No. 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.

(caption continued on inside cover)

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

BRIEF OF AMICI CURIAE CITIES OF LOS ANGELES, SAN JOSÉ, SANTA MONICA, OAKLAND, AND WEST HOLLYWOOD, CALIFORNIA, THE COUNTY OF SANTA CLARA, THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, THE SANTA MONICA RENT CONTROL BOARD, AND THE BERKELEY RENT STABILIZATION BOARD IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

JAMES R. WILLIAMS
SUSAN P. GREENBERG
ZOÉ E. FRIEDLAND
OFFICE OF THE COUNTY COUNSEL,
COUNTY OF SANTA CLARA
70 W. Hedding Street,
East Wing, 9th Floor
San José, CA 95110
Telephone: (408) 299-5900
zoe.friedland@cco.sccgov.org

Attorneys for Amicus Curiae
COUNTY OF SANTA CLARA, CA

DANIELLE L. GOLDSTEIN
ELAINE ZHONG
OFFICE OF THE LOS ANGELES CITY ATTORNEY
200 North Spring Street, 14th Floor
Los Angeles, CA 90012
Telephone: (213) 978-1868
danielle.goldstein@lacity.org

Attorneys for Amicus Curiae
CITY OF LOS ANGELES, CA

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

Defendants-Appellees,

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

Intervenors.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* are governmental entities for whom no corporate disclosure is required.

Dated: April 23, 2021

By: */s/ Danielle L. Goldstein*
Danielle L. Goldstein

Attorney for Amicus Curiae *City of Los Angeles, CA*

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INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT[1]

The Cities of Los Angeles, San José, Santa Monica, Oakland, and West Hollywood, California, together with the County of Santa Clara, California, the City and County of San Francisco, California, the Santa Monica Rent Control Board, and the Berkeley Rent Stabilization Board (Amici), submit this brief in support of Defendants-Appellees and the District Court's order in this case. Amici are local governments across California who design and administer rent stabilization laws (RSLs), enact policies to address the causes and impacts of housing instability, and implement an array of State and local programs in the housing market. In so doing, we seek to serve our entire populations—tenants and landlords alike. We tailor these complex and varied regulatory regimes to our specific housing stocks, population characteristics, and local and regional economies. We also seek to address segregation and histories of racial discrimination.

As a result, rent stabilization laws are no monolith: they are enacted and adjusted in response to circumstances including changes in rent, variable

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[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Amici thank Stanford Law School student Julian Schneider for his substantial assistance in drafting this brief.

development patterns, shifting demographics, and growth or stagnation in wages. These local measures are also constrained by statewide limitations, most notably California's Costa Hawkins Rental Housing Act. *E.g.*, Cal. Civ. Code § 1954.50, *et seq*. This scaffolding of policy choices reflects our diversity and the particularities of crafting tailored solutions to our local needs.

These complex State and local rent stabilization regimes have long been upheld as constitutional. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) ("States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation."). But, in a sharp departure from this long-standing precedent, Appellants and Amici San Francisco Apartment Association and California Apartment Association (SFAA/CAA) argue that New York's RSL facially violates the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. Brief for Appellants (App. Br.) at 15-19. Both claims are without merit. Appellants identify no legitimate basis to overturn the will of local communities and the judgments of their representatives in enacting RSLs tailored to local conditions and concerns.

New York City's (New York) RSL is not facially a regulatory taking. Facial regulatory takings claims turn on whether the regulation eliminates *all* economic value of the property. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452

U.S. 264, 295-96 (1981). Because rent-stabilized units are valuable properties that generate substantial profit for their owners, the RSL is not facially a regulatory taking.

In view of this limitation, Appellants attempt to mount a facial regulatory challenge using a test consisting of the "ad hoc, factual inquiries" set out in *Penn Central Transportation Co. v. City of New York*. 438 U.S. 104, 124 (1978). But this test is unavailable for facial claims, which are, by their nature, not fact-sensitive. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987). And Appellants' own application of these "complex factual assessments" fails to investigate the effects on *specific* landowners. *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992). This gap between the *Penn Central* test and Appellants' application of it demonstrates both that this test is incompatible with a facial analysis and that Appellants cannot prevail even if the test applied.

Appellants' Due Process Clause argument is also erroneous. They contend that economic legislation should be reviewed under strict scrutiny. App. Br. at 61. In the alternative, they argue that, even if rational basis applies, New York's RSL does not achieve its stated purpose. App. Br. at 61-65. But courts have long held that the appropriate standard for regulations of private property is rational basis review, which asks only if there is a conceivable rationale for the statute. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926). And rent

stabilization laws further the "legitimate interest" of states and local jurisdictions to preserve local communities and to protect vulnerable populations. *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992).

New York's RSL—just like laws across California—is a valid and vital use of the state's police power. RSLs preserve local neighborhoods and communities, and they ensure housing for community members at a range of income levels. They also help to prevent the displacement of vulnerable community members for whom displacement can lead to profound disruptions of healthcare, education, and employment. *See, e.g.*, N.Y.C. Admin Code § 26-501; West Hollywood Mun. Code § 17.04.020 (facilitating aging in place due to high proportion of renters over sixty-five); L.A. Mun. Code § 151.01 (limiting rent increases in light of fixed-, low-, and moderate-income populations); S.F. Admin. Code § 37.9(i) (facilitating aging in place for residents who are elderly, disabled, or catastrophically ill).

Appellants ignore, too, that RSLs are enacted against the backdrop of a larger, varied, and evolving set of state and local programs and laws addressing the causes and implications of housing instability. States like New York and California face a severe housing crisis with wide-ranging and significant implications for local governments, their community members, and the public health. This crisis requires local governments to use their police powers to implement a multi-faceted approach to build affordable housing, prevent

displacement, and support residents at risk of, or experiencing, homelessness.

Some of these tools include grants and loans to finance affordable housing and supportive housing services. Other regulatory measures promote the construction and disbursement of affordable units. And a number of these tools, like rental subsidies and development or refurbishment incentives, benefit landlords. For local governments like Amici, RSLs are one pivotal strategy among many to further government interests while serving the entire community.

ARGUMENT

I. New York's RSL Is Not a Facial Regulatory Taking Because Rent-Stabilized Units Have Economic Value.

Appellants urge that New York's RSL facially violates the regulatory takings doctrine. App. Br. at 55. But the RSL is not susceptible to a facial takings claim.[2] There are two types of takings challenges: facial and as-applied. Because a successful facial challenge targets a law in all possible applications, the test to show facial invalidity is extremely difficult to meet: It is the so-called "categorical" test, which demands that the challenged regulation eliminate *all* economic value in the class of property at issue. *See Hodel*, 452 U.S. at 295-96; *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997)

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[2] For the reasons capably set out in Appellees' briefs, RSLs cannot be a physical taking. Brief for City Appellees (NYC Br.) at 22-39. For the sake of brevity, Amici do not repeat that discussion here.

(confirming facial regulatory takings claims are limited to the categorical test). In contrast, the more lenient, fact-dependent, "non-categorical" standard is only employed in as-applied challenges. *See Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (limiting these "ad hoc, factual inquir[ies]" to "actual factual setting[s]") (internal citations omitted).

Because, under New York's RSL, rent-stabilized units remain valuable, profit-generating property, the RSL easily survives the test for facial challenge. As a result, Appellants attempt to import the standard for an *as-applied* takings challenge,[3] which uses "ad hoc, factual inquiries" considering a variety of factors focused on a specific "claimant." *Penn Central*, 438 U.S. at 124. But facial challenges, by definition, do not focus on a distinct, concrete controversy. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) ("[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications.") (internal citations omitted).

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[3] Appellants also attempt to create a new test fashioned from general statements of principle and a 1988 dissenting opinion. App. Br. at 37-39. Appellants urge that when a law imposes "public burdens" on private actors, that law effects a taking. App. Br. 37. But such arguments have been rejected, *see* NYC Br. at 56-58, and cannot be reconciled with a proper takings analysis. Determining the causes of social and economic issues, and crafting appropriate policy solutions, should rest with the people and their elected representatives.

In other words, a facial challenge is fundamentally incompatible with *Penn Central*'s fact-intensive, fact-dependent analysis. Nevertheless, Appellants urge this Court to adopt it here. The result is that Appellants improperly attempt to obtain the remedy associated with a facial challenge—a finding that New York's RSL is unconstitutional in *all* applications—by showing only that it may be unconstitutional in *some*. And while Appellants distort the governing law in an attempt to make the non-categorical test appear less fact-sensitive, in so doing they only demonstrate that they fail to meet it.

A. Rent Stabilization Laws Do Not Facially Violate the Regulatory Takings Doctrine Because Rent-Stabilized Units Are Economically Valuable.

Appellants claim that New York's RSL facially violates the regulatory takings doctrine, but then ignore the test applicable to a facial challenge. *See* App. Br. at 36-43. A facial regulatory taking can be established *only* through the categorical test. *See Hodel*, 452 U.S. at 295-96; *see also Suitum*, 520 U.S. at 736 n.10.

To establish a categorical taking, the property owner must show that the regulation eliminates "*all* economically beneficial uses." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (limiting categorical takings to a reduction in value "of 100%"). This test creates, at a

minimum, "an uphill battle" for the plaintiff. *Keystone*, 480 U.S. at 495. Here, that hill is insurmountable.

Under any RSL, the landlord retains their ownership of a valuable piece of property.[4] The landlord receives compensation for the property's use. And the landlord can sell the property for its value—and, of course, may profit off the sale. Since the landlord's rent-stabilized unit retains economic value, New York's RSL does not effect a categorical taking, and thus cannot facially violate the regulatory takings doctrine. Indeed, the RSL "easily survives scrutiny" under this test, in part because the law "merely regulates the conditions" of leasing units. *Hodel*, 452 U.S. at 296.

B. *Appellants Misapply the* Penn Central *Factors and Confirm the Non-Categorical Test's Unsuitability for Facial Challenges.*

Because they cannot meet the categorical test, Appellants attempt to apply the non-categorical test, which employs the factors set out in *Penn Central*. *See* App. Br. at 44-45. But this test cannot be deployed in a facial challenge because it

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[4] In California, the State Legislature has found that rent-stabilized units "enable[] a favorable return for a property owner compared to other business investments." A.B. 1482, Cal. Assemb. Floor Analysis 2 (Sept. 10, 2019). Amici's data confirm this finding. For example, in the City of Los Angeles, the value of rent-stabilized apartments has increased at a similar rate as unregulated properties, while net operating income of regulated properties has increased at a rate well-above inflation. *See* ECONOMIC STUDY OF THE RENT STABILIZATION ORDINANCE AND THE LOS ANGELES HOUSING MARKET, CITY OF LOS ANGELES HOUS. DEP'T. 5-6 (2009), https://clkrep.lacity.org/onlinedocs/2007/07-0883_rpt_lahd_6-25-2009-1.pdf.

is a fact-intensive inquiry into how the regulation affects a *specific* owner—not, as Appellants contend, whether the regulation affects owners *generally*. It is an "ad hoc, factual inquir[y]" considering a variety of factors applied specifically to the particular "claimant" and property at issue. *Penn Central*, 438 U.S. at 124. This "intensive *ad hoc* inquiry" investigates "the circumstances of each particular case." *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 375 (2d Cir. 2006). As a result, the Supreme Court has refused to adopt definitive rules, and has instead required a multi-factor test: (1) "the economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 125.

Appellants distort these factors in service of their claim, attempting to strip them of the factual specificity they plainly require. Apart from the fundamental legal flaws of this argument, Appellants' mischaracterization of the law means they fail to show that they actually meet the *Penn Central* factors. And, as a result, Appellants could not prevail even if the non-categorical test could be applied here.

The economic impact of the regulation on the claimant. This factor gauges how much value a particular property has lost as a result of the challenged regulation. This factual determination compares the "value that has been taken from the property with the value that remains in the property." *Murr v. Wisconsin*,

137 S. Ct. 1933, 1943 (2017). And this comparison, in turn, requires a detailed examination of what the value of the specific property would be without the regulation *and* "the proper unit of property against which to assess the effect" of the regulation. *Id*. Appellants attempt to gloss over all of these fact-bound (and required) inquiries by claiming that New York's RSL has an economic impact *generally* because rent-stabilized apartments *generally* charge lower rent than exempt apartments. App. Br. at 49-50.

But this proposition by itself says nothing about the RSL's impact on a particular property. The law requires looking at "the [regulation's] effect on the *entire* property held by the owner." *Murr*, 137 S. Ct. at 1944 (emphasis added). As a result, different landlords will have different units of comparison. For example, a landlord who owns multiple units in a building, including a mix of rent-stabilized and exempt units, might have a different "denominator" than a landlord who only owns rent-stabilized units.[5] *Keystone*, 480 U.S. at 497. This reliance on *ad hoc* economic assessments of each owner's property reinforces the as-applied nature of the test. And Appellants' failure to show any *particular* loss of economic value for *specific* landowners means they do not demonstrate this factor even if the

[5] In addition, underscoring the fact-sensitive nature of the inquiry, California state law permits landlords to set the initial rent for each new tenancy. Cal. Civ. Code § 1954.53. As a result, even in buildings subject to rent control laws, each unit could have different rent levels depending on the length of the tenancy.

Penn Central test applied.

The extent to which the regulation has interfered with distinct investment-backed expectations. Determining whether the regulation interferes with investment-backed expectations requires a factual finding that the property was bought "in reliance on a state of affairs that did not include the challenged regulatory regime." *Allen v. Cuomo*, 100 F.3d 253, 262 (2d Cir. 1996) (internal citations omitted). Appellants argue that New York's RSL generally interferes with investment-backed expectations by reducing landlord profits compared to market-rate apartments. App. Br. at 52. But Appellants' failure to address this factor's central factual question is fatal. New York's State and local governments have employed some form of rent regulation since the 1940s, but compliance costs have changed over time. Since landlords expect some regulatory compliance costs, and those costs will differ on a per-unit basis, this factor requires cataloguing the investment-backed expectations of *each* landlord in New York City for *each* rent-stabilized unit. Indeed, many New York landlords of rent-stabilized units would receive an unexpected *windfall* if the current regulations were curtailed. The thousands of permutations of this analysis are a reminder of why this *ad hoc*, factual inquiry is not amenable to a facial challenge.

The character of the governmental action. This final factor inquires whether the regulation at issue constitutes "an affirmative exploitation by the state," as

distinct from "a negative restriction" on the use of the property. *Buffalo Teachers Fed'n*, 464 F.3d at 375; *see also Horne v. Dep't of Agriculture*, 576 U.S. 350, 361 (2015) (affirming "the longstanding distinction between government acquisitions of property and regulations") (internal citation omitted). Appellants also misconstrue this factor; they neither acknowledge nor faithfully apply this controlling precedent. Instead, they claim, among other things, that New York's RSL has the character of governmental action because it regulates property use by owners of rent-stabilized apartments. *See* App. Br. at 46-47. But New York's RSL is fundamentally a negative restriction on the use of property and not "tantamount to a direct appropriation or ouster" by the government. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

In *Buffalo Teachers*, this Court held that the state's action was "uncharacteristic of a regulatory taking" because nothing was "affirmatively taken by the government." 464 F.3d at 375 (holding that annulling a "contractual right to a wage increase" was uncharacteristic of a regulatory taking because the government did not acquire property). Just like the statute in *Buffalo Teachers*, New York's RSL is a negative restriction, not a government acquisition of property, because it merely restricts how landlords use their property and contract with tenants. It is not characteristic of a regulatory taking.

In sum, Appellants' facial regulatory challenge to New York's RSL is not

viable because the *Penn Central* factors require engaging in *ad hoc*, factual assessments for each unit. Moreover, a facial challenge "must establish that *no set of circumstances* exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). Appellants fail to establish that there is *a* set of circumstances under which the RSL is invalid, let alone that it is invalid in *all* possible circumstances. And individual landlords aggrieved by the RSL are not without remedy; such landlords could seek relief under an as-applied theory, to highlight the impact in their individual cases.

II. Rent Stabilization Laws Promote the Continuity of Neighborhoods, Prevent Displacement, and Work in Tandem with State and Local Programs to Serve the Entire Community.

A. Appellants' Request for Strict Scrutiny Is Wrong on the Law and Dangerous in its Implications.

Appellants argue that New York's RSL violates the Due Process Clause and that the District Court erred by applying rational basis review to that claim. *See* App. Br. at 59. But the law here is neither unsettled nor ambiguous: The District Court applied the correct analysis. Property regulations violate the Due Process Clause only when they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid*, 272 U.S. at 395; *see also Lingle*, 544 U.S. at 542 (rational basis review for economic regulation); *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (same); *Pennell*, 485 U.S. at 11 (same); *Beatie v. City of New York*, 123

F.3d 707, 712 (2d Cir. 1997) (same).

Appellants insist that property rights are "fundamental rights" and, as a result, regulations affecting *any property right* should be reviewed under strict scrutiny. App. Br. at 59. But Appellants fail to identify a single case to support that contention, choosing to ignore the law. *See United States v. Locke*, 471 U.S. 84, 109 (1985) ("[I]n the regulation of private property rights, the Constitution offers the courts no warrant to inquire into whether some other scheme might be more rational[.]"). Instead, Appellants cite *Washington v. Glucksberg*, which holds that strict scrutiny applies only when the right is "deeply rooted in this Nation's history and tradition," and is so "implicit in the concept of ordered liberty . . . that neither liberty nor justice would exist if [the right] were sacrificed." 521 U.S. 702, 721 (1997) (internal citations omitted).

To put it mildly, the nation's liberty and justice do not depend on total freedom from economic regulation; to the contrary, even freedom to contract is a "qualified, and not an absolute, right." *West Coast Hotel Co. v. Parish*, 300 U.S. 379, 392 (1937). Accordingly, in the modern era, courts subject economic regulations to rational basis review. *See, e.g.*, *Loretto*, 458 U.S. at 426 (affirming "substantial regulation" of private property "to promote the public interest"). And, under that standard, "it is very difficult to overcome the strong presumption of rationality that attaches to" the regulations. *Beatie*, 123 F.3d at 712.

If strict scrutiny were applied to property rights, then the cascading effects could, for example, nullify zoning laws across the country. *See Village of Euclid*, 272 U.S. at 391 (holding that zoning ordinances "bear[] a rational relation to the health and safety of the community"). Such an outcome would devastate "the most essential function performed by local government," which ensures local control over local issues and protects diverse notions of "quality of life." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13-14 (1974) (J. Marshall, dissenting). If strict scrutiny was applied to all property used in economic transactions (as Appellants seek), then the dizzying consequences could extend immeasurably far: to consumer protection laws, land use laws, building codes, food safety ordinances, minimum wage laws, and more.

Appellants and Amici SFAA/CAA alternatively characterize landlords as a vulnerable minority who have been hurt by "an increasingly hostile atmosphere." Amici SFAA/CAA Br. at 13. But this claim is neither legally nor factually serious.[6] To the contrary, Amici SFAA/CAA have banked impressive legislative

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[6] Amici SFAA/CAA point to the gradual increase in statutory requirements for "habitability" as proof of a hostile atmosphere. Amici SFAA/CAA Br. at 35 n.20. But the implied warranty of habitability exists in nearly every jurisdiction in America—and it was first created in *Javins v. First Nat'l Realty Corp. See* 428 F.2d 1071 (D.C. Cir. 1970). Appellants and Amici SFAA/CAA's claim of "hostility" against them is based on the extraordinary claim that there they are a protected class because they face the "burdens" of maintaining units with "roof[s],

successes, including recent successful lobbying for a $2.6 billion State law guaranteeing landlords up to eighty percent of unpaid rent by tenants who are financially impacted by COVID-19.[7] Indeed, San Francisco has created a relief fund to provide financial support to landlords of rent-controlled units whose tenants have been unable to pay rent due to the COVID-19 pandemic. *See* S.F. Admin. Code §§ 10.100-51.1. Landlords have also obtained significant protections in the California Legislature through the Costa-Hawkins Act and the Ellis Act, which significantly limit local rent control laws.[8] *See* Cal. Civ. Code § 1954.50, *et seq.*; Cal. Gov. Code § 7060, *et seq.*; *see also* Cal. Assemb. Bill 1506 (2017) (failed repeal bill). And landlords have even successfully lobbied the electorate to reject attempts to narrow their protections. *See, e.g.*, Cal. Proposition 10 (2018) (failed initiative to expand local governments' authority to enact rent control on

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walls, floors" and of ensuring that all units have "hot and cold water." Amici SFAA/CAA Br. at 35 n.20.

[7] *See Gov. Newsom signs bill that will use $2.6 billion in federal funds for unpaid rent*, CALIFORNIA APARTMENT ASSOCIATION (Jan. 29, 2021), https://caanet.org/gov-newsom-signs-bill-with-2-6-billion-in-federal-funds-for-unpaid-rent/.

[8] In general, the Costa-Hawkins Rental Housing Act protects landlords by prohibiting rent control on certain types of housing, such as newly constructed rentals and allowing landlords to set the initial rent for new tenants. Cal. Civ. Code § 1954.50 *et seq*. The Ellis Act allows landlords to evict tenants in rent-controlled units, who would otherwise be protected from no-fault evictions, when a landlord seeks to leave the rental business. Cal. Gov. Code § 7060 *et seq*.

residential property); Cal. Proposition 21 (2020) (same). Billions of dollars in State aid and protective State regulations are not the products of "a position of political powerlessness." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

SFAA/CAA cite several lawsuits challenging San Francisco rent control regulations in support of their claim that they have been subjected to "anti-landlord legislation." *See* Amici SFAA/CAA Br. at 14 n.3. Far from establishing landlords as a vulnerable population, however, SFAA/CAA's list simply shows that landlords regularly challenge San Francisco's regulations—and that they sometimes succeed, but often not. Moreover, rents in San Francisco remain among the highest in the nation, despite the limits that the City imposes on rent increases once a tenant begins occupancy.[9] There are thousands of eviction filings in San Francisco per year, and landlords generally can reset the rent to market at the start of each new tenancy. For example, in 2018-2019, the San Francisco Rent Board reported over 1,500 eviction notices.[10]

At base, this lawsuit is an attack on the merits of rent stabilization laws, not

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[9] Neil Gerstein, *Zumper National Rent Report*, ZUMPER: BLOG (Mar. 24, 2021), https://www.zumper.com/blog/zumper-national-rent-report-march-2021/.

[10] *Rent Board Annual Statistical Report FY 2018-2019*, SAN FRANCISCO RESIDENTIAL RENT STABILIZATION AND ARBITRATION BOARD 2 (Nov. 15, 2019), https://sfrb.org/sites/default/files/Document/Statistics/Annual%20Statistical%20Report%20FY2018-2019-Web_Final.pdf.

an attempt to protect a truly vulnerable minority from abuse. But whether RSLs are wise policy is a matter for the people through their elected representatives. *See Lingle*, 544 U.S. at 545 (explaining that rational basis review gives "deference to legislative judgments" in determining "the need for, and likely effectiveness of, regulatory actions"). The only question for this Court is whether the government has a rational basis for its enactment.

B. Rent Stabilization Laws Promote Housing Stability and Preserve Neighborhoods.

Appellants contend that New York's RSL violates the Due Process Clause because, even if evaluated under rational basis review, the legislation does not achieve its stated purpose. *See* App. Br. at 61-65. While courts have consistently found that rent stabilization laws *do* achieve their stated purposes, the Due Process Clause imposes no burden on local jurisdictions to prove it. To show that the RSL lacks any rational basis under the Due Process Clause, Appellants must prove that "there is [no] reasonably conceivable state of facts that could provide a rational basis" for the law. *Beach Comm'ns*, 508 U.S. at 313, 315 (concluding that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence").

Across New York and California, state and local governments use RSLs to prevent disruptive rent increases and further their "legitimate interest in local

neighborhood preservation, continuity, and stability." *Nordlinger*, 505 U.S. at 12 (1992). California's cities implement a diverse array of rent stabilization laws to further local objectives and to protect vulnerable populations. For example, the City of Los Angeles enacted its Rent Stabilization Ordinance (RSO) in 1978 to combat a severe housing shortage and rising rents, which disparately affected, and continues to affect, "senior citizens, persons on fixed incomes, and low and moderate income households." L.A. Mun. Code § 151.01. The City of Los Angeles ties permissible rent increases to the consumer price index, with a 3 percent floor and an 8 percent ceiling, which has led to lower tenant turnover in RSO units than in unregulated units.[11] *See* L.A. Mun. Code §§ 151.06, 151.07. And the City of West Hollywood—one of California's most densely populated cities—passed its RSO, in part, to allow its renters to age in place and to prevent displacement of its elder community members. *See* West Hollywood Mun. Code § 17.04.020.[12]

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[11] *See* ECONOMIC STUDY OF THE RENT STABILIZATION ORDINANCE AND THE LOCAL HOUSING MARKET, CITY OF LOS ANGELES HOUS. DEP'T. 19 (2009), https://clkrep.lacity.org/onlinedocs/2007/07-0883_rpt_lahd_6-25-2009-1.pdf

[12] Indeed, the California Legislature recently chose to leave these local, varied protections in place by enacting the Emergency Tenant Protection Act of 2019 (ETPA). Amici SFAA/CAA mischaracterize the ETPA as a "statewide rent control bill," *see* SFAA/CAA Br. at 2, 33-34 n.18, but to the contrary, the ETPA is a targeted and time-limited provision enacted to curb specific forms of rent-gouging, *see* A.B. 1482, Cal. Assemb. Floor Analysis 2 (Sept. 10, 2019). For

These laws also evolve as local governments respond to the community's changing needs. In response to the effects of displacement on children attending schools, the City of Berkeley recently amended its rent-stabilization ordinance to prohibit owner-move-in evictions of families with school-aged children during the school year. *See* Berkeley Mun. Code § 13.76.130(a)(9)(k). San Francisco has, over the years, enacted special eviction protections for its most vulnerable residents, such as victims of domestic violence, school-age children, teachers, and the elderly. S.F. Admin. Code §§ 37.1, 37.9(a)(3), (i), (j). And, in the face of rampant residential real estate speculation, Santa Monica's policies target types of rapid rent increases that disparately affect "the poor, minorities, students, young families, and senior citizens." Santa Monica Rent Control Charter Amendment, Art. XVIII § 1800.

Some of Amici's laws reflect California's tradition of direct democracy. Santa Monica's Rent Control Law, which was enacted by voter initiative as an

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example, the ETPA sets modest caps on the percentage by which rent may be increased for some properties and imposes a "just cause" requirement to help prevent landlords from evicting tenants in order to dramatically increase rents. Cal. Civ. Code §§ 1947.12, 1946.2. In these ways, the ETPA complements, rather than supplants, more protective rent-stabilization and eviction-protection laws enacted by local governments, including Amici, in response to particular local needs and conditions. *Id.* § 1947.12(k); *see also* A.B. 1482, Cal. Assemb. Floor Analysis 2 (Sept. 10, 2019).

amendment to the City Charter, allows both landlords and tenants to petition for hearings on adjustments to the rent beyond the allowed annual increase. *See* Santa Monica Rent Control Charter Amendment, Art. XVIII. Similarly, Berkeley's rent stabilization law was originally passed by voter initiative. *See* Berkeley Mun. Code § 13.76.020.

Many of Amici's RSLs also seek to balance the interests of landlords and tenants. Oakland's RSL intends to "encourage investment in residential housing while also protecting the welfare of residential tenants" and "foster[ing] better relations between rental property owners and tenants." Oakland Mun. Code § 8.22.010. As a result, Oakland allows rent increases for rehabilitation costs and allows landlords to bank rent increases not imposed in prior years; the City even mediates disputes between landlords and tenants over rental rates and evictions. *See id.* at §§ 8.22.065, 8.22.100, 8.22.140. Amici's RSLs guarantee fair returns for landlords on their rental properties. *See, e.g.*, West Hollywood Mun. Code § 17.32.010; Santa Monica Charter Amend., Art. XVIII § 1800. RSLs cannot (and are not intended to) stop all displacement, and they recognize that landlords need to be able to charge adequate rents and retain a financial incentive to keep their properties safe and habitable.

While protecting low-income households is an important feature of New York's RSL and many others, Appellants erroneously claim that RSLs seek *only* to

maintain low-income housing. *See* App. Br. at 62. State and local governments serve their entire populations, seeking not only to maintain low-income housing, but also moderate-income housing, mixed-income neighborhoods, and the distinctive character of our communities, which would otherwise be eroded by displacement. These "legitimate interest[s]" are more than sufficient to establish a rational basis to regulate the landlord-tenant relationship. *Nordlinger*, 505 U.S. at 12.

C. Rent Stabilization Laws Also Serve as One Important Prong in a Mix of Strategies to Address the Broader Effects of Housing Instability and Protect the Public Health.

Rent stabilization laws also function as a component of a far broader set of government programs and policies addressing the implications of housing instability and precarity and their effects on public health and resident welfare. These extensive efforts have drawn from every available resource in governments' toolbox—including, for example, significant funding for affordable housing, social services, and public health programs; regulations protecting tenants and landlords alike; standards for housing quality and safety; and a varied and evolving mix of development initiatives, incentives, and innovations. The rationale for any particular rent stabilization regime thus cannot be evaluated in a vacuum. Rather, such regulatory programs are properly understood as one important and long-accepted plank in a series of strategies by which governments seek to act on every

front to curb displacement and homelessness, support tenants and landlords, and protect public health, safety, and general welfare.

Amici's experience as safety-net providers for our residents confirms that rent increases and evictions are a leading cause of tenant displacement.[13] The corrosive effects of such displacement are far-reaching. After an eviction in a tight rental market, it is "extremely difficult to relocate in the same city, or even the same region."[14] This displacement negatively impacts children's education, with children who move frequently experiencing academic delays, lower test scores, and frequent school absences.[15] Some families are forced into crowded conditions, which is similarly detrimental to children's academic and behavioral development.[16] Displacement also affects families' support structure and

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[13] *See generally* Bay Area Regional Health Inequities Initiative, *Displacement Brief*, GETHEALTHY SAN MATEO COUNTY 2, http://www.gethealthysmc.org/sites/main/files/file-attachments/barhii-displacement-brief.pdf?1465844839 (last visited Apr. 13, 2021).

[14] A.B. 1482, Cal. Assemb. Floor Analysis 2 (Sept. 10, 2019).

[15] Bay Area Regional Health Inequities Initiative, *Displacement Brief*, GETHEALTHY SAN MATEO COUNTY 2, http://www.gethealthysmc.org/sites/main/files/file-attachments/barhii-displacement-brief.pdf?1465844839 (last visited Apr. 13, 2021).

[16] *Id.*; *see also* County of Santa Clara Department of Planning and Development and Office of Supportive Housing, *Inclusionary Housing Ordinance*, COUNTY OF SANTA CLARA 5 (May 26 and May 28, 2020), https://www.sccgov.org/sites/dpd/DocsForms/Documents/InclusionaryHousing_Outreach_Presentation.pdf.

employment opportunities.[17] Finally, evictions and large rent increases are a major cause of homelessness, with dramatic increases in rent sometimes acting as a "final straw" driving people into homelessness.[18]

Housing instability, evictions, and displacement in turn have marked and well-documented impacts on public health[19] and place significant added strain on Amici's safety-net health care institutions.[20] Local and state governments' recent

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[17] A.B. 1482, Cal. Assemb. Floor Analysis 2 (Sept. 10, 2019).

[18] A.B. 1482, Cal. Senate Judiciary Report 1 (July 8, 2019).

[19] *See, e.g.*, THE STATE OF THE NATION'S HOUS., JOINT CTR. FOR HOUS. STUDIES OF HARV. U. 5-6 (2013), https://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2013.pdf (explaining that families spend less on food and healthcare when rent is high); Bay Area Regional Health Inequities Initiative, *Displacement Brief*, GETHEALTHY SAN MATEO COUNTY 1, http://www.gethealthysmc.org/sites/main/files/file-attachments/barhii-displacement-brief.pdf?1465844839 (last visited Apr. 13, 2021). (explaining that people who cannot afford housing are less likely to attend medical appointments and take needed medications); *Homelessness and Health: What's the Connection?*, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL 1-2 (Feb. 2019), https://nhchc.org/wp-content/uploads/2019/08/homelessness-and-health.pdf (discussing nexus between homelessness and health issues).

[20] Several of Amici play a central role in protecting public health and/or providing safety-net health care. The County of Santa Clara, for example, is the second largest safety-net medical provider in the State of California, operating an extensive network of County-owned hospitals, satellite health clinics, and public pharmacies; a public health department covering 15 cities within the County; and a publicly run health insurance plan available to anyone who lives or works in the County. San Francisco's budget anticipates $2.6 billion of funding in the upcoming fiscal year for public health services and safety-net medical care, including over a billion dollars in funding for Zuckerberg San Francisco General Hospital. *See FY 2021-22 and FY 2022-23 Budget*, S.F. DEP'T PUB. HEALTH 4

experience battling the effects of COVID-19 has only further underscored the close nexus between housing stability and public health. For example, policies that limit evictions have been found to reduce cumulative deaths by 11 percent.[21] Looking forward, stable housing will continue to be particularly important for people experiencing chronic symptoms or complications from COVID-19. And Amici anticipate that more residents will be at risk of homelessness due to the economic impacts of COVID-19, as well as the expiration of pandemic-related eviction moratoriums.

Recognizing the acute and cascading harms to the public resulting from housing instability and lack of affordable housing stock, Amici, like many other local governments, have collectively invested extensive public resources and enacted policies to build and protect affordable housing. For example, Santa Clara County voters approved an $950 million affordable housing bond, with planned development projects across seven cities within the County over the next several

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(Jan. 19, 2021), https://www.sfdph.org/dph/files/budget/files/FY_21-23_HC_First_Budget_Hearing_Presention-1-19-21_Final.pdf. San Francisco has also budgeted almost $490 million in public funds for supportive housing and shelters this fiscal year. *See Budget*, S.F. DEP'T HOMELESSNESS & SUPPORTIVE HOUS., https://hsh.sfgov.org/about/budget/ (last visited Apr. 22, 2021).

[21] Kay Jowers et al., *Housing Precarity and the COVID-19 Pandemic: Impacts of Utility Disconnection and Eviction Moratoria on Infections and Deaths Across US Counties*, NAT'L BUREAU OF ECON. RES. WORKING PAPER 11 (Jan. 2021), https://www.nber.org/system/files/working_papers/w28394/w28394.pdf.

years.[22] Similarly, the City of Los Angeles has committed over $973 million in loans for the construction of permanent supportive housing, along with millions of dollars each year in low-interest loans and tax credits for the construction and rehabilitation of affordable housing.[23] As part of these and other funding and regulatory programs, new developments are subject to a varied range of inclusionary housing incentives and requirements. *See, e.g.*, Santa Monica Municipal Code Chapter 9.64, Affordable Housing Production Program ("requires developers of market rate multi-family developments to contribute to affordable housing production and thereby help the City meet its affordable housing need"); L.A. Muni. Code § 12.22 A.31 (providing land use incentives in exchange for affordable housing). Landlords have also received significant public subsidies to shield them from the impact of COVID-related losses. *See* S.B. 91, 2021-2022 Leg., Reg. Sess. (Cal. 2021); S.F. Admin. Code §§ 10.100-51.1.

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[22] *County of Santa Clara Approves Funding for 7 More Affordable Housing Developments Totaling 865 New Apartments for Homeless, Senior and Low-Income Residents*, COUNTY OF SANTA CLARA: NEWS (March 10, 2020), https://www.sccgov.org/sites/opa/newsroom/Pages/more-affordable-housing.aspx.

[23] *Prop HHH Developments Summary*, CITY OF LOS ANGELES: HOUS. & COMMUNITY INVESTMENT DEP'T. (March 24, 2021), https://hcidla2.lacity.org/housing/prop-hhh-developments-summary; *Affordable Housing Managed Pipeline*, CITY OF LOS ANGELES: HOUS. & COMMUNITY INVESTMENT DEP'T. (April 13, 2021), https://hcidla2.lacity.org/partners/affordable-housing-managed-pipeline.

In New York and California, the need for such a multi-layered approach to addressing these issues is particularly acute given their long-standing and accelerating housing crises. In California, close to 30 percent of renters spend more than half of their income on rent[24]—leaving them with far less money to purchase other necessities like food and healthcare.[25] And over a million households—19 percent of all renter households—were behind on their rent payments as of December 2020.[26] Federal data from January 2020 indicates that whereas homelessness had increased about 2.2% nationally, California had experienced an increase of more than three times that rate.[27] Such intractable and complex problems often call, in Amici's experience, for a mix of strategies to address the causes and implications of housing instability on multiple fronts, such

[24] Sara Kimberlin, *Californians In All Parts of the State Pay More Than They Can Afford For Housing*, CAL. BUDGET & POL'Y CTR. (Sept. 2017), https://calbudgetcenter.org/resources/californians-parts-state-pay-can-afford-housing/.

[25] THE STATE OF THE NATION'S HOUS., JOINT CTR. FOR HOUS. STUDIES OF HARV. U. 5-6, 9 (2013), https://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2013.pdf.

[26] *See Fact Sheet: Preventing Eviction and Indebtedness in California*, BAY AREA EQUITY ATLAS, https://bayareaequityatlas.org/research/analyses/COVID-19-evictions-california (last visited Apr. 22, 2021).

[27] THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS, U.S. DEP'T OF HOUS. & URBAN DEV. 7, 11 (Jan. 2011), https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf.

as by acting both to increase housing stock *and* to protect those who are already housed from eviction.

If anything, Amici's experience reflects that no one approach to addressing the causes and effects of housing disparities and shortages is a panacea. Placing a rent stabilization program in the mix of state and local regulations and programs protecting tenants and landlords, incentivizing development and protection of housing, and responding to varied local needs and conditions is quite clearly rationally related to a legitimate governmental purpose.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's decision.

Respectfully submitted,

Dated: April 23, 2021

OFFICE OF THE COUNTY COUNSEL,
COUNTY OF SANTA CLARA

By: *____/s/ Zoé E. Friedland__*
ZOÉ E. FRIEDLAND

JAMES R. WILLIAMS
SUSAN P. GREENBERG
70 W. Hedding Street,
East Wing, 9th Floor
San José, CA 95110
Telephone: (408) 299-5900
Email: zoe.friedland@cco.sccgov.org

Attorneys for Amicus Curiae
COUNTY OF SANTA CLARA, CA

OFFICE OF THE LOS ANGELES
CITY ATTORNEY

By: *___/s/ Danielle L. Goldstein__*
DANIELLE L. GOLDSTEIN

ELAINE ZHONG
200 North Spring Street, 14th Floor
Los Angeles, CA 90012
Telephone: (213) 978-1868
Email: danielle.goldstein@lacity.org

Attorneys for Amicus Curiae
CITY OF LOS ANGELES, CA

ADDITIONAL COUNSEL FOR AMICI CURIAE

Alison Regan
Santa Monica Rent Control Board
1685 Main Street, Room 202
Santa Monica, CA 90401

Attorney for Amicus Curiae*,*
Santa Monica Rent Control Board

George S. Cardona
Interim City Attorney
1685 Main Street, Room 310
Santa Monica, CA 90401

Attorney for Amicus Curiae
City of Santa Monica

Matthew Siegel
Staff Attorney
2125 Milvia St.
Berkeley, CA 94704

Attorney for Amicus Curiae
Berkeley Rent Stabilization Board

Barbara J. Parker
City Attorney
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94612

Attorney for Amicus Curiae
City of Oakland, California

Lauren Langer
City Attorney, City of West Hollywood
Best, Best and Krieger
1230 Rosecrans Avenue, Suite 110
Manhattan Beach, California 90266

Attorney for Amicus Curiae
City of West Hollywood, California

Dennis J. Herrera
City Attorney
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102

Attorney for Amicus Curiae *City and County of San Francisco, California*

Nora Frimann
City Attorney
Office of the City Attorney
200 E. Santa Clara Street, 16th Floor
San Jose, California 95113-1905

Attorney for Amicus Curiae
City of San Jose, California

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-1(c) because it contains 6,497 words, exclusive of the portions of the brief that are exempted by Federal Rule of Appellate Procedure 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: April 23, 2021

By: *_/s/ Danielle L. Goldstein_*
Danielle L. Goldstein

CERTIFICATE OF SERVICE

I, Danielle L. Goldstein, hereby certify that I electronically filed this Brief of Amici Curiae Cities of Los Angeles, San José, Santa Monica, Oakland, and West Hollywood, California, the County Of Santa Clara, the City And County Of San Francisco, California, the Santa Monica Rent Control Board, and the Berkeley Rent Stabilization Board in Support Of Defendants-Appellees and Affirmance with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on April 23, 2021. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed April 23, 2021, at Los Angeles, California.

/s/ Danielle L. Goldstein
Danielle L. Goldstein