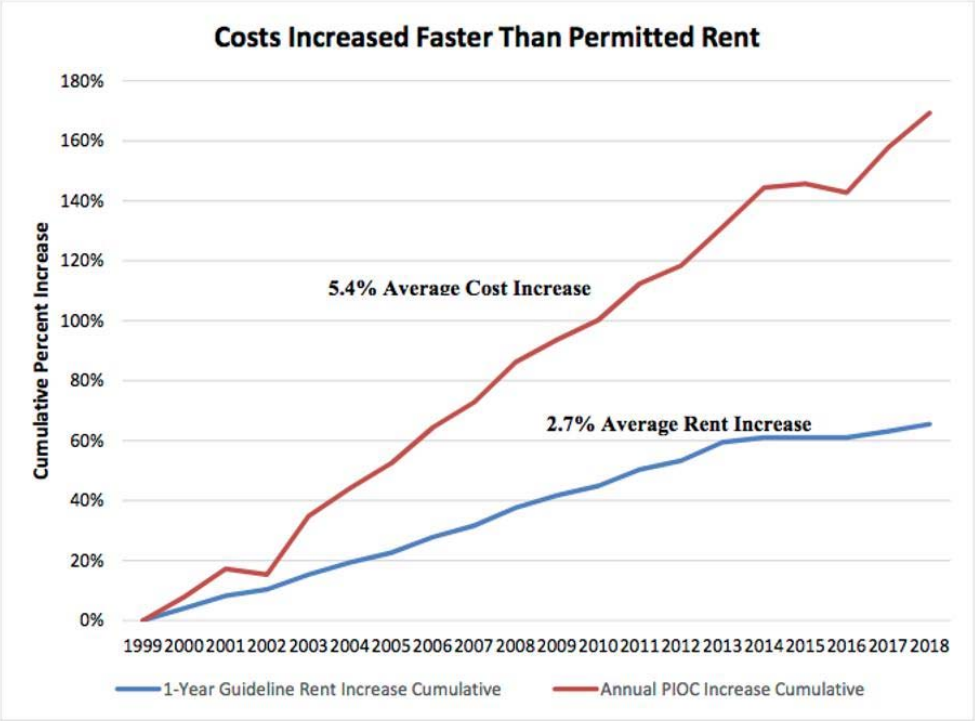
and Affordability Study 12 (Apr. 30, 2020), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/04/2020-IA.pdf.

In practice, these factors authorize the RGB to set a rent increase below a commercially reasonable level to offset economic hardships faced by tenants. But as Justice Scalia explained, "the existence of some renters who are too poor to afford even reasonably priced housing . . . is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food[] or the department stores that sell them their clothes." *Pennell*, 485. U.S. at 21. The government may not address "the problem of those who cannot pay reasonable prices for privately sold necessities" by forcing landlords—specifically, landlords who happen to own rent-stabilized apartments—to be the sole bearers of the costs. *Id.* This is a public burden that "should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

The majority in *Pennell* declined to reach the question of whether consideration of the tenant-hardship factor resulted in a taking because of the lack of record evidence that it had ever been relied upon to bring rent below the reasonable rate. 485 U.S. at 9–10. There is no question that the RSL has been put to such use here. The public data shows that, year-in and year-out, the RGB sets a maximum rent increase well below what a commercially reasonable level would be according to the objective factors identified in Section 26-510(b)(1). The RGB estimates the increase of owners' costs through its Price Index of Operating Costs ("PIOC"), which includes such factors as

taxes, utilities, maintenance, administrative costs, insurance costs, and other costs. Despite estimating that owner costs have increased 5.4% on average per year from 1999 to 2018, the RGB has approved rent increases of only half that amount during the same period: 2.7% on average per year. Compl. ¶ 291.

CHART 1: RGB-Permitted Rent Cumulatively Increased at Half the Rate of Owners' Costs



Id. Moreover, the RGB's data shows that rents should have increased an average of 5.6% per year since 1999 for net income to remain constant. *Id.* ¶ 292. Yet the RGB has consistently increased rent at a far lower rate, which means landlords' net income is being reduced every year.

The difference between the increases the RGB has approved and commercially reasonable rent increases is attributable to the RGB's consideration of tenant hardship, such as tenant income and housing affordability. But because the problems that the government seeks to address through the restricted rent increases are societal problems not attributable to the subset of landlords who own rent-stabilized apartments, their costs must be "borne by the public as a whole." *Armstrong*, 364 U.S. at 49. The government cannot force landlords alone to bear those costs, as the RSL does and enables the RGB to do, without compensating them for the taking.

II. RENT CONTROL LAWS UNDERMINE THEIR PURPORTED GOAL OF PROMOTING HOUSING AFFORDABILITY AND HAVE A SIGNIFICANT NEGATIVE IMPACT ON HOUSING MARKETS.

Rent control laws not only offend the Constitution, they are also misguided policy. Far from advancing the goal of housing affordability, rent control laws like the RSL generate a host of problems in housing markets by discouraging construction of new housing units and the maintenance of existing ones. Economists almost universally agree that rent control creates more problems than it solves[8] because it: (1) reduces the quantity of available housing (thereby exacerbating the existing housing shortage and affordability problem); (2) reduces the quality of available housing; (3) reduces consumer mobility and entry into the housing market; and (4) offers an inequitable solution to housing affordability issues.

[8] R.M. Alston, J.R. Kearl, & M.B. Vaughan, *Is There a Consensus Among Economists in the 1990s?*, 82 Am. Econ. Rev. 203 (1992).

A. Rent Control Reduces the Quantity of Available Housing.

Like in any other market, prices in the housing market are responsive to supply and demand. Rents and home prices tend to increase in the short-term when demand outstrips supply. Over time, however, higher rents encourage new investment in rental housing, which yields "new construction, rehabilitation of existing units, and conversion of buildings from nonresidential to residential use," and contributes to eliminating the housing shortage.[9] Artificially capping rents sends a false message that no such investment is necessary, thereby reducing rather than expanding the housing supply.[10] Because it reduces the profitability of rental housing, rent control "direct[s] investment capital out of the rental market and into other more profitable markets."[11] This results not only in a decline of construction of new housing, but existing rental units are often converted to other uses.[12] In short, rent control "perpetuates the very problem it was designed to address: a housing shortage."[13]

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[9] Val Werness, *Rent Controls: A White Paper Report* 94, National Association of Realtors (Mar. 2017), https://realtorparty.realtor/wp-content/uploads/2017/12/State-Local-Issues-Rent-Control-White-Paper.pdf.

[10] *Id.*

[11] National Multifamily Housing Council, *The High Cost of Rent Control*, https://www.nmhc.org/news/articles/the-high-cost-of-rent-control/.

[12] *Id.*

[13] Peter D. Salins, *Rent Control's Last Gasp*, City Journal (Winter 1997), https://www.city-journal.org/html/rentcontrol%E2%80%99s-last-gasp-11951.html.

Numerous studies of the real-world impact of rent control support the position that rent control reduces quantity of available housing. For example, the number of rental units decreased in Cambridge (8%) and Brookline (12%), Massachusetts, during the 1980s after those cities imposed rent control measures, while the number of rental units in neighboring communities increased during the same period.[14] Similarly, the number of rental units decreased in Berkeley (14%) and Santa Monica (8%), California, between 1978 and 1990 after those cities imposed rent control measures, while the rental supply rose in nearby cities during the same period.[15] A recent study of the San Francisco housing market found that rent control reduced the rental supply of small multi-family housing by 15%, which ultimately led to rent increases and increased gentrification.[16] Another study concluded that rent control held thousands of units off the rental market in Boston.[17]

The New York RSL has a similar impact. Data demonstrates that, despite ample zoning capacity, buildings where more than 75% of the units are rent stabilized have a significantly higher share of their zoned capacity available for development than

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[14] Rolf Goetze, *Rent Control: Affordable Housing for the Privileged, Not the Poor* (1994).

[15] St. John & Associates, *Rent Control in Perspective: Impacts on Citizens and Housing in Berkeley and Santa Monica Twelve Years Later*, Pacific Legal Foundation (1993).

[16] Rebecca Diamond, Tim McQuade, & Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 Am. Econ. Rev. 3365 (2019)

[17] David P. Sims, *Out of Control: What Can We Learn from the End of Massachusetts Rent Control?*, 61 J. Urb. Econ. 129 (2007).

buildings that contain no rent stabilized units. Compl. ¶ 124. Such buildings have approximately 20% of their zoned capacity available, while buildings without rent stabilized units tend to *exceed* their zoned capacity. *Id.* This disparity in development demonstrates that the RSL contributes significantly to the underdevelopment of rental properties, thus aggravating the very housing supply problem that it purports to remedy.

It is not hard to see why the RSL has had this effect. The RSL reduces revenue from buildings that could be reinvested into further development and restricts owners' ability to demolish and rebuild their buildings to provide additional rental units. *Id.* ¶ 121. Moreover, the RSL's limitations on an owner's right to recover units create substantial barriers to redeveloping a building, because stabilized tenants (and their successors) can leverage their rights to extract outsized buyout payments in exchange for vacating the premises. *Id.* ¶ 127. The 2019 Amendments to the RSL make the problem worse. The amendments eliminated two decontrol provisions, eliminated two bases for rent increases, and capped the amount recoverable for making improvements to rental units. *Id.* ¶¶ 131–33.

Because rent control worsens, rather than solves, the problem of housing scarcity, one additional consequence is that rent control laws tend to contribute to greater rent increases in the unregulated market. One study concluded that the RSL

had this effect on rents in uncontrolled units.[18] Another concluded that rents in uncontrolled units in New York City were between 22% and 25% higher than they would be in the absence of the RSL.[19]

B. Rent Control Reduces the Quality of Available Housing.

Not only does rent control reduce the supply of available housing, it also results in deterioration of the quality of existing housing. This is in part because property owners derive less revenue from their rental units and thus have less money available to devote to maintenance and repair. One study estimated that a Los Angeles rent control law causes increased deterioration over time, so much so that the deterioration offset a significant percentage of the benefit to consumers of lowered rent.[20] Studies of New York and Boston housing markets found lower housing quality and fewer expenditures on maintenance and repair for rent-controlled units versus market-rate units.[21] This has obvious negative effects on tenants in rent-controlled housing, because

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[18] Dirk W. Early, *Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits*, 48 J. Urb. Econ. 185 (2000)

[19] Steven B. Caudill, *Estimating the Costs of Partial-Coverage Rent Controls: A Stochastic Frontier Approach*, 75 Rev. Econ. & Stat. 727 (1993).

[20] C.P. Rydell et al., *The Impact of Rent Control on the Los Angeles Housing Market* 55–59, The Rand Corporation (1981).

[21] NMHC, *The High Cost of Rent Control*, *supra* n.11.

landlords lack the incentive to properly maintain units and provide amenities or services that appeal to tenants in a competitive market.[22]

The 2019 Amendments to the New York RSL compound the law's negative effect on housing quality. The Amendments drastically reduced the amount owners could recover via rent increases for making Major Capital Improvements to the property as well as for making Individual Apartment Improvements. Compl. ¶ 69. The obvious consequence of these changes is that landlords have less incentive to make improvements to their rental properties.

C. Rent Control Reduces Consumer Mobility and Entry.

Tenants in rent-controlled units are understandably reluctant to give up their housing subsidy and thus are less willing to move or pursue homeownership, even when it may be in their best interest to do so. One study found that rent control in New York City tripled the expected duration of a tenant's residence.[23] A study of San Francisco's housing market concluded that rent control limited renters' mobility by 20% and lowered displacement from San Francisco.[24] This reduced mobility "can be particularly costly to families whose job opportunities are geographically or otherwise limited and

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[22] Norm Miller, *California Rent Controls: Good Intentions with Disastrous Consequences*, Univ. of San Diego (May 16, 2018), https://www.sandiego.edu/news/detail.php?_focus=67472.

[23] Richard W. Ault et al., *The Effect of Long-Term Rent Control on Tenant Mobility*, 35 J. Urb. Econ. 140 (1994).

[24] Diamond et al., *supra* n.16.

who may have to travel long distances to reach those jobs available to them."[25] This can also cause spillover effects in the community, such as increased traffic congestion and demand for city services.[26]

Additionally, rent control erects barriers to entry into the housing market. As explained above, rent control has the effect of exacerbating housing scarcity and raising rents for unregulated apartments. Consequently, in many rent-controlled communities, prospective consumers must pay substantial finder's fees or other payments to current consumers to obtain a rental unit.[27] Some communities have developed a housing "gray-market," where units are passed among friends or family members.[28] These barriers to entry disproportionately affect low-income and young people.[29]

D. Rent Control Is Not an Equitable Solution to the Housing Affordability Problem.

Contrary to its proponents' intentions, rent control frequently benefits the wealthy while doing little to help the poor. The RSL is particularly egregious example of a poorly structured rent control law. The RSL haphazardly applies to a large number of buildings and does not target relief to low-income populations. There is no means testing, financial qualification, or other requirement that rent-stabilized apartments be

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[25] NMHC, *The High Cost of Rent Control*, *supra* n.11.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

rented to low-income families. Compl. ¶ 86. And, because the RSL effectively requires owners to perpetually renew leases, landlords have an incentive to choose tenants with higher incomes and better credit. *Id.*

On the other side, examples abound of wealthy New Yorkers who have no need for housing subsidies living in rent-stabilized apartments. For example, one report stated that a polo-playing multimillionaire whose family owned a 300-acre estate in North Salem, New York lived in a rent-stabilized apartment for several years.[30] A former executive with a weekend home in the Berkshires lived in a rent-stabilized apartment for nearly 20 years.[31] A former magazine editor and her husband who owned a photo agency lived in a rent-stabilized unit in the Upper West Side for 27 years while also owning a cottage on a 7-acre property in upstate New York.[32]

Studies confirm that a large number of high-income households occupy rent-stabilized apartments. One study found that, in 2010, there were an estimated 22,642 rent-stabilized households in New York that had incomes of more than $199,000, and 2,300 rent-stabilized households with incomes of more than $500,000. Compl. ¶ 92. In 2017, there were 37,177 rent-stabilized units occupied by households with incomes

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[30] James Fanelli, *Rent-Stabilized Apartments Are Being Occupied by Millionaires, Records Show*, DNAInfo (Apr. 30, 2014), https://www.dnainfo.com/new-york/20140430/new-york-city/rent-stabilized-apartments-are-being-occupied-by-millionaires-records-show/.

[31] *Id.*

[32] *Id.*

of at least $200,000 and 6,034 with incomes of at least $500,000. *Id.* Studies from other jurisdictions confirm that this misallocation of resources is not limited to New York. For example, a study of the effects of rent control in Boston revealed that 26% of rent-controlled units were occupied by tenants with incomes in the bottom quartile of the population, while 30% of rent-controlled units were occupied by tenants in the top half of income distribution.[33]

As the outcomes of the RSL and other rent control laws show, rent control is an inefficient and inequitable way to address housing scarcity and affordability issues.

CONCLUSION

NAR respectfully requests that the Court reverse the judgment below.

Dated: January 22, 2021

Respectfully submitted,

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[33] Sims, *supra* n.17.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5); the type style requirements of Fed. R. App. P. 32(a)(6); and the type volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and L.R. 29.1(c) and 32.1(a)(4)(A), because it is proportionally spaced and has a typeface of 14-point Garamond, and contains 6,191 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Dated: January 22, 2021 *s/ Brett A. Shumate*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

Dated: January 22, 2021 *s/ Brett A. Shumate*