

No. 18-16995

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DEAN HOTOP, et al.,

Plaintiffs-Appellants,

v.

CITY OF SAN JOSE, a municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of
California, Case No. 5:18-cv-02024-LHK

**AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES IN
SUPPORT OF DEFENDANT-APPELLEE**

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IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The League of California Cities (“League”) is an association of 475 California cities dedicated to promoting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The League and its constituent cities have a unique interest in this case, which challenges cities’ ability to collect information regarding rental units. Cities’ ability to gather information from residents and businesses is critical to effective enforcement of local laws, including rent stabilization ordinances. Of the fifteen cities in California with ordinances limiting rents, eight have implemented rent registries to track rent amounts, monitor changes, and sanction unlawful increases.¹ These registries not only support cities’ efforts to ensure compliance with local rent stabilization laws; the information gathered can also be invaluable to some municipalities as they continue to evaluate and innovate long-term solutions to California’s affordable housing crisis.

The parties, through their respective counsel, have consented to the filing of this amicus curiae brief. No party, or counsel for any party, authored the attached

¹ See *infra* at pp. 9-10.

brief, in whole or in part, or made any monetary contribution toward the preparation or submission of the brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae League of California Cities aver that they are a nonprofit corporation which does not issue stock and which is not a subsidiary or affiliate of any publicly owned corporation.

INTRODUCTION

Cities are constitutionally vested with the authority and the right to ensure the health, safety, and welfare of their residents. To this end, cities have adopted a myriad of laws for which it is necessary to gather information in order to ensure compliance. Some cities require that businesses provide financial information to obtain a business license and for cities to determine the applicable business tax. Some contractors must apply for permits so that cities can verify compliance with building and planning codes. Service providers, including massage parlors, may also be subject to registration laws designed to create professional standards and detect and deter crime. Rent registration is just one more example of such an information-gathering law. If merely collecting basic information from entities doing business in a city violates the Fourth Amendment, not only rent registration requirements will be invalidated, but also a host of other ordinances that assist cities with enforcing their laws and making sound public policy decisions.

The main purpose of a rent registration requirement is to reduce the likelihood of landlords overcharging tenants living in rent-stabilized units. California is facing an affordable housing crisis, and its most vulnerable residents are among the most impacted. As cities explore new ways to preserve and expand their affordable housing stock, rent stabilization offers some cities an immediate and cost-efficient mechanism for local governments to keep families at high risk of displacement in their homes. Rent stabilization ordinances, however, are only effective at controlling rent levels to the extent that landlords comply with them. It

can be difficult for tenants and local governments to determine whether or not a landlord is complying with these laws without reference to a repository of unit-specific rent information. As a result, several cities in California have enacted rent registry policies that require landlords to submit targeted categories of information regarding their rent-stabilized units, including rent amounts, dates of tenancies, and reasons for their termination at the start of each new tenancy.² City agencies then use this data to reduce the risk of unpermitted rent increases through a combination of education and enforcement efforts.

Appellants, a group of landlords who rent housing in the City of San Jose, claim that San Jose's rent registry requirements violate their Fourth Amendment rights. Appellants' argument is predicated on a strained reading of *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), a recent Supreme Court case involving a hotel registry enforcement scheme that empowered police officers to demand inspection of hotel guest records and arrest hotel operators who resisted. As the evidence presented in the district court demonstrates, the mechanics of San Jose's rent registry bear little resemblance to these searches, most notably because the consequences of failing to submit rent registry information are much less immediate and extreme, allowing for pre-compliance review. Landlords also lack a privacy interest in the information included in rent registries as they—and their tenants—routinely submit similar information to the government in other contexts, including during adjudication of rent disputes. Accordingly, cities must be allowed

² See *infra* at pp. 9-10.

to collect this information through rent registries. Not only are registries essential tools for rent enforcement, they also provide local governments with data that will enable lawmakers to make more informed housing policy decisions in the future.

ARGUMENT

I. SOME CITIES HAVE FOUND THAT RENT STABILIZATION IS AN EFFECTIVE AFFORDABLE HOUSING INTERVENTION.

Rent control first emerged in California during World War II, when the federal government introduced temporary price controls to mitigate the impacts of declining levels of housing vacancy and production.³ It wasn't until the 1970s, however, that the idea began to gain traction at the state and local level.⁴ As housing prices skyrocketed, “rental apartment construction fell, vacancy rates fell, and rents increased faster than inflation,” tightening California’s rental housing market.⁵

In 1978, voters passed Proposition 13, which imposed strict limitations on property tax increases in California.⁶ While courting tenant votes, proponents of Proposition 13 emphasized that lower tax rates for property owners would result in decreased rents for tenants.⁷ When residential rents continued to rise in the wake of

³ *History of the Rent Control Debate in California*, No Place Like Home (last visited May 28, 2019), <https://noplacelikehome.ucsc.edu/en/history-of-the-rent-control-debate-in-california/>.

⁴ *See id.*

⁵ Peter Dreier, *Rent Deregulation in California and Massachusetts: Politics, Policy, and Impacts* 16-17 (Int'l & Pub. Affairs Ctr., 1997).

⁶ *See* No Place Like Home, *supra* note 3.

⁷ *See id.*; W. Dennis Keating, Inst. of Gov'tl Studies, *Rent Control in California: Responding to the Housing Crisis* 3-4 (1983).

Proposition 13’s passage, tenants organized to demand action from their state and local governments.⁸ By 1982, eleven localities in California—including Los Angeles, San Francisco, Oakland, Berkeley, Beverly Hills, Hayward, and San Jose—had enacted rent control laws of varying strength.⁹ Some of these laws applied to a broad range of housing and continued to regulate rents between tenancies (“strict rent control”).¹⁰ Others contained broader exemptions and permitted landlords to raise rents to market value after tenants vacated rent-controlled units (“vacancy decontrol”).¹¹

As the number of jurisdictions with rent control laws grew, landlords implored the state legislature to impose limitations on these regulations.¹² In 1995, the legislature enacted the Costa-Hawkins Rental Housing Act (“Costa-Hawkins”), which prevents municipalities from restricting rents for single-family homes and buildings constructed after 1995. *See* Cal. Civ. Code § 1954.52. The law also preempted five cities’ strict rent ordinances by prohibiting local governments from controlling rents between tenancies. *See* Cal. Civ. Code § 1954.53. Under Costa-Hawkins, vacancy decontrol became the law of the land in California.

California’s housing crisis has renewed interest in rent control as an affordable housing intervention, with Mountain View and Richmond becoming “the first California cities to pass new local rent control ordinances in decades” in

⁸ *See* Keating, *supra* note 7, at 3-4.

⁹ *Id.* at 4, Table 1.

¹⁰ *See id.* at 7 (referring to this as “strong rent control”).

¹¹ *Id.* at 7-8.

¹² *See* No Place Like Home, *supra* note 3.

2016 and several cities placing rent stabilization measures on their ballots in 2018.¹³ Wages have not kept pace with rising housing costs in California,¹⁴ resulting in families spending far more than thirty percent of their incomes—widely considered the standard of affordability—on rent each month. In 2015, more than fifty percent of all renter households in California were “rent-burdened,” and more than a quarter payed over fifty percent of their incomes towards rent.¹⁵ Of Californians spending more than thirty percent of their incomes on housing, over two-thirds were people of color.¹⁶

In addition to Latinos, African Americans, and low-wage workers, California’s affordable housing shortage disproportionately impacts seniors, families with children, and people with disabilities.¹⁷ To stem the tide of displacement and preserve the character and integrity of their neighborhoods, localities have explored a number of policies designed to protect tenants and preserve and expand affordable housing stock, including rent stabilization. While

¹³ Karim Doumar, *Rent Control is Gaining Steam in California*, CityLab (July 26, 2018), <https://www.citylab.com/life/2018/07/rent-control-is-gaining-steam-in-california/565856/>. Since Costa-Hawkins prohibits strict “rent control,” these ordinances are classified as “rent stabilization” laws.

¹⁴ Nicole Montojo et al., Haas Institute, *Opening the Door for Rent Control: Towards a Comprehensive Approach to Protecting California’s Renters* 10-11 (2018).

¹⁵ Cal. Dep’t of Hous. & Cmty. Dev., *California’s Housing Future: Challenges and Opportunities* 27, Figure 1.21 (2018).

¹⁶ Sara Kimberlin, *Californians in All Parts of the State Pay More Than They Can Afford for Housing*, Cal. Budget & Policy Ctr. (Sept. 2016), <https://calbudgetcenter.org/resources/californians-parts-state-pay-can-afford-housing/>.

¹⁷ See Montojo, *supra* note 14, at 18.

any long-term solution to California’s affordability crisis must include an increase in housing production,¹⁸ some cities have found that rent stabilization is one way they can act quickly to minimize dislocation of vulnerable populations.¹⁹

Academic studies on rent control laws have found that such laws increase the likelihood of renters remaining in their homes.²⁰ One recent study, for example, concluded that San Francisco tenants living in rent-controlled units were ten to twenty percent more likely to stay at their address in the medium- to long-term and that “the vast majority” of these renters “would have been displaced from San Francisco had [their apartments] not been covered” by rent control.²¹ This effect

¹⁸ *See id.* at 30 (describing why housing production and renter protections are both necessary to address California residents’ housing needs).

¹⁹ Stephen Barton, *The Economics of Residential Rent Control: A Not-So-Simple Matter of Supply and Demand*, Dollars & Sense, Jan./Feb. 2019, at 20 (explaining that rent regulation can help to stabilize tenants’ lives, reduce forced displacement, and limit hardships caused by unfair and unnecessary rent increases).

²⁰ Prasanna Rajasekaran et al., Urban Inst., *Rent Control: What Does the Research Tell Us about the Effectiveness of Local Action?* 4 (2019) (providing a brief summary of this research).

²¹ Rebecca Diamond, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco* 25, 3 (Nat’l Bureau of Econ. Research, Working Paper No. w24181, 2018). This study compared two- to four-unit structures built in or before 1979 with similar buildings constructed between 1980 and 1990. *See id.* at 7. In 1994, San Francisco passed a ballot initiative subjecting owner-occupied two- to four-unit structures built before 1980 to rent control, while the rents of two- to four-unit buildings constructed in or after 1980 remained unregulated. *See id.* at 3. In light of these comparison groups (and the fact that the 1994 law affected only owner-occupied units), the conclusions that can be drawn from this study are limited, and academics have critiqued attempts to overextend the data to draw broad inferences about the impacts of rent control on the supply and maintenance of affordable housing. *See, e.g.*, Barton, *supra* note 19, at 19.

was especially strong for racial minorities, “suggesting rent control helped prevent minority displacement from San Francisco.”²² Housing security, in turn, contributes to neighborhood stabilization, supporting low-income families’ resilience in response to economic shocks and resulting in positive educational outcomes for children.²³

II. RENT REGISTRIES CAN HELP CITIES THAT HAVE ENACTED RENT STABILIZATION ORDINANCES ENFORCE THOSE ORDINANCES.

Rent stabilization ordinances are not self-effectuating; enacting cities and tenants living in rent-controlled units must enforce them. Of the fifteen cities in California with rent stabilization ordinances, several exclusively rely upon tenants filing petitions contesting rents with their local rent boards for enforcement.²⁴ Others “employ an active approach to enforcing their rent laws [by] us[ing] registries to register individual tenancies (known as tenancy registration), collect

²² Diamond, *supra* note 21, at 25.

²³ See, e.g., *Return of Rent Control: New Research Shows Benefit of Decades-Old Affordable Housing Approach*, Colum. Bus. School (April 8, 2019), <https://www8.gsb.columbia.edu/newsroom/newsn/6916/return-of-rent-control-new-research-shows-benefit-of-decades-old-affordable-housing-approach> (referencing Jack Y. Favilukis et al., *Affordable Housing and City Welfare* (Colum. Bus. Sch., Research Paper No. 18-77, 2019); see also Leslie Gordon, Urban Habitat, *Strengthening Communities Through Rent Control and Just-Cause Evictions: Case Studies from Berkeley, Santa Monica, and Richmond* 12 (2018) (noting the negative effects of housing instability on children’s educational outcomes).

²⁴ City & Cnty. of San Francisco Budget & Legislative Analyst’s Office, *Policy Analysis Report Re: Creating a Rental Registry in San Francisco* 2 (2019), <https://sfbos.org/sites/default/files/BLA.RentalRegistry.041619.pdf>. Oakland, Richmond, and Mountain View are examples.

information about the rental unit, landlord, tenant(s), and rental amounts, and monitor and disseminate information about allowable increases in rent per rental unit to landlords and tenants.”²⁵ These cities include Berkeley, Beverly Hills, East Palo Alto, Los Angeles, Richmond, San Jose, Santa Monica, and West Hollywood.²⁶

Because their enforcement efforts depend upon tenant complaints, cities without rent registries face difficulties monitoring compliance with their rent stabilization ordinances. Tenants often do not realize when rent increases are excessive or do not report illegal increases for fear of retaliation by their landlords. One study of tenants in Los Angeles, for instance, found that over thirty percent of renters were “incorrect about, or unaware of” the rent stabilization status of their unit.²⁷ This same study found that twenty-seven percent of tenants living in rent-controlled units in Los Angeles were charged rents above allowable amounts under local laws.²⁸ By tracking tenancies in rent-controlled units, local governments are better able to connect these vulnerable residents with services and information that may help them combat unlawful rent increases and eviction actions.²⁹

²⁵ *Id.*

²⁶ *Id.* at 7. Fresno, Pittsburgh, and Santa Cruz maintain rent registries but do not use them to enforce rent ordinances. *Id.* at 3.

²⁷ Daniel Flaming et al., Economic Roundtable, *Economic Study of the Rent Stabilization Ordinance and the Los Angeles Housing Market* 11 (2009), https://hcidla.lacity.org/system/files_force/documents/Economic%20Study%20of%20the%20Rent%20Stabilization%202009.pdf.

²⁸ *Id.* at 125.

²⁹ A property owner’s history of compliance with local rent laws is one example of information that may assist a tenant in the context of an eviction action. See City & Cnty. of San Francisco Budget & Legislative Analyst’s Office, *supra* note 24, at 9.

Cities with rent registries typically require landlords of rent-controlled units to submit information such as rent amounts, tenant and owner identification, and dates of tenancies as well as reasons for their termination at the start of each new tenancy.³⁰ With this information, city agencies can calculate what the maximum allowable rents will be for the unit and monitor rental rates to ensure compliance with local laws.³¹ For example, rent registries can help cities that restrict or prohibit rent increases after no-fault evictions (e.g., owner move-ins) determine when landlords have overcharged new tenants. Without a rent registry, neither cities nor new tenants can independently verify what the prior rents were, which form the baseline for what landlords can raise them to within legal limits.

Cities with rent registries can also reduce the risk of unpermitted rent increases and expedite resolution of related landlord-tenant disputes by sharing the information they gather with tenants and property owners so they are aware of their rights and obligations.³² This exchange of information may be especially useful when a property changes ownership or management, as new owners and operators may lack complete information regarding who the tenants are and what the rents were at the time of sale.

³⁰ *See id.* at 1. In Beverly Hills, San Jose, and Los Angeles, landlords also must re-register rent-controlled units on an annual basis. *Id.* at 5-6.

³¹ *See id.* at 10.

³² Rent registries also benefit cities insofar as they reduce the costs associated with adjudicating rent-related disagreements between landlords and tenants. For example, San Francisco's Budget and Legislative Analyst's Office reports that the volume of petitions filed with Berkeley's Rent Board in connection with landlord-tenant disputes dropped from 485 in 1995 to 176 in 2016. *See id.* at 8.

III. LANDLORDS DO NOT HAVE A PRIVACY INTEREST OR A REASONABLE EXPECTATION OF PRIVACY IN RENT INFORMATION.

On appeal, Appellants' primary legal argument is that San Jose's rent registry violates their Fourth Amendment rights "under the *Katz v. United States*, 389 U.S. 347 (1967) 'expectation of privacy' test, and under the 'common law trespassory' test articulated in *United States v. Jones*, 132 S. Ct. 945 (2012) regardless of whether they have a privacy interest in their records." Opening Br. at 10. This isn't the only lawsuit in which Appellants' counsel has asserted this untenable application of Fourth Amendment case law, nor is the lower court the only to reject it. Just last month, a federal judge in the Central District of California granted a motion to dismiss a nearly identical Fourth Amendment claim challenging Beverly Hills' registration requirement for rent-stabilized units. *Apt. Ass'n of Greater Los Angeles v. City of Beverly Hills*, 2019 WL 1930136 at *4 (C.D. Cal. Apr. 17, 2019). Appellants' counsel also represents the plaintiffs—a trade association of apartment owners and one of its members—in that action.

Given that *no* rent registries in California—including San Jose's—involve the government physically intruding on landlords' property, the logic underpinning Appellants' common law trespass claim is baffling at best. In support of their argument, Appellants rely on a grossly overbroad interpretation of *Patel v. City of Los Angeles*, which they maintain "extended the scope of [Fourth Amendment] doctrine to include business records, independent of an expectation of privacy, under the 'common law trespassory' test." Opening Br. at 14. Since the opinion does not mention this test, Appellants must have drawn their conclusion from the

Court's treatment of the facts at issue in *Patel*, which bear little resemblance to the mechanics of rent registries. *See generally City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015).

The ordinance considered in *Patel* allowed police officers to enter hotels, demand guest records, and arrest hotel operators who did not comply. *See id.* at 2452. In ruling on the case, the Supreme Court was clear that its holding turned on the ordinance's failure to provide for pre-compliance review. *See id.* at 2453 (“[W]e hold only that a hotel owner must be afforded an opportunity to have a neutral decisionmaker review an officer’s demand to search the registry before he or she faces penalties for failing to comply.”). That is not the case here, as landlords convey rent registration information remotely on a regular basis, and a landlord’s noncompliance generally results only in denial of a rent increase or a defense to eviction for the tenant— not immediate arrest. *See Answering Br. 20-21*. Thus, landlords have ample opportunity to seek pre-compliance review (as this case demonstrates), and rent registries do not trigger the same concerns as the *Patel* ordinance regarding subjection to the “‘unbridled discretion’ of officers in the field, who are free to choose whom to inspect, when to inspect, and the frequency with which those inspections occur.” *Patel*, 135 S. Ct. at 2463 (internal citation omitted).

While the common law trespassory test is inapposite to Appellants’ claims, application of the “reasonable expectation of privacy” test is dispositive of them. As the lower court noted, the Ninth Circuit has already reached the conclusion that landlords lack a cognizable privacy interest in information included in buyout

agreements with tenants, in part because they regularly share similar information with government entities. ER 354. In that case, the plaintiffs challenged a San Francisco ordinance requiring landlords to submit buyout agreements to the city, which then made them available for public review. *S.F. Apt. Ass'n v. City & Cnty. of San Francisco*, 142 F. Supp. 3d 910, 933 (N.D. Cal. 2015). The city also created a public, searchable database of these agreements, which included landlords' business contact information and the addresses of all rental units subject to buyout agreements in the city. *Id.* In affirming the district court's determination that the landlords had neither a legally protected privacy interest nor a reasonable expectation of privacy in this information, the Ninth Circuit noted that the plaintiffs had failed to articulate any explanation for "why the terms or consideration for a buyout agreement is more sensitive or private than other financial information routinely submitted to the government and made publicly available." *S.F. Apt. Ass'n v. City & Cnty. of San Francisco*, 881 F.3d 1169, 1170 (9th Cir. 2018).

The same is true here. Appellants have offered no reason why they have a reasonable expectation of privacy in the information requested for inclusion in San Jose's rent registry when landlords routinely turn over comparable information for taxation and business licensing purposes as well as in connection with rent program fees, rent increase petitions, and other city processes.³³

³³ For example, San Francisco's Rent Ordinance and Oakland's Just Cause for Eviction regulations require landlords to provide unit-specific rent information when they pursue no-fault evictions. S.F. Admin. Code § 37.9(c); Oakland Just Cause for Eviction Regulations § 8.22.360.A.9.

Even if the information landlords are required to disclose under San Jose’s ordinance was private at one point, it is well-established precedent that information “may lose [constitutional] protection depending upon what the person does with it.”³⁴ Courts have applied this reasoning to information conveyed to a third party with the expectation that they will only use it for a limited purpose (e.g., financial information given to a bank). *United States v. Golden Valley Elec. Ass’n*, 689 F.3d 1108, 1116 (9th Cir. 2012). Thus, the fact that *tenants* submit unit-specific rent information to government agencies—including when they contest rent increases—further undercuts Appellants’ privacy interest in this information.

Finally, Appellants also do not dispute that municipalities need the information captured by rent registries to determine whether landlords are charging appropriate rents and only seeking legal rent increases. This constitutes an admission by Appellants that any subjective expectation of privacy in such information is not objectively justifiable insofar as it would defeat the essential requirements and purpose of rent ordinances in force throughout the country.

IV. RENT REGISTRIES ASSIST LAWMAKERS IN MAKING INFORMED HOUSING POLICY DECISIONS.

Another benefit of rent registries is that they allow municipalities to conduct more thorough and targeted assessments of the impacts of local policies and changes in the market on affordable housing stock. Cities across the country are facing severe housing crises and grappling with how to provide affordable housing to their constituents and ameliorate homelessness in their jurisdictions. Solutions to

³⁴ Gregory M. Caskey, *Cal. Search & Seizure* § 2:3 (Westlaw 2019).

these pressing issues will not be one-size-fits-all, and existing data sources on local rents fail to account for the rents of tenants living in rent-stabilized units. With longitudinal data regarding where and why units kept affordable through rent regulation are disappearing, cities can make more informed choices about where to invest in affordable housing and how best to tailor housing interventions to increase their effectiveness.

CONCLUSION

Rent registration ordinances are one of the tools local governments have to help enforce rent stabilization ordinances and address the immediate impacts of California's housing crisis on their communities. These ordinances and other licensing, registration, and similar information-gathering laws serve essential roles in helping cities protect the public's health, safety, and welfare. Good governance requires that cities be able to enforce the laws they enact and modify them in light of new information regarding their effectiveness. Invalidating these information-gathering laws—many of which have been in force for decades—would severely undermine cities' ability to protect their residents and fight crime. This underscores that the decision below must be affirmed.

Dated: May 31, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with type-volume limitations set forth in FRAP 29(a)(5) and FRAP 29(d). This brief is proportionately spaced, contains 3,652 words, and has a typeface of 14 points or more.

Dated: May 31, 2019

By: /s/ Kent Qian
Kent Qian