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Are Rent Control Laws Constitutional?

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The Cato Institute has filed an amicus brief in the Second Circuit in an important challenge to New York's rent control laws. Rent control is a silly and counterproductive idea, but it also might be unconstitutional. Economists have long known that rent control is a bad idea. Rent control, after all, is just a price ceiling, and price ceilings yield expected results: consumers over-use the product and producers under-produce it. If there was a price ceiling on, say, video games, people would be more willing to buy them and makers would be less willing to produce them. The result would be a shortage of video games. Similarly, when rent control laws are in place, renters do not economize on their choices and landlords are reluctant to build and maintain their properties. Two people might cram into an apartment in San Francisco, but, if rent control mandates a lower price, then one person might decide to occupy the space while the other person takes up another apartment. The result is fewer rentable apartments. And the property owner, unable to get the market price for rent, is likely to not maintain the property or refuse to rent altogether. In 2019, the New York legislature passed a series of amendments to its rent control laws, known as rent-stabilization laws (RSLs). These are not the first amendments to the still-controversial RSLs, though they are the most stringent in decades. One of the more egregious new provisions extends the eviction stay period even if the tenant is being removed for cause. The RSLs also maintain a tenant's strange right to transfer their lease—without the landlord's permission—to family members who have resided with them for a certain amount of time. Taken together, the RSLs force landlords to rent to many tenants they don't want to rent to, which is akin to the government essentially mandating that someone can occupy property against an owner's will. While rent-control laws are not a direct taking of property by the government, surely there would be some point where a rent-control law would be little different from a forced property transfer. If a New York landlord were forced to rent an apartment to someone for $50, that would amount to little more than a forced occupation. Rent control laws are often based on a purported economic "emergency," and New York's are no different. The Supreme Court has heard cases challenging the constitutionality of "emergency" rent control laws. In 1921, in Block v. Hirsch, the Court narrowly upheld, by a 5–4 vote, a Washington D.C. rent control law that was enacted in the economic emergency after World War I. In his dissent, Justice Joseph McKenna rebuked the Court for allowing such an abridgment of property rights based on a proclaimed "emergency." He wrote, "If such exercise of government be legal, what exercise of government

is illegal? Houses are a necessary of life, but other things are as necessary. May they too be taken from the direction of their owners and disposed of by the Government?" Three years later, in Chastleton Corp. v. Sinclair, the Court unanimously overturned the same D.C. rent control law on the grounds that the purported emergency of Block v. Hirsch had expired and Congress was not free to merely assert that the emergency still existed. Justice Oliver Wendell Holmes, who wrote the majority opinion in Block, reasonably said that the emergency powers of Congress were limited by the continued presence of an actual emergency: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." New York's rent-control laws also purportedly solve an "emergency," and it's an emergency that has been proclaimed for 100 years. In the new challenge to the laws, various property owners seek to revive what the Court realized in 1924: a legislature cannot simply say "emergency" and abridge fundamental property rights. When the government doesn't physically take land but rather passes regulations that greatly undermine traditional property rights, it's possible that such regulations can be a "regulatory taking" under the Fifth Amendment's Takings Clause, meaning just compensation is owed to the property owner. With New York's RSLs, while each provision might not alone rise to a regulatory taking, together they offend the common law "right to exclude." The right to exclude people from occupying your property is obviously central to the concept of "property." The Supreme Court has held that even minor interferences with the right to exclude and other fundamental attributes of ownership are per se takings that always require the government compensate affected owners. In those cases, the purpose behind the offending regulation is irrelevant. Several New York landlord advocacy groups sued New York City and the state in federal court, alleging per se takings of their fundamental right to exclude, among other constitutional claims. The Eastern District of New York rejected their per se takings argument, however, opting instead to subject the RSLs primarily to what is called a "partial regulatory takings" test. Using this flawed test, courts have often been too willing to rubberstamp any and all regulations that only severely, rather than totally, destroy a property's value or usefulness. New York landlords are fearful of the impact this rubberstamping will have on the increasingly shaky residential rental market. They appealed the district court's misguided ruling to the Second Circuit. Cato's amicus brief argues that the Second Circuit should follow the Supreme Court's partial lead and extend the per se test to the logical next step. The Court has already applied the per se test to "permanent and continuous" physical invasions (for example, a cable line running through an apartment) but it should extend to interference with any fundamental attribute of ownership, such as the right to exclude or the right to transfer. When it comes to such rights, it should not matter how extensive the occupation or interference, in terms of duration or the amount of space occupied. Sometimes regulations that interfere with fundamental attributes of ownership are not takings, but only in limited circumstances. The Supreme Court has long held that the "reciprocity of advantage"—the benefits affected owners gain from the same regulation's imposition on their neighbors—can serve to compensate burdened owners "in kind." Yet New York's RSLs are applied so haphazardly there can be no true reciprocity of advantage. Instead, New York's RSLs are an obvious wealth transfer, and targeted owners do not realize a net-gain from the arrangement. Regulating harmful uses is another exception to the per se takings test. Generally, if an owner's use of their land will harm the public, or serve as a major

impediment to the fulfillment of a public need, then a regulation targeting that use does not "take" the owner's property. Yet it would be very strange to argue that landlords renting apartments at market prices are somehow creating a public harm. In the absence of these two exclusive excuses for the regulation of a fundamental attribute of ownership, the RSLs imposed on New York's landlords are nothing short of per se takings. It is high time the work the Supreme Court has begun in this area be drawn nearer to its obvious conclusion.