

# No. 20-3366

IN THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

—against—

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

Defendants-Appellees,

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

Intervenors.

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

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**BRIEF OF *AMICI CURIAE* THE NATIONAL HOUSING LAW PROJECT,  
ET AL., IN SUPPORT OF DEFENDANTS-APPELLEES ADVOCATING  
AFFIRMANCE**

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**CORPORATE DISCLOSURE STATEMENT PURSUANT  
TO FED. R. APP. P. 26.1 AND 29**

*Amici Curiae* the National Housing Law Project, KC Tenants Union, Alliance for Housing Justice, National Low-Income Housing Coalition, and Lift The Ban Coalition are non-profit corporations or coalitions of non-profit corporations, and are not publicly held companies that issue stock. The *amici* have no financial interest in the outcome of this litigation.

Date:

April 23, 2021

/s/ Katherine E. Walz

*Counsel for Amici Curiae*

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## INTERESTS OF THE AMICUS CURIAE

From firsthand experiences advocating for better tenant protections, and as organizers of legal aid attorneys, tenants, and organizers across the country fighting for housing justice and racial equity, *Amici* have a strong and unique interest in this case as the loss of core tenant protections, such as rent stabilization, among other policies, undercut efforts to ensure that the laws recognize tenants as valued members of society entitled to decent, safe, affordable, and secure housing.<sup>1</sup>

**The National Housing Law Project (NHLP)** is a nonprofit organization that advances housing justice for poor people and communities, predominantly through technical assistance and training to legal aid attorneys, policy advocacy, and co-counseling litigation. NHLP works to strengthen and enforce tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes. NHLP also coordinates the Housing Justice Network, a collection of over 1,400 legal aid attorneys, advocates, and organizers from around the United States who collaborate to advance model state and local laws and litigation that protect tenants and their housing.

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<sup>1</sup> Pursuant to F.R.A.P. 29(a)(4)(E), no party's counsel authored the amicus brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the amicus brief, and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. All parties consented to its filing.

**The KC Tenants Union** (“KC Tenants”) is an organization led by a multiracial, multigenerational base of poor and working-class tenants in Kansas City, MO. KC Tenants are organizing to ensure that everyone in KC has a safe, accessible, and truly affordable home. KC Tenants organizes and develops grassroots tenant leaders to learn their rights, tell their stories, and determine their own liberation. KC Tenants push for visionary and comprehensive housing strategies with explicit racial justice outcomes, including a Kansas City Tenant Bill of Rights, protection from discrimination and exploitation in the rental market, the right to counsel in landlord-tenant matters, the right to decent housing, the right to organize, and protection from retaliation. KC Tenants is also advocating for removal of the ban on rent control in Missouri state law.

**The National Low-Income Housing Coalition** (“NLIHC”) is a national non-profit membership-based organization headquartered in Washington D.C. NLIHC has over 1,000 members across the United States, including housing developers and landlords, public housing agencies, state and local government bodies, nonprofit organizations, and individuals. NLIHC has members in every U.S. state, the District of Columbia, and Puerto Rico. NLIHC advocates to preserve and increase the supply of federal affordable housing, protect low-income renters, and promote equitable access to affordable housing.

Formed in 2017, **The Lift the Ban Coalition** (LTB Coalition), is comprised of grassroots community groups, political organizations, nonprofits, and unions in Chicago and across the state of Illinois. The LTB Coalition members are renters, homeowners, small landlords, workers, students, seniors, local elected officials, and faith leaders united in the struggle for housing justice. The LTB Coalition is a multiracial, multigenerational coalition centering the needs of low-income and working-class families. The LTB Coalition advocates for economic well-being and stability for Illinois' families through repealing Illinois' Rent Control Preemption Act of 1997, and establishing rent control for Illinois residents.

**The Alliance for Housing Justice** (AHJ) is a coalition of legal, policy, research and grassroots organizing groups dedicated to supporting the full realization of the human right to housing, so that all people can live fulfilling and healthy lives. While AHJ has been in existence for four years, the five core partners of the Alliance have a combined 175 years of experience working to advance fair and equitable housing. AHJ's work promotes policy interventions driven by those most impacted to guarantee a safe, healthy and affordable home, free from discrimination and the threat of displacement for all. AHJ works to achieve these goals by supporting the capacity, power, and priorities of those most impacted by housing injustice including Black Indigenous, women and people of color. The Alliance for Housing Justice is a collaboration of Lawyers' Committee

for Civil Rights Under Law, PolicyLink, Poverty & Race Research Action Council, Public Advocates and Right to the City Alliance

### **SUMMARY OF ARGUMENT**

The United States is increasingly becoming a renter nation, with more and more households joining the permanent renter class, deep disparities in access to homeownership among Black and Latinx households, and with rental housing costs rising far above household incomes. State and local governments provide an essential forum for developing regulatory policies that stabilize renters, balance the landlord-tenant relationship, and bring it into the 21<sup>st</sup> century. The District Court properly granted the motion of defendants-appellees to dismiss the case because of the long-standing caselaw recognizing it as a proper exercise of police power.

### **ARGUMENT**

#### **I. AS THE UNITED STATES BECOMES A RENTER NATION, HOUSING POLICIES MUST PROTECT RENTERS AND BRING BALANCE TO THE LANDLORD-TENANT RELATIONSHIP.**

Since the Great Recession and housing bust of more than a decade ago, the United States has increasingly become a nation of renters.<sup>2</sup> Public policy has not

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<sup>2</sup> Anthony Cilluffo, A.W. Geiger & Richard Fry, *More U.S. Households are Renting than at Any Point in 50 years*, Pew Research Center (July 19, 2017), <https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/>

always kept pace with this trend, often leaving tenants at the mercy of their landlords. State and local governments can play a vital role in creating an important framework of housing policies that increase protections and stability for tenants. The notion of the American dream, which has centered around homeownership for close to 100 years,<sup>3</sup> must evolve to include the nation's millions of tenants deserving of greater housing security.

According to the National Multifamily Housing Council, more than 44.1 million households are renters,<sup>4</sup> accounting for roughly 36% of all United States households.<sup>5</sup> More U.S. households are renters than at any point since at least 1965.<sup>6</sup> Between 2001 and 2017, the number of renters increased across all age groups, except for adults 65 and older, whose renter rate has remained steady.<sup>7</sup> The number of people who rent their housing will continue to expand into the future. Between 2020 and 2040, the number of older adults who rent is expected to

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<sup>3</sup> See Brian J. McCabe, *No Place Like Home: Wealth, Community & The Politics of Homeownership*, Ch. 2 (2015).

<sup>4</sup> National Multifamily Housing Council, *Quick Facts: Resident Demographics* (Apr. 16, 2021, 7:32 PM), <https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/>.

<sup>5</sup> United States Census Bureau, *See QuickFacts: United States* (Apr. 16, 2021, 7:32 PM), <https://www.census.gov/quickfacts/fact/table/US/HSD410219>.

<sup>6</sup> Cilluffo, Geiger & Fry, *supra* note 2.

<sup>7</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-427, *RENTAL HOUSING: AS MORE HOUSEHOLDS RENT, THE POOREST FACE AFFORDABILITY AND HOUSING QUALITY CHALLENGES* 6-7 (2020); Cilluffo, Geiger & Fry *supra* note 2.



explode, increasing from 34 million to 48 million, with the greatest increase among Black senior heads of household.<sup>8</sup>

The nation's largest generation, millennials, who span the ages of 24 to 39, will continue to lag behind previous generations in attaining homeownership.<sup>9</sup> Saddled with student loan debt and little savings, almost 1 in 5 millennial renters believe they will never own a home.<sup>10</sup> Due to massive wealth inequality, Black millennials face the greatest generational homeownership divide, with white millennials by age 30 more than 2.5 times likely to own a home than their Black counterparts.<sup>11</sup> The COVID-19 pandemic only worsened housing affordability among millennials, making homeownership even less attainable.<sup>12</sup>

Only with a safety net of protections, including rent stabilization, for current and future generations of lifelong renters, can we ensure that tenants and the communities they live in are secure from housing instability.

**A. Systemic Racism Led to Black and Latinx Households Being Left Out of or Discriminated Against Within the Homeownership Market, Forcing Them into Rental Housing.**

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<sup>8</sup> Laurie Goodman & Jun Zhu, *What Will it Take to Support 5.5 Million More Senior Renters by 2040?*, Urban Institute, (Feb. 9, 2021), <https://www.urban.org/urban-wire?blogsearch=senior+renters>

<sup>9</sup> Rob Warnock, *Apartment's List 2021 Millennial Homeownership Report*, Apartment List, (Feb. 9, 2021), <https://www.apartmentlist.com/research/millennial-homeownership-2021>

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Due to more than a century of structural racism and ongoing discrimination, Black and Latinx households in the United States were largely left out of homeownership efforts.<sup>13</sup> Thus, they are more likely to rent than white households.<sup>14</sup> Even when they do achieve homeownership, they often face predatory lending, lower home valuations, or other discriminatory policies and practices that strip them of wealth and push them back into rental housing.<sup>15</sup> They have also experienced higher rates of poverty and housing insecurity both before and during the COVID-19 pandemic than white households.<sup>16</sup>

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<sup>13</sup> See Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 64-65 (2017); see also NPR, ROBERT WOOD JOHNSON FOUNDATION, HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH, *Discrimination in America: Final Summary* 11-12 (Jan. 2018), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2018/01/NPR-RWJF-HSPH-Discrimination-Final-Summary.pdf>.

<sup>14</sup> JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, *THE STATE OF THE NATION'S HOUSING 2020* 29 (2020).

<sup>15</sup> Michela Zonta, *Racial Disparities in Home Appreciation*, Center for American Progress (Jul. 15, 2019), <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/>.

<sup>16</sup> Jaboa Lake, *The Pandemic Has Exacerbated Housing Instability for Renters of Color*, CENTER FOR AMERICAN PROGRESS (Oct. 30, 2020), <https://www.americanprogress.org/issues/poverty/reports/2020/10/30/492606/pandemic-exacerbated-housing-instability-renters-color> (citing Andrew Aurand et al., “*The Gap: A Shortage of Affordable Homes*,” NATIONAL LOW INCOME HOUSING COALITION (March 2020), [https://reports.nlihc.org/sites/default/files/gap/Gap-Report\\_2020.pdf](https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2020.pdf); POVERTY USA, *The Population of Poverty USA*, <https://www.povertyusa.org/facts> (last visited Dec. 17, 2020).)

At least 48% of renter households are headed by a person of color, even though such households account for only 33% of the overall population.<sup>17</sup> Between 2004 and 2019, the share of renter households headed by a person of color increased by 6 percent.<sup>18</sup> Overall, renters of color face innumerable systemic inequities in accessing and maintaining decent, safe, and affordable rental housing. Renters of color face challenges securing rental housing in areas outside of racially segregated communities, where there are employment opportunities, access to quality health care, grocery stores, and quality schools.<sup>19</sup> They are also more likely to live in rental housing with poor conditions and in zip codes with higher rates of environmental toxins, which can contribute to poor health outcomes.<sup>20</sup> The National Community Reinvestment Coalition noted that in previously redlined neighborhoods, which today are still often primarily Black and Latinx with higher rates of poverty, “there are statistically significant associations between greater redlining and preexisting conditions for heightened risk of morbidity in COVID-19

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<sup>17</sup> *Id.*

<sup>18</sup> *See id.*

<sup>19</sup> Lake, *supra* note 16; JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, *supra* note 14, at 5-6.

<sup>20</sup> BROOKINGS INSTITUTE, *Time for Justice: Tackling Race Inequalities in Health and Housing* (Oct. 19, 2016), <https://www.brookings.edu/research/time-for-justice-tackling-race-inequalities-in-health-and-housing>; David E. Jacobs, *Environmental Health Disparities in Housing*, 101 Suppl. 1 AM. J. PUBLIC HEALTH S115, S116 (2011).

patients like asthma, COPD, diabetes, hypertension, high cholesterol, kidney disease, obesity and stroke.”<sup>21</sup>

Tenants of color are also more likely than white tenants to be cost burdened, meaning they pay more than 30% of their household income towards rent.<sup>22</sup>

Roughly 53.7% of Black tenants and 51.9% of Latinx tenants are cost burdened.<sup>23</sup>

These disparities in rental cost burdens are frequently tied to underlying discrimination and different treatment by property owners, including Black and Latinx renters being shown fewer units and quoted higher rents than their white counterparts.<sup>24</sup>

Evictions are also tinged with racial bias, and disproportionately affect Black and Latinx renters in particular. Research indicates that nonwhite renters face higher eviction rates, and in some cases are more than twice as likely to be evicted as white renters.<sup>25</sup> Evictions also fall particularly hard on Black women. Across their lifetimes, 1 in 5 Black women are evicted, compared with 1 in 15 white

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<sup>21</sup> NATIONAL COMMUNITY REINVESTMENT COALITION, *Redlining and Neighborhood Health* (Sept. 10, 2020), [https://ncrc.org/holc-health/?mc\\_cid=a9108bde40&mc\\_eid=e6da65b132](https://ncrc.org/holc-health/?mc_cid=a9108bde40&mc_eid=e6da65b132).

<sup>22</sup> *Id.* at 35.

<sup>23</sup> *Id.*

<sup>24</sup> U.S. Dept. of Hous. and Urb. Dev., Office of Policy Dev. and Research, *Housing Discrimination Against Racial and Ethnic Minorities 2012* 39, [https://www.huduser.gov/portal/Publications/pdf/HUD-514\\_HDS2012.pdf](https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf).

<sup>25</sup> Lake, *supra* note 16.

women.<sup>26</sup> Even the threat of an eviction has lifelong negative health effects on the household.<sup>27</sup> Black, Latinx, and other tenants of color are also more likely to end up homeless as a result of an eviction.<sup>28</sup> Rental housing regulations can serve as a crucial antidote to these structural inequities that destabilize Black, Latinx, and other renters of color.

### **B. COVID-19 Laid Bare Just How Vital a Comprehensive Set of Housing Protections Can Be.**

COVID-19 has further amplified these racial disparities and growing economic insecurity among households of color, in particular Black and Latino households. Renters of color report having “having less confidence in their ability to pay rent and experiencing greater difficulties staying current on rent compared with their white counterparts.”<sup>29</sup> When the pandemic triggered an economic recession, Black, Native American, and Latinx households also faced higher rates of unemployment,<sup>30</sup> which in turn increased their economic insecurity and inability to pay rent.<sup>31</sup> The severe impacts of the pandemic on households of color will only

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; NPR, ROBERT WOOD JOHNSON FOUNDATION, HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH, *The Impact of the Coronavirus on Households by Race/Ethnicity* 3 (Sept. 2020), [https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2020/09/NPR-Harvard-RWJF-Race-Ethnicity-Poll\\_091620.pdf](https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2020/09/NPR-Harvard-RWJF-Race-Ethnicity-Poll_091620.pdf).

<sup>31</sup> Lake, *supra* note 16.

amplify already striking disparities in both legal and extra-judicial eviction rates. State and local governments must have the power to respond to these crises within established constitutional norms in order to meet the needs of their residents and broader community.

### **C. Without Adequate Protections, Renters Are Less Able to Weather Future Pandemics and Climate Disasters.**

Renters in the United States face a myriad of other vulnerabilities as a result of their renter status, including the inability to successfully navigate disasters. Renters have less access to credit and have smaller financial reserves with which to face emergencies like the COVID-19 pandemic.<sup>32</sup> Such emergencies are expected to occur with greater frequency, especially as climate change increases the occurrence of severe weather events and natural disasters.<sup>33</sup> Existing renters will require additional protections against such disasters, and at the same time, more Americans are likely to become renters as a result of disasters. For example, the devastating wildfires in California of the past five years destroyed thousands of

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<sup>32</sup> Jung Hyun Choi, Laurie Goodman, & Jun Zhu, *We Must Act Quickly to Protect Millions of Vulnerable Renters*, Urban Institute Blog (Mar. 25, 2020), <https://www.urban.org/urban-wire/we-must-act-quickly-protect-millions-vulnerable-renters>.

<sup>33</sup> Christopher Flavelle & Henry Fountain, *Hurricane, Fire, Covid-19: Disasters Expose the Hard Reality of Climate Change*, New York Times (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/climate/hurricane-isaias-apple-fire-climate.html>.

homes, flooding the rental markets in impacted areas and causing rents to soar at the moment of greatest need.<sup>34</sup> To make matters worse, emergency response resources and infrastructure improvements have not kept pace with the increase in severe weather events and natural disasters.<sup>35</sup> In a future where more Americans will become renters through economic and climate disasters, additional renter protections enacted by state and local legislatures are fundamental to the health, safety, and stability of the American public.

#### **D. Rent Stabilization Regulations Are Necessary Because Rental Housing Costs Have Risen Far Above Incomes.**

Rent regulation is also necessary because rental housing costs have outpaced wages for at least two decades. Since 2001, rents have outpaced renter income.<sup>36</sup> For example, in 2018, the median rent in the United States rose 2.1%, as adjusted for inflation, but the median renter household income rose only 1.6%.<sup>37</sup> A one-bedroom rental home is unaffordable to more than 40% of all wage earners in the United States, while a two-bedroom home is unaffordable to more than 60% of

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<sup>34</sup> Erin McCormick, *California Wildfires Took Thousands of Homes. Now Rent in Hardest-Hit Areas is Soaring*, The Guardian (Oct. 23, 2017), <https://www.theguardian.com/us-news/2017/oct/23/california-wildfires-santa-rosa-sonoma-rent-spike-homelessness>.

<sup>35</sup> Flavelle & Fountain, *supra* note 33.

<sup>36</sup> Alicia Mazzara, *Census: Income-Rent Gap Grew in 2018*, Center on Budget and Policy Priorities Blog (Sept. 27, 2019), <https://www.cbpp.org/blog/census-income-rent-gap-grew-in-2018>.

<sup>37</sup> *Id.*

wage earners.<sup>38</sup> Full-time workers in 12 of the 20 largest occupations in the United States cannot afford the national average fair market rent.<sup>39</sup> The gap between wages and rents is even wider for Black and Latinx renters. In contrast to median wages for white workers, Black and Latinx workers' median full-time wages are not enough to afford a one-bedroom apartment at fair market rent.<sup>40</sup>

### **E. Landlords Are Increasingly Large, Corporate Institutional Investors Who Should Be Subject to Regulation and Oversight.**

Contrary to popular narratives, landlords are largely no longer the quintessential small, "mom and pop"-type operation. Indeed, as of 2015, less than half of all rental units were owned by individual investors.<sup>41</sup> Small landlords' share of the market has decreased steadily since the 2007-2009 financial crisis.<sup>42</sup> After the financial crisis, institutional investors acquired 28% of rental properties sold between 2010 and 2012, and 49.3% sold between 2013 and 2015, with a

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<sup>38</sup> NATIONAL LOW-INCOME HOUSING COALITION, *OUT OF REACH: THE HIGH COST OF HOUSING 5* (2020).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 6-7.

<sup>41</sup> Individual investors are commonly referred to as "mom and pop" landlords. The U.S. Census Bureau defines "individual investor" as an "an individual who buys and sells an asset for their personal account, and not for another company." 2018 Rental Housing Finance Survey (RHFS) Glossary of Terms, United States Census Bureau (last visited Apr. 20, 2021, 9:05 PM), [https://www2.census.gov/programs-surveys/rhfs/technical-documentation/glossary/2018/2018\\_RHFS\\_Glossary\\_Final.pdf](https://www2.census.gov/programs-surveys/rhfs/technical-documentation/glossary/2018/2018_RHFS_Glossary_Final.pdf).

<sup>42</sup> Hyojung Lee, *Who Owns Rental Property, and Is It Changing?* Joint Center for Housing Studies of Harvard University Blog (Aug. 18, 2017), <https://www.jchs.harvard.edu/blog/who-owns-rental-properties-and-is-it-changing>.



substantial rate of increase in acquisition of single family homes, as well as 2-4 unit properties.<sup>43</sup> The US Census Bureau's 2018 Rental Housing Finance Survey demonstrates a continued overall decline in small landlord ownership of rental properties and rental units.<sup>44</sup> After the Covid-19 pandemic and ensuing economic downturn, institutional investors are expected to increase their share of the rental market even more. This buy-up will continue the evolution of the rental housing market into one that squeezes tenants under extractive, profit-driven business models, rather than one largely administered by small property owners invested in and a part of their local communities. This shift towards institutional investors necessitates robust regulation of the rental market, since corporations will not prioritize the safety and housing stability of renters, especially those at the lowest income levels, unless it serves their profit-motivated interests.

**II. APPELLANTS' CHALLENGE IS A BROAD ASSAULT ON THE POWERS OF STATE AND LOCAL GOVERNMENTS TO PROTECT TENANTS.**

Appellants would have this Court believe their challenge here is solely about the 2019 Amendments to the Rent Stabilization Laws (RSL). Not so. This is a well-worn attack on New York's Rent Stabilization scheme that is part of an

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<sup>43</sup> *Id.*

<sup>44</sup> U.S. Census Bureau, *2018 Rental Housing Finance Survey* (last visited Apr. 16, 2021, 8:35 PM), [https://www.census.gov/data-tools/demo/rhfs/#/?s\\_tableName=TABLE1&s\\_type=2&s\\_byGroup1=6](https://www.census.gov/data-tools/demo/rhfs/#/?s_tableName=TABLE1&s_type=2&s_byGroup1=6).

attempt to further de-regulate the rental housing market throughout the country, leaving tenants and their housing stability and security at the mercy of the free market.

**A. Rent Stabilization Laws Are a Critical Part of a Broad Framework to Protect Tenants from Exploitive Rental Schemes and Address Public Health, Safety, and Welfare Crises.**

State and local governments have long employed their police powers to protect public health, safety, and the general welfare by regulating the landlord-tenant relationship. These legislatures act in direct response to local and state need, and they help to balance the interests of all the parties involved.

For example, back in 1969, New York City observed that large numbers of its residents were facing increasing housing instability and sought to use its legislative authority to protect them. Seeing that some landlords were exploiting inflation and the city's acute shortage of rental housing and charging New York City tenants exorbitant rents, New York City enacted its RSL to curb such extractive practices. N.Y.C. Admin. Code § 26-501. “[S]uch increases and demands cause[d] severe hardship to tenants . . . and . . . uproot[ed] long-time city residents from their communities.” *Id.* To address these “. . . serious threats to the public health, safety, and general welfare,” the city determined it was necessary to regulate the contractual relationship between landlords and tenants by imposing “. . . reasonable rent and eviction protections.” *Id.* Shortly thereafter, the New York

state legislature in part gutted the City's efforts by passing legislation that relied on the free market to set fair rents and allowed for the decontrol of certain rent-stabilized units. *335-7 LLC v. City of New York*, No. 20 Civ. 1053, 2021 WL 860153, at \*2 (S.D.N.Y. March 8, 2021). A few years later, however, recognizing that this free market approach had failed to address the public emergency of increasingly high rents, the state legislature adjusted its policy approach by passing the Emergency Tenant Protection Act of 1974. *335-7 LLC*, 2021 WL 860153, at \*2.

This law created a rent stabilization scheme that gave New York City and certain other jurisdictions in the state the option to adopt rent regulations,<sup>45</sup> which allowed New York City to regulate previously unregulated units and give tenants greater protections.<sup>46</sup> This pendulum of fewer and greater rent stabilization protections has swung back and forth over the years, culminating into the 2019 amendments at issue now. *335-7 LLC*, 2021 WL 860153, at \*2.

Appellants claim that these 2019 amendments make the entire RSL scheme unconstitutional. But like prior reforms that were found to be constitutional, the 2019 amendments limit a property owner's ability to increase rents and retake

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<sup>46</sup> N.Y. Unconsol. Law §8623; Diane Ungar, *Emergency Tenant Protection in New York: Ten Years of Rent Stabilization*, 7 Fordham Urb. L.J. 305, 313-315 (1979) (discussing the history of New York state's rental stabilization regulatory scheme).

possession of its property but do not amount to a complete deprivation of an owner's right to possess, use and dispose of the property. Because the 2019 amendments are not qualitatively different from previous RSL reforms, all of which have been previously upheld as a proper exercise of state and local power,<sup>47</sup> Appellants' efforts appear to be more broadly aimed at eroding the authority of state and local governments to enact necessary tenant protections.

Indeed, Appellants argue that “. . . even prior to the 2019 Amendments, dramatic limitations on permissible rental increases and the modifications to the RSL have taken, piece-by-piece, various economic rights of property owners . . .” in an unconstitutional way. Compl. ¶ 307. If Appellants were to succeed in eroding the fundamental authority of state and local governments to regulate their housing markets, the precedent could spur the unraveling of tenant protections enacted over the course of the past 50 years on which millions of tenants in New York and across the country now depend.

**B. State and Local Governments Have Long Regulated the Housing Market in Response to the Realities of the Modern Landlord-Tenant Relationship.**

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<sup>47</sup>See e.g., *Rent Stabilization Ass'n of New York City, Inc. v. Higgins*, 83 N.Y.2d 156, 165 (2d Cir. 1993); *Ansonia Residents Ass'n v. New York State Div. of Hous. & Cmty. Renewal*, 75 N.Y.2d 206 (1989); *8200 Realty Corp. v. Lindsay*, 27 N.Y.2d 124 (1970);

Residential tenancies were once treated as Appellants suggest they should be treated now: as arrangements between private parties, only subject to their “freedom to contract” free from government regulation. But what Appellants want is of a bygone era. The economic evolution of the modern landlord-tenant relationship long ago spurred a paradigm shift in how state and local governments regulate their housing markets. *Green v. Superior Court*, 10 Cal.3d 616 (1974) (“*Green*”). *Green* illustrates this shift. In *Green*, the California Supreme Court recognized the transformation of the modern landlord-tenant relationship and the modern housing market overall, particularly the scarcity of adequate low-cost housing in virtually every urban setting. *Id.* at 625. Consequently, the court noted, tenants were left with little bargaining power to gain concessions from their landlords, like a basic guarantee that their rental unit would be fit for human habitation. *Id.* These circumstances made the free market an impractical and inequitable means of allocating rights and responsibilities between landlords and tenants. *Id.* Accordingly, in a break with centuries-old common law rules, the court held that it was necessary to recognize an implied warranty of habitability in every residential lease. *Id.* The *Green* court further noted the need for comprehensive housing statutes to regulate the housing market in light of the economic and other realities of the modern landlord-tenant relationship. *Id.* at 627. Recognizing the fundamental change in the landlord-tenant relationship and the modern residential

housing market, thirty-eight states codified the warranty of habitability around the same time as *Green*,<sup>48</sup> and today every state except one has adopted some form of this basic tenant protection.<sup>49</sup>

**C. The Uniform Residential Landlord and Tenant Act Sought to Balance the Power of Landlords and Tenants and Establish a Basic Set of Rights and Responsibilities.**

The economic realities of the modern landlord-tenant relationship that serve as the foundation for the *Green* court's decision were actually recognized a few years before by the Uniform Law Commission (ULC), established more than a century ago to create uniform state laws and consistent rules and procedures. When the ULC turned its focus to landlord and tenant law in the late 1960s,<sup>50</sup> it noted that landlord and tenant relationships throughout the nation at the time were "a maze of disjointed and contradictory legislation, ordinances, administrative regulations and court decisions. All of these are based, or overlaid, on a system of 'common law' devised to meet the needs of a feudal society in which noble landowners rented out their property to commoner farmers..."<sup>51</sup>

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<sup>48</sup> Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B. C. L. Rev. 23 503, 523-524 (May 1982).

<sup>49</sup> *Non-Legislative Commission On The Study of Landlord-Tenant Laws*, 35 U. Ark. Little Rock L. Rev. 739, 764 (December 2012).

<sup>50</sup> Lawrence McDonough, *Then and Now: The Uniform Residential Landlord and Tenant Act*, 35 U. Ark. Little Rock L. Rev. 975, 977 (2013).

<sup>51</sup> *Id.* quoting *Residential Landlord and Tenant Act Summary*, UNIF. LAW COMM'N, <http://uniform>

In response, the ULC created uniform landlord-tenant legislation, called the Uniform Residential Landlord and Tenant Act (URLTA) of 1972, that would: equalize the bargaining positions of landlords and tenants; force landlords to meet minimum standards for providing safe and habitable housing; spell out the responsibilities of tenants for maintaining their housing units; and ensure tenants' right to occupy a dwelling unit as long as they fulfill their responsibilities.<sup>52</sup> The URLTA sets out a comprehensive set of rights and responsibilities for landlords and tenants which 21 states have adopted to date.<sup>53</sup>

The URLTA served as the foundation for the wave of reforms that followed<sup>54</sup> which produced tenant protections that are now staples of the landlord-tenant relationship, restricting a landlord's ability to reject lease assignments and subleases, prohibiting retaliatory evictions against tenants exercising their legal rights, imposing a duty on landlords to mitigate damages when a tenant abandons a unit before the lease ends, and imposing limits on security deposit amounts.<sup>55</sup>

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[laws.org/ActSummary.aspx?title=Residential%20Landlord%20and%20Tenant%20Act](https://www.uniformlaws.org/ActSummary.aspx?title=Residential%20Landlord%20and%20Tenant%20Act) (last visited Apr. 17, 2021).

<sup>52</sup> *Id.* at 977-8.

<sup>53</sup> McDonough, *supra* note 50, at 984-985.

<sup>54</sup> *Id.* at 985.

<sup>55</sup> Edward H. Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517, 531, 532 (1984).

**D. Rent Stabilization Has Become an Increasingly Important Part of Landlord-Tenant Law.**

Like New York state and New York City, over 200 cities in the U.S., including Boston, Los Angeles, San Francisco, and Washington D.C., have passed rent control ordinances, affecting a significant portion of the nations' multi-family housing stock.<sup>56</sup> Recognizing, among other things, that current rents far outpace wages, California and Oregon recently passed statewide rent control laws. Cal. Civ. Code §1947.12; Or. Rev. Stat. § 90.323. There are also an increasing number of campaigns, including ones led by some of the *amici*, that seek to lift the state statutory bans on rent control that were enacted as a part of a broad national agenda of the American Legislative Exchange Council-ALEC.<sup>57</sup> Just-cause eviction protections were likewise enacted all over the country during the post-URLTA wave of reforms, including in most rent control jurisdictions.<sup>58</sup> The number of just-cause jurisdictions has expanded since, including with California and Oregon

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<sup>56</sup> *Id.* at 527-28.

<sup>57</sup> Maya Dukmasova, *The Secret History of Illinois's Rent Control Prohibition: How Conservatives Preempted Rent Control Before the Public was Ready to Talk About it*, *Chicago Reader*, (May 16, 2017), <https://www.chicagoreader.com/chicago/illinois-rent-control-prohibition-history/Content?oid=26517042>

<sup>58</sup> Rabin, *supra* note 55 at 534-35.



recently enacting statewide just-cause protections,<sup>59</sup> ensuring that millions of more tenants won't lose their homes for arbitrary reasons – or for no reason at all.

**E. Regulation of the Landlord-Tenant Relationship Can Also Serve to Root Out Discriminatory Practices.**

States and local governments have also used their authority to curb discriminatory and harmful behavior by landlords in their jurisdictions, often going beyond what the federal government proscribes. While the federal Fair Housing Act (FHA) prohibits landlords from refusing to rent to someone on the basis of race, color, religion, sex, disability, national origin, and familial status,<sup>60</sup> most state and local laws have expanded their view of unlawful discrimination by adding other protected classes. For example, the vast majority of states and many local governments have enacted laws to protect survivors of domestic violence and sexual assault from discrimination.<sup>61</sup> These laws manifest in a variety of ways, including prohibiting discrimination against a survivor who seeks court or police assistance, enabling survivors to end their rental leases early or receive an emergency lock change, or establishing a defense against an eviction that is

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<sup>59</sup> Cal. Civ. Code §1946.2; Or. Rev. Stat. §90.323.

<sup>60</sup> 42 U.S.C. § 3601.

<sup>61</sup> National Housing Law Project, *State Law Compendium: Housing Rights of Domestic Violence Survivors*, <https://www.nhlp.org/manuals/state-law-compendium-housing-rights-of-domestic-violence-survivors/> (last visited Apr. 18, 2021).

premised on an act of violence against the tenant.<sup>62</sup> These laws were created in response to landlords blaming survivors for the acts of their perpetrators and being unwillingly to permit survivors of violence to take basic steps to protect themselves from further violence.

Approximately 12 states and 87 county and city governments also prohibit landlords from refusing to rent to tenants who rely on a Housing Choice (“Section 8”) voucher to pay a portion of their rent.<sup>63</sup> These laws were likewise enacted in response to rampant discrimination by landlords to ensure that tenants with Housing Choice vouchers could access housing.<sup>64</sup> Finally, state and local governments are increasingly prohibiting landlords from using blanket bans on renting to persons who have had contact with the criminal legal system and restricting the use of criminal records in the rental application process.<sup>65</sup>

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<sup>62</sup> *Id.*

<sup>63</sup>Urban Institute, *State and Local Voucher Protection Laws: Introducing a New Legal Dataset*, <https://www.urban.org/research/publication/state-and-local-voucher-protection-laws-introducing-new-legal-dataset> (last visited Apr. 18, 2021).

<sup>64</sup> U.S. Dept. of Hous. and Urb. Dev. Office of Policy, Dev. and Research, *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers* (Sept. 2018), <https://www.huduser.gov/portal/pilot-study-landlord-acceptance-hcv.html>.

<sup>65</sup> *See, e.g.*, Seattle Office of Civil Rights, Fair Chance Housing, <https://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-chance-housing> (last visited Apr. 21, 2021); Cook County Government, What is the Just Housing Ordinance?, <https://www.cookcountyil.gov/content/just-housing-amendment-human-rights-ordinance> (last visited Apr. 21, 2021).

**F. State and Local Government Who Fail to Legislatively Balance the Landlord-Tenant Relationship Leave Tenants Vulnerable to Housing Instability.**

While some state and local legislatures have adopted laws like the URLTA, some have either failed to pass laws to balance the landlord-tenant relationship or enacted laws benefitting landlords. Both scenarios leave tenants vulnerable to unfairly losing their housing, experiencing terrible housing conditions without recourse, and without the balance necessary to make this relationship fair.

For example, Georgia, Indiana, and Texas (among several others) permit landlords to set whatever amount they would like on security deposits. Ga. Code Ann. § 44-7-30 et. seq.; Ind. Code Ann. § 32-31-1.1. et. seq.; Tex. Prop. Code § 92.101 et. seq. In Georgia, a written termination notice is not required to evict a tenant who remains after the lease ends or who fails to pay rent. Ga. Code Ann. § 44-7-50. And in Texas, a landlord has no duty to repair a unit if the tenant is delinquent on rent, significantly undermining a tenant's ability to withhold rent, the only practical way a tenant can enforce the warranty of habitability. Tex. Prop. Code § 92.052. These laws leave tenants in those states at the mercy of the goodwill of their landlords, and often result in terrible outcomes.

Arkansas has in many respects led the way in bucking the national trend towards providing basic safeguards to tenants, even going so far as to essentially

strip the basic tenant protections and landlord obligations from the URLTA.<sup>66</sup> Indeed, Arkansas is the only state in the nation that has yet to enact some variation of the warranty of habitability.<sup>67</sup> Arkansas is also one of only eight states that *allows* a landlord to evict a tenant in retaliation for a tenant's exercise of his or her legal rights.<sup>68</sup>

Arkansas' legislature also upended centuries of common law holding that evictions are purely a civil matter and made it a crime for a tenant to holdover after nonpayment of rent. Ark. Code Ann. §18-16-101 (making a failure to vacate after a demanded for rent a misdemeanor punishable for up to 90 days in jail). A 2013 Human Rights Watch report found that in 2012, out of the 11 district courts records that were reviewed, more than 1,200 tenants were criminally charged under the law, even though some tenants withheld their rent in an attempt to redress poor housing conditions.<sup>69</sup>

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<sup>66</sup>Human Rights Watch, *PAY THE RENT OR FACE ARREST: Abusive Impacts of Arkansas' Draconian Eviction Law*, (2013) 7, [https://www.hrw.org/sites/default/files/reports/us0113arkansas\\_reportcover\\_web.pdf](https://www.hrw.org/sites/default/files/reports/us0113arkansas_reportcover_web.pdf). citing Marshall Prettyman, *The Landlord Protection Act, Arkansas Code § 18-17-101 et seq.*, Arkansas Law Notes, 2008, 71-82 <http://lawnotes.law.uark.edu/wp-content/uploads/Prettyman-The-Landlord-Protection-Act-Arkansas-LawNotes-2008.pdf>.

<sup>67</sup> *Non-Legislative Commission on The Study of Landlord-Tenant Laws*, supra note 764.

<sup>68</sup> *Id.* at 762-763.

<sup>69</sup> Human Rights Watch, supra note 63 at 15.

Arkansas' reticence to offering even basic protections to tenants is not without consequences. Between 2010 and 2014, 47% of renter households in the city of Little Rock, Arkansas' most populous city, reported one or more habitability issues with their unit, with 25% of these households reporting severe habitability issues.<sup>70</sup>

Stories from tenants themselves further illustrate the impact. For example, a 23-year-old mother of a young child experienced major problems with mold, water leaks, and an inoperable air conditioner during her three-year tenancy at a Little Rock apartment complex.<sup>71</sup> Her landlord ignored multiple requests for repairs, forcing her to fix things herself.<sup>72</sup> Although she always paid the rent on time, the tenant was ultimately evicted, very likely in retaliation for her complaints about the condition of the unit.<sup>73</sup> A 74-year-old Little Rock tenant had a similar experience at the home she has rented for 10 years.<sup>74</sup> This tenant's unit had leaky pipes, moisture-induced rotting in the kitchen and of her personal property, and holes throughout the dwelling.<sup>75</sup> Because her landlord continuously ignored her requests

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<sup>70</sup> Arkansas Community Institute, *Assessing the Health and Equity Impacts of an Implied Warranty of Habitability in Little Rock* (Nov. 2017) at 19, available at <https://www.pewtrusts.org/-/media/assets/2018/09/warranty-of-habitability-in-arkansas-hia.pdf>.

<sup>71</sup> *Id.* at 31.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 7.

<sup>75</sup> *Id.*

for repairs, the tenant was forced to make repairs herself at a cost of \$1,000.<sup>76</sup>

While the tenant was hesitant to tell her story out of fear that her landlord would retaliate by evicting her, she was “at the end of her rope” and decided that if she is evicted, “then it’s God’s will.”<sup>77</sup> What these tenants experience and fear is perfectly legal under Arkansas law. Accepting Appellants’ position would risk a return to such a deregulated and inequitable landlord-tenant relationship nationwide.

### **CONCLUSION**

Tenants should not have to depend on a higher power for basic tenant protections. That must be the province of state and local legislative bodies who can investigate and study a problem facing the citizenry, debate competing solutions, and be ultimately accountable to the people directly affected by the laws they enact. Thus, contrary to Appellant’s position, state and local jurisdictions must retain the authority to regulate the housing market for the benefit of society as a whole and to adjust their policies when necessary, as New York and other jurisdictions have done for half a century in the rental housing market. The judgment of dismissal in favor of Defendants-Appellees should be affirmed.

DATED: April 23, 2021

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,922 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/Katherine E. Walz

Counsel For *Amicus Curiae*

Dated: April 23, 2021



**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed this Amicus Curiae brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system on April 23, 2021. I also certify that the foregoing document is being served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2).

April 23, 2021

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