

# LET CITIES DECIDE: END COLORADO'S PROHIBITION ON RENT REGULATION

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## INTRODUCTION

Dana Gilbert has lived in Denver, Colorado for twenty-eight years.<sup>1</sup> In addition to providing after-school childcare to her granddaughter, she works two jobs cleaning office buildings. Despite the fact that Dana can barely afford a studio apartment in Harvey Park<sup>2</sup>—the cheapest neighborhood on the outskirts of Denver—her landlord just sent a rent renewal lease for her apartment; rent is increasing from \$800 to \$1,050 per month for next year. This 31 percent increase puts the unit out of Dana’s price range. She secures a housing voucher from the Denver Housing Authority but is unable to find any landlords in Denver who will accept it. Eventually, she finds a one-bedroom apartment in Aurora—a city approximately ten miles southeast of Denver—for \$650 per month. Not only does the move mean that Dana needs to account for an additional \$86 in commuting expenses,<sup>3</sup> but it also means that she can no longer help with her granddaughter, thus putting new financial burdens on her son to cover the expense of after-school childcare.<sup>4</sup> The steep rent increase has uprooted Dana and her family in so many ways. Dana’s story represents the reality of rising rental costs for low and middle-income renters—a reality facing many Coloradans today.<sup>5</sup>

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1. Dana Gilbert is a fictional character, and this is a fictional account based on housing statistics and reported experiences.

2. Robert Garrison, *Here are the Cheapest and Most Expensive Denver Neighborhoods for Renters*, THE DENVER CHANNEL.COM (Jan. 23, 2018, 3:29 PM), <https://www.thedenverchannel.com/lifestyle/real-estate/here-are-the-cheapest-and-most-expensive-denver-neighborhoods-for-renters> [<https://perma.cc/4Y24-QFYN>].

3. This expense is based on the difference between a local and regional monthly pass from RTD. *See Fares*, RTD, <https://www.rtd-denver.com/fares-passes/fares> (last visited Jan. 30, 2020) [<https://perma.cc/YX8Y-8BCM>].

4. *See* QUALISTAR COLORADO, CHILD CARE PRICE AND AFFORDABILITY: A STRUGGLE FOR COLORADO FAMILIES & PROVIDERS 4 (June 2014), <http://www.wfco.org/file/ColoradoChildCarePricesandAffordabilityBrief.pdf> [<https://perma.cc/DC9Q-L7JF>].

5. *See infra* Part II; Lydia DePillis, *How Colorado Became One of the Least Affordable Places to Live in the U.S.*, CNN (Nov. 1, 2017, 6:09 AM), <http://money.cnn.com/2017/11/01/news/economy/colorado-housing-prices/index.html> [<https://perma.cc/3CWP-S9J3>] (quoting the owner of an affordable housing development company in Denver about Wadsworth Station tenants); *see also* JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., AM.’S RENTAL HOUS.: EVOLVING MARKETS AND NEEDS 6 (2013), [https://www.jchs.harvard.edu/sites/default/files/jchs\\_americas\\_rental\\_housing\\_2013\\_1\\_0.pdf](https://www.jchs.harvard.edu/sites/default/files/jchs_americas_rental_housing_2013_1_0.pdf) [<https://perma.cc/T7KW-2VDP>] (“While the steady erosion of household incomes has helped lift the ranks of cost-burdened renters, the affordability problem fundamentally reflects the simple fact that the cost of providing decent housing exceeds what low-income renters can afford to pay.”); Conroy

Increasing access to affordable housing is a proven method to improve living standards for communities and individuals like Dana. Affordable housing can improve childhood educational outcomes, allow families to cover healthcare costs, reduce both transportation expenses and air pollution, and increase neighborhood economic diversity.<sup>6</sup> In fact, affordable housing can contribute to an array of positive outcomes for children, including a 28 percent lower risk of being seriously underweight and 19 percent lower risk of being food insecure.<sup>7</sup> These connections between positive outcomes and affordable housing make clear that access to affordable housing is an issue of social justice, particularly for communities of color.<sup>8</sup>

To ensure access to affordable housing, legislators consider a variety of policies—from increased investments in public

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Dougherty & Luis Ferré-Sadurní, *California Approves Statewide Rent Control to Ease Housing Crisis*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/09/11/business/economy/california-rent-control.html> [<https://perma.cc/RMF4-FTWG>] (recounting Sandra Zamora’s story of adding a roommate and a weekend job to afford a 70 percent rent increase); Ally Schweitzer, *With D.C.’s Rent Control Law Up for Renewal, Housing Advocates Want To Make It Stronger*, DCIST (Oct. 4, 2019, 10:50 AM), <https://dcist.com/story/19/10/04/with-d-c-s-rent-control-law-up-for-renewal-housing-advocates-want-to-make-it-stronger/> [<https://perma.cc/3DHR-3J7B>] (sharing Shirley Tabb’s story of being priced out of her D.C. apartment when the rent was raised by \$800 per month).

6. See N.Y.C., DEP’T CITY PLAN., MANDATORY INCLUSIONARY HOUSING: PROMOTING ECONOMICALLY DIVERSE NEIGHBORHOODS 8–9 (Sept. 2015), [https://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/mih\\_report.pdf](https://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/mih_report.pdf) [<https://perma.cc/2B26-3C7K>] (presenting research on the impacts of economically segregated communities and benefits of economically diverse neighborhoods); Kottke et al., *Access to Affordable Housing Promote Health and Well-being and Reduces Hospital Visits*, 22 PERM. J. 17-079 (2017) (presenting clinical results from a study on the mitigation of homelessness and housing insecurity); ENTERPRISE, IMPACT OF AFFORDABLE HOUSING ON FAMILIES AND COMMUNITIES: A REVIEW OF THE EVIDENCE BASE (2014), <https://homeforallsmc.org/wp-content/uploads/2017/05/Impact-of-Affordable-Housing-on-Families-and-Communities.pdf> [<http://perma.cc/EC3M-4QS2>] (consolidating research related to child and family health outcomes associated with access to affordable housing and stable environments).

7. ENTERPRISE, *supra* note 6, at 7.

8. See NAT’L LOW INCOME HOUS. COAL., SOCIAL DISPARITIES AMONG EXTREMELY LOW-INCOME RENTERS (Apr. 15, 2019), <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters> [<https://perma.cc/CJ3E-DYMM4>] (explaining the disproportionate likelihood that non-white households are extremely low-income renters); see also Michael Casey, *Communities of Color Hit Hardest by Evictions in Boston, Report Finds*, BOSTON.COM (June 28, 2020), <https://www.boston.com/news/local-news/2020/06/28/communities-of-color-hit-hardest-by-evictions-in-boston-report-finds> [<https://perma.cc/58FJ-PT8G>] (demonstrating that evictions are more likely in neighborhoods where a majority of residents are people of color).

housing to private-employer incentives<sup>9</sup>—but none may be as contentious as rent regulation.<sup>10</sup> Supporters of rent regulation—any government-enforced price control measure on rent—argue that it provides insurance against rapid increases in rental rates and has a direct, positive impact on the welfare of individuals in regulated units.<sup>11</sup> In contrast, opponents argue that rent regulation negatively impacts the housing market by reducing the quality and supply of rental units.<sup>12</sup>

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9. For example, Cosgrove presents several tools currently used by local governments to spur the development of affordable housing units, including tax abatements, tax credits or housing vouchers, community benefit agreements, and community development corporations. See Anthony W. Cosgrove, *Affordable Housing Crisis or Shortage?: Reconciling Legal Scholarship with Free Market Solutions Over the Use of Eminent Domain for Economic Development*, 37 J.L. & COM. 83 (2018). By contrast, Pasquini and Munroe instead focus on public-private partnership options and social impact bonds to deliver community projects that address housing and health care together. Y. Melinda Pasquini & Robert M. Munroe, *Building Healthy Communities Through Health Care and Affordable Housing Synergies*, 48 COLO. LAW. 40 (Dec. 2019); see also Robert Samuels, *Six Possible Solutions to the Affordable Housing Crisis*, WASH. POST (July 2, 2014, 10:32 AM), <https://www.washingtonpost.com/blogs/local/wp/2014/07/02/six-possible-solutions-to-the-affordable-housing-crisis/> [<https://perma.cc/QVC2-52XV>]; Kyle Shoemaker, *Profitable Rent Control? Why Subsidies Are Better Solutions to the Affordable Housing Crisis*, FORBES (Mar. 13, 2020, 8:00 AM), <https://www.forbes.com/sites/forbesrealestatecouncil/2020/03/13/profitable-rent-control-why-subsidies-are-better-solutions-to-the-affordable-housing-crisis/#67e7077428bb> [<https://perma.cc/3C27-SMHZ>]; NAT'L LOW INCOME HOUS. COAL., SOLUTIONS TO THE AFFORDABLE HOUSING CRISIS (Aug. 15, 2019), <https://nlihc.org/sites/default/files/Solutions-to-the-Affordable-Housing-Crisis.pdf> [<https://perma.cc/K98H-8GPA>].

10. See, e.g., Conor Dougherty, *Why Rent Control is a Lightning Rod*, N.Y. TIMES (Oct. 12, 2018), <https://www.nytimes.com/2018/10/12/business/economy/rent-control-explained.html> [<https://perma.cc/46LK-8SN3>].

11. See W. DENNIS KEATING ET AL., RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET 56–57 (1998) (describing how regulatory intervention creates stability in a market prone to titanic fluctuations that can negatively impact renters and result in external costs to society); Rebecca Diamond et al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 AM. ECON. REV. 3365, 3393 (2019) (finding that “beneficiaries of rent control are between 10 and 20 percent more likely to remain at their 1994 address relative to the control group” with “significantly stronger” effects for “older households and among households that have already spent a number of years at their current address”); Kaushik Basu & Patrick M. Emerson, *Efficiency Pricing, Tenancy Rent Control and Monopolistic Landlords*, 70 ECONOMICA 223, 224 (2003) (citing a “fair amount of empirical evidence suggesting that many rental housing markets are far from competitive” and presenting a model to assess a monopoly landlord).

12. See JOHN INGRAM GILDERBLOOM, INVISIBLE CITY: POVERTY, HOUSING AND NEW URBANISM 69 (2008) (explaining the argument that rent regulation causes deleterious effects on the quality and availability of rent units by impacting “landlords’ ability to respond to market signals”); Diamond et al., *supra* note 11 (detailing the long-term negative impacts on housing availability).

Even as the debate over the efficacy of rent regulation continues, thirty-two states—including Colorado—still have long-standing statewide bans that prevent municipalities from using rent regulation to address affordable housing.<sup>13</sup> Colorado, like many other states, is a home-rule jurisdiction—its Constitution grants its municipalities broad authority to enact a wide array of local policies. Despite this constitutional commitment to local governance, in 1981 the Colorado legislature established that “no county or municipality may enact any ordinance or resolution that would control rent on either private residential property or a private residential housing unit.”<sup>14</sup> As interpreted by the Colorado Supreme Court, this prohibition on “rent control” prevents municipalities from utilizing common modern affordable housing tools of rent stabilization and mandatory inclusionary housing policies.<sup>15</sup> Rent stabilization sets caps on how much landlords may raise rent on an annual basis,<sup>16</sup> while mandatory inclusion housing (MIH) policies require new rental developments to set aside a percentage of units for below-market rentals.<sup>17</sup> While strict rent control policies that freeze rent in perpetuity are no longer seen as effective, modern rent regulations are important tools for municipalities to address affordable housing.

This Comment argues that the Colorado General Assembly should overturn the broad prohibition on modern forms of rent regulation, returning to municipalities the home-rule authority to enact policies like rent stabilization and MIH as affordable-housing solutions. Part I explains the emergence of rent regulation nationwide and common forms of rent regulation. Part II describes Colorado’s housing crisis before analyzing the State’s prohibition on “rent control” alongside the Colorado Supreme Court’s broad interpretation of “rent control.” Part III argues

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13. NAT’L MULTIFAMILY HOUS. COUNCIL, RENT CONTROL BY STATE LAW 1 (2019), <https://www.nmhc.org/globalassets/advocacy/rent-control/Rent-Control-by-State-Chart.pdf> [<https://perma.cc/HK3C-G5P2>].

14. See *infra* Part 0; COLO. REV. STAT. ANN. § 38-12-301(1) (West 2020); Eliza Carter, *Demonstrators Call for the Repeal of Colorado’s Rent Control Ban*, COLO. INDEP. (Sept. 23, 2016), <https://www.coloradoindependent.com/2016/09/23/demonstration-rent-control-ban-telluride/> [<https://perma.cc/AX64-MUMC>].

15. See *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30 (Colo. 2000).

16. Sage Singleton, *Rent Control vs. Rent Stabilization: What’s the Difference?*, APARTMENT GUIDE (Oct. 24, 2019), <https://www.apartmentguide.com/blog/rent-control-vs-rent-stabilization/> [<https://perma.cc/5BDY-QK6V>].

17. *Inclusionary Housing: The Basics*, NAT’L HOUS. CONF., <https://www.nhc.org/policy-guide/inclusionary-housing-the-basics/> (last visited Feb. 3, 2020) [<https://perma.cc/845F-YKVZ>].

that the legislature should overturn restrictions on municipal rent regulation because home-rule municipalities are better positioned than the legislature to (A) tailor housing policies to the particular challenges of their community; (B) experiment and innovate to find the best housing policy solutions; and (C) balance and be accountable to varied, municipality-specific local interests. Part IV assumes a world where the Colorado legislature has lifted the restriction on municipal rent regulation and municipalities have the freedom to decide whether rent regulation would be an efficacious local solution. It analyzes policy choices and legal hurdles for municipalities to consider when doing so.

## I. RENT REGULATION IN THE UNITED STATES

From a strict, temporary rent freeze first used during World War I to a variety of second-generation policies intended to address affordable housing crises, rent regulations have evolved since their emergence in the early 1900s. From the origins of rent regulation to the passing of rent regulation in today's political landscape, this Part details and situates Colorado's prohibition on rent regulation within the broader national context.

### A. *The Birth of Rent Control and the Emergence of Second-Generation Rent Regulation*

Rent regulation first emerged as an affordable-housing policy solution following New York's adoption of rent control during World War I.<sup>18</sup> As war efforts began, workers moved into cities to get higher-paying wartime jobs.<sup>19</sup> This migration of workers skyrocketed the demand for housing in New York City.<sup>20</sup> By 1919, the vacancy rate of apartments had dropped below 1 percent and new construction had all but halted because materials and labor had been allocated to the war effort.<sup>21</sup> Landlords responded to the high demand for housing by dramatically increasing rent.<sup>22</sup> To avoid widespread evictions in New York City, the state legislature passed emergency rent-freezing measures—the

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18. ROBERT M. FOGELSON, *THE GREAT RENT WARS: NEW YORK 1917-1929* 22 (2013).

19. *Id.*

20. *Id.*

21. *Id.* at 23–25.

22. *Id.* at 40–41.

first form of rent regulation in the United States.<sup>23</sup> These early “rent control” policies imposed strict ceilings on allowable annual rent increases and essentially froze the rent of units at the existing level at the time of enactment, allowing only nominal rent increases for many years.<sup>24</sup>

Temporary rent control laws reappeared during wartime through the mid-twentieth century and paved the way for public demand for permanent rent-regulation policies.<sup>25</sup> Twice—once during World War II and again during the Vietnam War—the federal government enacted temporary rent-freezing measures and stabilization programs.<sup>26</sup> When these federal programs expired, tenants pressured their local governments to enact rent control policies that would stabilize rent markets in the absence of federal aid.<sup>27</sup> This resulted in the emergence of “second-generation” rent regulation in multiple jurisdictions, including New Jersey, Massachusetts, Washington D.C., and California.<sup>28</sup> These “second-generation” programs expanded possible rent regulation to encompass a much broader set of policies than just rent-freezing measures, including rent stabilization and MIH.<sup>29</sup>

Though the term “rent regulation” still conjures up the image of apartments in New York City that have been restricted to a fixed rent since the 1970s, the reality is that modern forms of rent regulation—rent stabilization and MIH—are more widely used today.<sup>30</sup> The differences between “rent control,” “rent stabilization,” and “MIH,” are in *who* the policies target and *how* they regulate rent.

Rent control and rent stabilization policies target landlords’ behaviors and actions. “Rent control” specifically refers to the control of rent through strict rate ceilings.<sup>31</sup> These policies

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23. *Id.* at 196–97.

24. *Id.*

25. KEATING ET AL., *supra* note 11, at 4.

26. *Id.* at 5.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Rent Control FAQ*, NYC RENT GUIDELINES BOARD, <https://rentguidelinesboard.cityofnewyork.us/resources/faqs/rent-control/> (last visited Nov. 18, 2019) [<https://perma.cc/J2H2-KYNX>].

31. Prasanna Rajasekaran et al., *Rent Control: What Does the Research Tell Us About the Effectiveness of Local Action?*, URBAN INST., 3 (Jan. 2019), <https://www.urban.org/research/publication/rent-control-what-does-research-tell-us-about-effectiveness-local-action> [<https://perma.cc/96L4-55W9>] (recognizing that the different definitions of success for rent control leads to varied research conclusions).

essentially freeze the rent of units to the existing level at the time of enactment, allowing only nominal increases in rent even over many years. In contrast, “rent stabilization” policies give landlords an allowable percentage increase in rent on an annual basis, thereby accounting for market changes while still protecting renters.<sup>32</sup> They may also include provisions that cap the number of rent increases during the year<sup>33</sup> or allow for the roll-over of unused annual increases to another year.<sup>34</sup> These regulations aim to prevent disruptions to renters caused by sudden increases in rent—such as evictions or unplanned moves—while ensuring landlords receive enough rent income to pay their mortgage, provide property maintenance, and make a reasonable profit.<sup>35</sup>

Lastly, MIH policies regulate developers by requiring a set number or a percentage of new housing units to be rented at below-market prices.<sup>36</sup> This effectively requires developers to build below-market housing units in new developments to address the supply of affordable housing in a particular neighborhood or across a jurisdiction.<sup>37</sup> Voluntary inclusionary housing (VIH) programs offer incentives for developers to do similar set-asides.<sup>38</sup> However, MIH programs tend to result in the production of more affordable housing units than voluntary programs<sup>39</sup>

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32. See, e.g., *Topic No. 051: This Year's Annual Allowable Increase*, CITY & CTY. OF S.F. RENT BD. (Nov. 11, 2018), <https://sfrb.org/topic-no-051-years-annual-allowable-increase#:~:text=The%20annual%20allowable%20increase%20amount,when%20renting%20a%20vacant%20unit> [<https://perma.cc/87DX-8TME>].

33. See, e.g., L.A., Cal., Ordinance No. 2018-0045 (Nov. 20, 2018).

34. See, e.g., *Topic No. 053 Banked Rent Increases*, CITY & CTY. OF S.F. RENT BD. (Nov. 11, 2018), <https://sfrb.org/topic-no-053-banked-rent-increases> [<https://perma.cc/E6HG-PVBM>].

35. Rajasekaran et al., *supra* note 31, at 1.

36. Benjamin Schneider, *CityLab University: Inclusionary Zoning*, BLOOMBERG CITYLAB (July 17, 2018, 2:15PM), <https://www.bloomberg.com/news/articles/2018-07-17/inclusionary-zoning-everything-you-need-to-know> [<https://perma.cc/T89V-HNV7>].

37. *Designing a Policy*, INCLUSIONARY HOUSING, <http://inclusionaryhousing.org/designing-a-policy/onsite-development/the-set-aside-requirement/> (last visited Sept. 27, 2019) [<https://perma.cc/8G7X-5WV3>].

38. *Inclusionary Housing: The Basics*, *supra* note 17 (discussing both mandatory and voluntary inclusionary housing programs).

39. LISA A. STURTEVANT, SEPARATING FACT FROM FICTION TO DESIGN EFFECTIVE INCLUSIONARY HOUSING PROGRAMS 8 (May 2016), <https://ihiusa.org/wp-content/uploads/Seperating-Fact-from-Fiction.pdf> [<https://perma.cc/8TCF-DKZ2>].



with the legal mechanism being the *required* production of on-site affordable units.<sup>40</sup>

*B. Backlash to Second-Generation Programs and Recent Political Momentum Supporting Rent Regulation*

Landlords and the real estate industry responded to the wave of second-generation rent regulation with legal challenges to overturn ordinances and political efforts to lobby state legislatures, and even the federal government, to preempt local policies.<sup>41</sup> Some political efforts resulted in the state rollback of local ordinances, such as a successful 1994 statewide referendum in Massachusetts that prohibited municipal rent control measures<sup>42</sup> and a 1995 California law that prohibited local governments from putting rent regulations on housing units that came onto the market after 1995.<sup>43</sup> As previously mentioned, Colorado is one of thirty-two states that currently preempts local rent regulation,<sup>44</sup> and it has since 1981.<sup>45</sup> When the City of Boulder put a voter initiative on the ballot for second-generation rent regulation in 1980, the General Assembly sprang into action and enacted a statewide ban to preempt local rent control.<sup>46</sup>

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40. *Program Structure*, INCLUSIONARY HOUSING, <http://inclusionaryhousing.org/designing-a-policy/program-structure/> (last visited Nov. 18, 2019) [<https://perma.cc/8TCF-DKZ2>].

41. *See id.* (recounting the battles to rollback or preempt local rent control at the state and federal level); CHARLES S. RHYNE ET AL., MUNICIPALITIES AND MULTIPLE RESIDENTIAL HOUSING: CONDOMINIUMS AND RENT CONTROL 7 (1975) (citing several court cases addressing whether rent control ordinances are a valid exercise of municipal police power).

42. *See Battle Goes on as Rent Control is Defeated in Massachusetts*, N.Y. TIMES, Nov. 22, 1994, at A18 (reporting the results of the statewide ballot initiative passing 51 percent to 49 percent).

43. *See* Conor Dougherty & Luis Ferré-Sadurní, *California Rent Control Bill Advances, Fueled by Housing Crisis*, N.Y. TIMES (Sept. 10, 2019), <https://www.nytimes.com/2019/09/10/business/economy/california-rent-control.html> [<https://perma.cc/ANB3-DZEC>].

44. NAT'L MULTIFAMILY HOUS. COUNCIL, *supra* note 13, at 1.

45. Carter, *supra* note 14.

46. There are few sources on the Boulder rent control initiative that led to the statewide prohibition. An article written by the Director of the Boulder Tenants Union at the time recounted that the movement for rent control was born out of CU Boulder and morphed into a non-student activist effort. The movement succeeded in getting rent control on the ballot, but the legislature passed the ban “before voters could make their own mind up.” Mark Fearer, *Boulder’s Tenant Movement: From Radical to Dormant*, BOULDER WKLY. (Aug. 15, 1996), <https://bcn.boulder.co.us/housing/tenant.html> [<https://perma.cc/5NE7-4TGC>]; *see also* Carter, *supra* note 14 (recounting the origins of Colorado’s rent control prohibition).

However, in many jurisdictions, including at the federal level, attempts to preempt state and local rent control legislation failed due to public support for rent regulation.<sup>47</sup>

Today, Oregon and California are the only states with statewide rent regulation, and both states enacted their laws in 2019.<sup>48</sup> Oregon's law caps the annual increase of rent to 7 percent plus the "consumer price index" and provides tenants the remedy of "an amount equal to three months' rent plus actual damages suffered" from the landlord for violations.<sup>49</sup> Similarly, California's recently enacted law prohibits landlords from increasing rent more than 5 percent "plus the percentage change in the cost of living" until January 1, 2030.<sup>50</sup> California's law allows local rent restrictions to remain intact and does not overturn the state law that bans municipal rent regulation on units built after 1995.<sup>51</sup>

Alternatively, many jurisdictions permit localities to regulate rent in the absence of state policy; Maryland, New Jersey, New York, and Washington, D.C. expressly allow municipal rent regulation.<sup>52</sup> Municipalities in these jurisdictions have a variety of ordinances in place, from rent stabilization to strict rent caps to some combination of the two. For instance, Jersey City, New Jersey, has both a rent cap on units rented before 1973 and a rent stabilization provision that sets the annual increase in rent at four percent, or the calculated consumer price index amount, when a lease expires or is terminated.<sup>53</sup>

Recently, elected officials have been under intensifying political pressure to present solutions to the affordable housing crisis occurring in the United States<sup>54</sup> and, as will be discussed in

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47. KEATING ET AL., *supra* note 11, at 5.

48. NAT'L MULTIFAMILY HOUS. COUNCIL, *supra* note 13.

49. OR. REV. STAT. ANN. § 90.323 (West 2019).

50. Tenant Protection Act of 2019, AB-1482 (Cal. 2019).

51. *Id.*

52. NAT'L MULTIFAMILY HOUS. COUNCIL, *supra* note 13.

53. JERSEY CITY, N.J., CODE § 260-2, 3 (2019).

54. See AMERICA'S RENTAL HOUSING: EVOLVING MARKETS AND NEEDS, JOINT CTR. FOR HOUS. STUD. HARV. UNIV. 39 (2013), [https://www.jchs.harvard.edu/sites/default/files/jchs\\_americas\\_rental\\_housing\\_2013\\_1\\_0.pdf](https://www.jchs.harvard.edu/sites/default/files/jchs_americas_rental_housing_2013_1_0.pdf) [<https://perma.cc/T7KW-2VDP>] ("It is hardly hyperbole to call the growing lack of rental affordability a crisis. More than half of all renters pay more than 30 percent of income for housing, including more than one in four that pay more than 50 percent."); Dennis Rodkin, *Voters in 3 Chicago Wards Support Rent Control*, CRAIN'S CHI. BUS. (Nov. 7, 2018, 11:50 AM), <https://www.chicagobusiness.com/residential-real-estate/voters-3-chicago-wards-support-rent-control> [<https://perma.cc/X4W4-Q2Z6>] (multiple wards in Chicago have voted in support of state legislators overturning the Illinois

Part II, in Colorado specifically.<sup>55</sup> In fact, a recent poll shows that 60 percent of Americans believe affordable housing is “a serious problem in the area where they live.”<sup>56</sup> During the 2020 Presidential Primary campaign, Democratic candidates went to bat for a variety of solutions, ranging from Senator Bernie Sanders’ plan to establish national rent control to former Housing and Urban Development Secretary Julian Castro’s plan to issue more housing vouchers to low-income families.<sup>57</sup> Thus, the question for elected officials is not whether to address affordable housing—but how to address it effectively.

## II. COLORADO’S HOUSING CRISIS AND ITS BROAD PROHIBITION ON MUNICIPAL RENT REGULATION

The debate surrounding rent regulation has taken center stage again as Colorado continues to rank in the top ten nationally for state growth rate,<sup>58</sup> and both residents and municipalities feel the effects of a dwindling supply of affordable housing. This Part details the affordable housing crisis underway in Colorado, and then explains relevant state law prohibiting rent regulation—both the statutory prohibition on “rent control” and the Colorado Supreme Court’s broad interpretation of that statute.

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prohibition on rent control); Ankita Rao, ‘*Universal Rent Control*’ Is the Left-Wing Dream That’s Actually Happening, VICE (Mar. 6, 2019, 7:57 AM), [https://www.vice.com/en\\_us/article/vbwqd8/universal-rent-control-is-the-left-wing-dream-thats-actually-happening](https://www.vice.com/en_us/article/vbwqd8/universal-rent-control-is-the-left-wing-dream-thats-actually-happening) [<https://perma.cc/D2ZU-SX42>] (“housing is getting the blue wave treatment, with states and cities weighing a host of sweeping reforms to make both renting and owning more affordable”); Jimmy Tobias, *In the Heart of Real-Estate Power, Housing Movement Nears Victory*, NATION (May 30, 2019), <https://www.thenation.com/article/universal-rent-regulation-new-york/> [<https://perma.cc/RK7D-7JQG>] (describing the political climate in New York with “crisis and corruption . . . ignit[ing] an inferno of tenant anger”).

55. See, e.g., Carter, *supra* note 14.

56. OPPORTUNITY STARTS AT HOME, THE NEED FOR ACTION ON HOUSING AFFORDABILITY 4 (2019), <https://www.opportunityhome.org/wp-content/uploads/2019/03/Full-Report-PPT-NoEM.pdf> [<https://perma.cc/B886-ELRV>].

57. Pam Fessler, *2020 Democrats Offer Up Affordable Housing Plans Amid Surging Prices*, NPR (June 21, 2019, 5:00 AM), <https://www.npr.org/2019/06/21/734143716/2020-democrats-offer-up-affordable-housing-plans-amid-surgings-prices> [<https://perma.cc/6BDJ-NMZ3>].

58. Associated Press, *Colorado Gains 80,000 Residents, Growth Rate 7<sup>th</sup> in Nation*, THE DENVER CHANNEL.COM (Dec. 25, 2018, 11:09 AM), <https://www.thedenverchannel.com/news/local-news/colorado-gains-80-000-residents-growth-rate-7th-in-nation> [<https://perma.cc/46V2-8GP3>].

A. *Colorado's Existing Affordable Housing Crisis  
Compounded by COVID-19*

Evictions have shot up in recent years in counties across the state, with 7,171 evictions in El Paso County and 4,345 in Jefferson County in 2018 alone.<sup>59</sup> Nearly one in four households (24 percent) is “extremely cost-burdened,” paying 50 percent or more of their income towards rent.<sup>60</sup> The story of Dana Gilbert—mentioned in this Comment’s introduction, which outlined the domino effect that unaffordable rent increases have on tenants—serves as an important reminder that Coloradans and their families suffer without affordable housing options in their communities.

The housing crisis in Colorado impacts mountain towns, suburban areas, and urban cities alike, though each community faces unique housing market challenges. In Denver, rents increased by 46 percent between 2011 and 2016, with asking rents at levels that “suggest that households using rental assistance like Section 8 vouchers may already be having trouble accessing smaller units.”<sup>61</sup> This steep increase across the Denver rental market can be attributed to a strong urban economy and population growth.<sup>62</sup> In contrast, mountain towns face the specific challenge of split housing markets—with vacationers and second-home owners inflating prices for a lower-income workforce.<sup>63</sup> In San Miguel County, home to the popular ski resort town of Telluride, a growing number of employers report that

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59. See Jennifer Brown & Jesse Paul, *It's the Year of the Renter at the Colorado Statehouse, from Rent Control to Less Stringent Eviction Timelines*, COLO. SUN (April 2, 2019, 5:02 AM), <https://coloradosun.com/2019/04/02/colorado-rent-control-bills-eviction-crisis/> [<https://perma.cc/F5PZ-W5T8>] (reporting a county breakdown of evictions in 2018, such as 7,171 evictions in El Paso County and 4,345 in Jefferson County).

60. COLO. HOUS. AND FINANCE AUTH., *THE HOUSING AFFORDABILITY GAP 2* (2018), [http://www.chfainfo.com/news/ResourceLibrary/wp/WP\\_HousingAffordabilityGap.pdf](http://www.chfainfo.com/news/ResourceLibrary/wp/WP_HousingAffordabilityGap.pdf) [<https://perma.cc/T25W-DY6H>].

61. DENVER HOUS. ADVISORY COMM., *HOUSING AN INCLUSIVE DENVER: SETTING HOUSING POLICY 34* (2018), [https://www.denvergov.org/content/dam/denvergov/Portals/690/Housing/HousingInclusiveDenver\\_FINAL\\_020918.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/690/Housing/HousingInclusiveDenver_FINAL_020918.pdf) [<https://perma.cc/YW9E-LHWG>].

62. See Connor Briggs, *Where are Denver Apartment Rents Headed in 2020?*, COLO. REAL ESTATE J. (Nov. 22, 2019), <https://crej.com/news/where-are-denver-apartment-rents-headed-in-2020/> [<https://perma.cc/SR4W-T54R>].

63. See *id.*; Jason Blevins, *Affordable Housing Crisis Threatens Vitality of Colorado's High-Country Economies*, COLO. SUN (Jan. 18, 2019, 5:04 AM), <https://coloradosun.com/2019/01/18/affordable-housing-crisis-colorado-high-country/> [<https://perma.cc/M7R9-A3WD>].

“affordable housing for local residents is the ‘most critical problem in the area.’”<sup>64</sup> On the western slope, the Roaring Fork Valley region, where the ski resort town of Aspen is located, predicts that it will have a deficit of about 5,700 affordable housing units by 2027.<sup>65</sup>

With Colorado’s existing housing crisis, the COVID-19 pandemic threatens to make a bad situation catastrophic. Rental markets will be shaken and disrupted, with nearly 28 million renters nationwide<sup>66</sup> and 460,000 Coloradans at risk of eviction.<sup>67</sup> While Colorado saw close-to-average rates for renters fully paying their rent in May 2020, renters’ inability to pay rent could skyrocket as enhanced federal benefits expire and the unemployment rate hovers around 10 percent, or even climbs higher.<sup>68</sup> In one Colorado Springs household, for example, all three members of the family were furloughed or fired over the course of ten days due to the COVID-19 pandemic.<sup>69</sup> They could not pay rent while still affording groceries and essential expenses, and faced the prospect of eviction. As more begin to face a similar reality, the demand for affordable housing will increase.

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64. ECON. & PLANNING SYS., INC., SAN MIGUEL COUNTY HOUSING NEEDS ASSESSMENT: DRAFT REPORT 56 (Aug. 16, 2018), <https://townofmountainvillage.com/media/2018-San-Miguel-County-Housing-Needs-Assessment-Study.pdf> [<https://perma.cc/2QBT-79PS>].

65. Scott Condon, *Study Forecasts How Bad Roaring Fork Valley’s Affordable Housing Shortage Will Be by 2027*, ASPEN TIMES (Feb. 12, 2019), <https://www.aspentimes.com/trending/study-forecasts-how-bad-roaring-fork-valleys-affordable-housing-shortage-will-be-by-2027/> [<https://perma.cc/8VBN-VA8H>].

66. Renae Merle, *Democrats Have Proposed \$100 Billion for Struggling Renters. It May Not Be Enough*, WASH. POST (May 13, 2020, 10:42 AM), <https://www.washingtonpost.com/business/2020/05/13/rental-assistance-coronavirus/> [<https://perma.cc/2FD8-ZQ47>].

67. Steve Staeger, *What Happens When Colorado Reopens and the Rent is Due?*, 9NEWS (April 28, 2020, 9:33 PM), <https://www.9news.com/article/news/health/coronavirus/colorado-may-rent-coronavirus-covid/73-d059f8fb-4148-4241-a9f5-cffc9683297f> [<https://perma.cc/5DZ4-TUVY>].

68. Aldo Svaldi, *With Moratorium Lifted, Will Colorado’s Rental Market See a Spike in Evictions?*, DENVER POST (June 23, 2020, 6:00 AM), <https://www.denverpost.com/2020/06/23/colorado-evictions-rent-coronavirus/> [<https://perma.cc/N9GZ-PEEX>].

69. Anita Hassan, *No Money, but Rent Is Due: In Colorado, Few Eviction Protections as Coronavirus Spreads*, NBC NEWS (April 22, 2020, 4:20 PM), <https://www.nbcnews.com/news/us-news/no-money-rent-due-colorado-few-eviction-protections-coronavirus-spreads-n1189846> [<https://perma.cc/E3D8-QVQY>].

The impact of the pandemic on access to housing will not be felt equally across the population.<sup>70</sup> Black and Latinx people, particularly mothers and children, are the most likely to be affected as evictions rise.<sup>71</sup> People from other vulnerable populations—such as the disabled community, the formerly incarcerated, undocumented people, and LGBTQ+ people—will likely be negatively impacted by rising evictions as well.<sup>72</sup> At the same time, units on the higher end of the rental market and in urban locations may see a decrease in prices—otherwise known as “pandemic pricing.”<sup>73</sup> Renters who rent by choice, meaning they have the economic means to decide where and when to rent, are deciding to leave their expensive, downtown units while cities are shutdown or subdued in favor of other locations.<sup>74</sup> As a result, renters looking on the higher end of the rental market may find cheaper rents with incentives to sign a lease, including offers such as a month or two of free rent.<sup>75</sup> Unsurprisingly, these benefits do not appear to be available to more vulnerable populations with insecure housing.<sup>76</sup>

In response to the COVID-19 pandemic, Colorado Governor Jared Polis issued a series of executive orders placing a moratorium on evictions.<sup>77</sup> When the moratorium expired on June 13, 2020, Governor Polis enacted a new order requiring landlords to provide tenants with thirty days’ notice before eviction rather than the typical ten days’ notice.<sup>78</sup> The legislature attempted to

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70. Renae Merle, *Evictions Are Likely to Skyrocket This Summer as Jobs Remain Scarce. Black Renters Will Be Hard Hit.*, WASH. POST (July 6, 2020, 9:27 AM), <https://www.washingtonpost.com/business/2020/07/06/eviction-moratoriums-starwood/> [https://perma.cc/62PH-2EV3].

71. Katherine Lucas McKay et al., *20 Million Renters Are at Risk of Eviction; Policymakers Must Act Now to Mitigate Widespread Hardship*, ASPEN INST. (June 19, 2020), <https://www.aspeninstitute.org/blog-posts/20-million-renters-are-at-risk-of-eviction/> [https://perma.cc/4ZS2-7B64].

72. *Id.*

73. Anna Bahney, *‘Pandemic Pricing’ is Here. Rents are Dropping Across the US*, CNN BUS. (June 17, 2020, 9:13 AM), <https://www.cnn.com/2020/06/16/success/rents-are-dropping-us-cities-coronavirus/index.html> [https://perma.cc/26H3-KLYG].

74. *Id.*

75. *Id.*

76. *Id.*

77. Colo. Exec. Order No. D-2020-012 (March 20, 2020); Colo. Exec. Order No. D-2020-031 (April 6, 2020); Colo. Exec. Order No. D-2020-088 (May 29, 2020).

78. Colo. Exec. Order No. D-2020-101 (June 13, 2020); see Alex Burness, *Colorado Governor Issues New Order to Delay Evictions*, DENVER POST (June 13, 2020, 9:45 PM), <https://www.denverpost.com/2020/06/13/polis-order-evictions-colorado-covid-coronavirus/> [https://perma.cc/T6J8-ZVP8].

extend the moratorium before the end of the legislative session, but the bill failed in the Senate. Perhaps worth noting is the disheartening political reality that at least one member of the Colorado Senate is also a landlord.<sup>79</sup>

With Colorado's existing housing crisis and the coronavirus pandemic, the need for affordable housing solutions is ever present and growing. Nevertheless, due to Colorado's broad prohibition on municipal "resolutions or ordinances that control rent," municipalities cannot respond to these crises by enacting rent stabilization or MIH policies.

*B. The Statewide Prohibition on Municipal Rent Regulation*

Under the Colorado Constitution, municipalities in Colorado have "home-rule powers"—the "powers necessary, requisite or proper for the government and administration of its local and municipal matters."<sup>80</sup> This "home-rule" authority means that the state legislature cannot regulate matters that are "solely of local concern," leaving this domain exclusively to municipalities.<sup>81</sup> For "matters of mixed state and local concern," both home-rule municipalities and the state legislature have the constitutional authority to legislate, with conflicts being resolved in favor of state legislation.<sup>82</sup> In contrast, for "matters of statewide concern," home-rule municipalities must have express authorization from the Colorado Constitution or legislation to regulate.<sup>83</sup>

When litigants challenge municipal or state constitutional authority to enact a law, courts determine whether the law's province should be deemed "solely of local concern," "mixed state and local concern," or "statewide concern" using a multifactor test.<sup>84</sup> The test includes analysis of: "(1) the need for statewide uniformity of regulation; (2) the extraterritorial impact of local regulation; (3) whether the matter has traditionally been regulated at the state or local level; and (4) whether the Colorado Constitution specifically commits the matter to state or local

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79. Burness, *supra* note 78.

80. COLO. CONST. art. XX, § 6.

81. Webb v. City of Black Hawk, 295 P.3d 480, 486 (Colo. 2013).

82. *Id.*

83. *Id.*

84. *Id.*

regulation.”<sup>85</sup> In addition, courts take into account the state legislature’s determination that “a matter is of statewide concern.”<sup>86</sup> Though such a declaration by the state legislature is not dispositive, courts do lend credence to the state legislature’s determination.<sup>87</sup>

In 1981, as recounted previously, the General Assembly did just that—it “[found] and declare[d] that the imposition of rent control on private residential housing units is a matter of statewide concern.”<sup>88</sup> By this determination, the legislature thus justified its usurpation of municipal authority over local rent regulation policies—a usurpation that would later be sanctioned by the Colorado Supreme Court.<sup>89</sup>

### C. *The Colorado Supreme Court’s Broad Interpretation of “Rent Control”*

In 2000, the Colorado Supreme Court broadly interpreted the statewide ban in *Town of Telluride v. Lot Thirty-Four Venture*, invalidating Telluride’s MIH requirement for new developments as prohibited “rent control.”<sup>90</sup> Telluride’s ordinance required developers to create affordable rental units in new developments and laid out four ways a developer could meet the requirement: “by constructing new housing units with fixed rental rates, by imposing deed restrictions on free market units in order to fix rental rates, by paying fees in lieu of housing, or by conveying land to the Town for affordable housing.”<sup>91</sup> In its analysis, the Court defined “rent control” as an “allowable rent capped at a fixed rate with only limited increases” and found that Telluride’s ordinance, by “operat[ing] to suppress rental values below their market values,” fell within that definition.<sup>92</sup>

Importantly, the Court also found that state law preempted local law despite Telluride—like all municipalities in Colorado—being a home-rule municipality.<sup>93</sup> Engaging in a thorough

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85. *Id.*

86. *Id.*

87. *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30, 37 (Colo. 2000).

88. *Id.* at 35.

89. *See id.* at 39 (finding that the state statute on rent control preempts the authority of a home rule municipality).

90. *Id.* at 32.

91. *Id.*

92. *Id.* at 35.

93. *Id.* at 37.



analysis of the multifactor test, the Court found that factors (1) and (2) above weighed in favor of rent regulation being “a matter of statewide concern,” reasoning that uniformity in landlord-tenant relations “fosters informed and realistic expectations by the parties to a lease” and that rent regulations can impact other neighboring communities.<sup>94</sup> The Court found that factors (3) and (4) did not weigh strongly in either direction, though it noted that some other states “have concluded that rent control is an issue of statewide concern.”<sup>95</sup> Ultimately, the Court relied on the General Assembly’s declaration that this “is a matter of statewide concern” to conclude that the state law supersedes home-rule municipality authority.<sup>96</sup> Thus, the Court overturned Telluride’s MIH ordinance as a form of “rent control” preempted by the 1981 ban.

In the wake of *Telluride*’s broad interpretation of “rent control,” Colorado’s home-rule municipalities are presently preempted from mandating that any new or existing housing be rented at a more affordable rate than market value<sup>97</sup>—despite the fact that the market value of Colorado housing has skyrocketed in recent years.<sup>98</sup> However, the line between voluntary and mandatory policies is not always clear and courts will look out for voluntary programs that are coercive or functionally mandatory.<sup>99</sup> For example, in *Meyerstein v. City of Aspen*, a property owner challenged the validity of a deed restriction that reflected a voluntary agreement between his predecessor in interest and the City of Aspen under Colorado’s ban on rent control.<sup>100</sup> The Colorado Court of Appeals recognized that section 38-12-201(2) “expressly allows for the imposition of deed restrictions that limit rents on property pursuant to a voluntary agreement between a governmental entity and a property owner” and, therefore, the deed restriction would be enforceable against Meyerstein if it was “voluntary.”<sup>101</sup> After remand to the Pitkin County District Court and another appeal, the Colorado Court of

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94. *Id.* at 38–39.

95. *Id.* at 39.

96. *Id.* at 38.

97. *Id.* at 35.

98. See DENVER HOUS. ADVISORY COMM., *supra* note 61.

99. *Meyerstein v. City of Aspen*, 282 P.3d 456, 466 (Colo. App. 2011).

100. *Id.* at 460.

101. *Id.* at 466.

Appeals affirmed that there was no evidence of coercion and the agreement was “voluntary.”<sup>102</sup>

To be clear, *Telluride* left intact two exceptions to the statewide ban on “rent control.” First, municipalities can pass mandatory rent regulation for properties in which they have a “government interest.”<sup>103</sup> Second, as illustrated in *Meyerstein*, municipalities can enact voluntary programs to incentivize developers and landlords to offer affordable housing.<sup>104</sup> But these exceptions don’t fully equip municipalities with the tools to increase the supply of affordable housing. The “government interest” exception only regulates development projects with government involvement through a housing authority or similar agency, and the voluntary agreement exception does not extend to MIH policies. Thus, after *Telluride*, the only solution for home-rule cities seeking to pass mandatory rent regulation lies with reform by the state legislature.<sup>105</sup> Luckily, members of the public in Colorado seem poised to push for such reform.

#### *D. Colorado’s Appetite for Rent Regulation Reform*

As the State’s housing crisis intensifies, there have been recent calls for the state legislature to repeal the prohibition on rent regulation and equip cities with all available tools to increase affordable housing.<sup>106</sup> While rent control, in its original form, has been phased out in most jurisdictions across the country,<sup>107</sup> the opposite is true for rent stabilization and MIH policies.<sup>108</sup> However, in Colorado, both the state prohibition and its broad meaning under *Telluride* essentially prevent municipalities from even considering rent stabilization and MIH policies.

Yet, at least some state legislators support reform via overturning or narrowing *Telluride*. In 2019, legislators introduced a bill to repeal the State’s prohibition on rent regulation,

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102. *Meyerstein v. City of Aspen*, No. 13CA0330, 2014 WL 323734, at \*1 (Colo. App. Jan. 30, 2014).

103. See COLO. REV. STAT. § 38-12-301(5) (2010).

104. COLO. REV. STAT. § 38-12-301(2) (2010).

105. *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30, 32 (Colo. 2000).

106. See, e.g., Justin Wingerter, *Bill Allowing for Rent Control Hits Dead-End in Colorado Senate*, DENVER POST (Apr. 30, 2019, 12:20 PM), <https://www.denverpost.com/2019/04/30/rent-control-bill-colorado-senate/> [<https://perma.cc/KVQ3-A7NA>].

107. See, e.g., *Rent Control FAQ*, *supra* note 30 (applying only to units with renters, or their lawful successors, who have been in occupancy since July 1, 1971).

108. See *supra* Section I.B.

allowing local governments to “enact and enforce any ordinance, resolution, agreement, deed restriction, or other measure that would stabilize rent on private residential property.”<sup>109</sup> The bill passed out of committee in the Senate by a 3-2 vote but did not reach the floor for a vote.<sup>110</sup> Opponents of the bill argued that rent regulation can have an adverse effect on housing markets, despite the fact that the bill, itself, would not have put in place any rent regulations.<sup>111</sup> In 2020, legislators tried again, focusing this time only on overturning *Telluride* with a bill that clarified that MIH programs do not fall under the state prohibition.<sup>112</sup> Unfortunately, the bill was postponed indefinitely when the coronavirus pandemic arrived in Colorado.<sup>113</sup> Though an election separates the 2020 and 2021 legislatures, the General Assembly—backed by strong public sentiment—seems ready to take up this issue again in the upcoming years.

### III. LET CITIES DECIDE: THE LEGISLATURE SHOULD OVERTURN THE BAN ON MUNICIPAL RENT REGULATION

The Colorado legislature need not decide whether to enact statewide rent regulation, as Oregon and California did, nor need it resolve the debate over the efficacy of rent regulation for increasing affordable housing. Instead, the question on the table is simply whether *municipalities* should have the authority to enact rent regulation if *they* so choose. As a home-rule state, Colorado’s values are better served by letting cities decide—by authorizing municipalities to consider rent regulation to address the housing crisis rather than maintaining the current statewide prohibition.<sup>114</sup> Thus, the General Assembly should either repeal the ban altogether or, at the very least, amend it to provide a narrower definition of “rent control” that allows municipalities to enact rent stabilization and MIH policies.

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109. S.B. 19-225, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

110. Wingerter, *supra* note 106.

111. *Id.*

112. H.B. 20-1351, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

113. FINAL FISCAL NOTE: H.B. 20-1351, LEGISLATIVE COUNCIL STAFF (July 23, 2020), [https://leg.colorado.gov/sites/default/files/documents/2020A/bills/fn/2020a\\_hb1351\\_f1.pdf](https://leg.colorado.gov/sites/default/files/documents/2020A/bills/fn/2020a_hb1351_f1.pdf) [<https://perma.cc/Q9JJ-N547>].

114. Kathrine M. Mutz, *Home Rule City Regulation of Oil and Gas Development*, 23 COLO. LAW. 2771, 2771 (1994) (citing the Colorado Supreme Court’s broad interpretation of the Home Rule Amendment to be “intended to reiterate unmistakably the will of the people that the power of a municipal corporation should be as broad as possible within the scope of a Republican form of government of the State”).

The legislature has the power to reinstate municipal home-rule authority. As previously discussed, the Colorado Supreme Court in *Telluride* determined that rent regulation was “a matter of statewide concern” for home-rule-authority purposes, but the Court deferred in its analysis to the legislature declaring as much.<sup>115</sup> This finding led the Court to conclude that the State’s prohibition preempted the local ordinance; however, the legislature could declare that rent regulation is “a matter of local concern,” a declaration to which the Court would likely again defer. Alternatively, the General Assembly could maintain that rent regulation is “a matter of statewide concern” but expressly authorize municipalities to enact such regulations anyway. The legislature thus has power to repeal the state prohibition to reinstate home-rule authority over rent regulation.

Either way, the General Assembly should repeal or amend the ban for three reasons: (A) these policies must be tailored to the distinct, localized housing challenges found in the various types of Colorado communities; (B) affordable housing policies, like other home-rule matters, require local experimentation to determine which policies are the most effective; and (C) municipal leaders are more politically responsive to the tides of local interest groups and housing markets.

#### A. *Tailoring Housing Policies at the Local Level*

First, effective affordable housing policies often do not fall into a one-size-fits-all approach.<sup>116</sup> Instead, there is a laundry list of variables that impact a city’s housing market, requiring policymakers to consider creative and tailored solutions to address the root cause of the problem.<sup>117</sup> For instance, researchers found that vacancy rates of rental units are both responsive to significant rent-price fluctuations and unique to individual

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115. *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30, 38 (Colo. 2000).

116. See Teresa Wiltz, *In Shift, States Step in on Affordable Housing*, PEW (Oct. 15, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/15/in-shift-states-step-in-on-affordable-housing> [<https://perma.cc/D6MX-C8VA>] (highlighting that states should not replace cities in the housing policy arena because policies need to be carefully tailored and designed in collaboration with local governments).

117. See GILDERBLOOM, *supra* note 12, at 65 (“Conventional housing analysis is incomplete because it ignores a number of critical variables that help explain variations in rental prices across cities.”).

localities.<sup>118</sup> Municipalities also likely have existing policies, such as zoning regulations, that they need to factor into a locally devised affordable-housing scheme.<sup>119</sup> In particular, MIH policies are most effective when designed as part of a “local jurisdiction’s comprehensive affordable housing strategy.”<sup>120</sup> When Colorado courts consider what constitutes a matter of “local” versus “statewide” concern for home-rule powers, they look at whether “[statewide] uniformity of regulation seems desirable.”<sup>121</sup> For the above reasons, cross-municipality uniformity in rent regulation is *not* typically desirable. Affordable housing is better categorized as a “matter of local concern” that requires well-tailored policies and should therefore be left to home-rule cities to address.

A good example of the impact of tailored local policies can be seen in Oregon where, after a statewide law preempting rent regulation was repealed in 2016, Portland passed an MIH program giving the Portland Housing Bureau the authority to administer rules and implement the MIH program on an ongoing basis.<sup>122</sup> Portland’s MIH program specifically addresses the “need for a minimum of 23,000 additional housing units to serve low and moderate-income households.”<sup>123</sup> Under a targeted approach to create 23,000 housing units, the Portland Housing Bureau devised rules that require developers to detail an inclusionary housing requirement in their permit applications for developments of twenty or more units.<sup>124</sup> Three years after its launch, Portland reports that its MIH program has led to the development of 700 inclusionary housing units from ninety-seven different development projects.<sup>125</sup> The City projects that

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118. *See id.* (summarizing the policy implications of a data analysis of housing markets).

119. Howard C. Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321, 360 n.175 (1964) (listing subjects that are considered “local” for home-rule control, some of which would be relevant for Colorado municipalities to consider in devising rent regulation).

120. STURTEVANT, *supra* note 39, at 11.

121. Klemme, *supra* note 119, at 329.

122. PORTLAND, OR., CITY CODE 30.01.120(B) (effective Dec. 12, 2018).

123. *Inclusionary Housing: A Comprehensive Guide*, CITY OF PORTLAND, OR., <https://www.portland.gov/inclusionary-housing/inclusionary-housing-comprehensive-guide> (last visited June 19, 2020) [<https://perma.cc/VQ6S-534N>].

124. PORTLAND, OR., ARC-HOU-3.04 IV (Dec. 21, 2016) (amended July 3, 2019).

125. *Inclusionary Housing PDX: The Success of Inclusionary Housing in Portland, Oregon*, PORTLAND HOUSING BUREAU, <https://pdx.maps.arcgis.com/apps/Cascade/index.html?appid=4396ccc2125f4e31b39c74430cea3662> (last visited Nov. 18, 2019) [<https://perma.cc/3DMP-4XBX>].

the MIH program has already saved over \$62.6 million in public subsidy.<sup>126</sup> With the local authority to implement an MIH program, Colorado municipalities could follow Portland's lead in better understanding the particular needs of their housing markets and tailoring policies to both generate affordable housing units while saving public resources.

The above argument for rent regulation being a “matter of local concern” also coheres with arguments for why other types of policies, such as zoning<sup>127</sup> and some environmental regulation,<sup>128</sup> have been left to municipal authority. For example, home-rule municipalities enjoy the power of eminent domain to condemn property for open space<sup>129</sup> and even have the authority, albeit limited, to regulate oil and gas operations.<sup>130</sup> In similar fashion to zoning or land-use regulations to protect the public, housing regulations further a legitimate government interest—to protect the “home and family” as the logical extension of family into government.<sup>131</sup> And, similar to environmental regulations, they seek to directly protect citizens from harms where state legislators either choose not to intervene or do not see the harms as much of an issue.<sup>132</sup> Thus, housing policies, like zoning and environmental regulations in Colorado, are best left to municipalities to allow for the tailoring of local policies to meet distinct local challenges.

Any well-tailored housing policy will require some trial and error—and plenty of time and effort from government staff. Municipalities are in the best position to take on the task and experiment with different rent-regulation frameworks.

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126. *Id.*

127. *City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1247 (Colo. 2000) (recognizing that zoning has been categorized as a local matter for home-rule purposes).

128. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 171 (2008) (holding that home-rule cities enjoy the power of eminent domain to condemn private property for open space).

129. *Id.*

130. S.B. 19-181, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

131. Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 B.Y.U. L. REV. 177, 211.

132. See generally Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 *ECOLOGY L.Q.* 575 (2017).

### B. *Experimentation with Rent Regulation*

Second, a core principle of home-rule municipal authority is the need for experimentation at the local level without the burden of state control.<sup>133</sup> This is particularly true when it comes to affordable housing in Colorado because of the different housing markets at play in the state. While mountain towns struggle with a split market where vacation homes drive up housing costs for seasonal workers,<sup>134</sup> cities on the Front Range are contending with rising costs in urban centers that disrupt established communities and gentrify neighborhoods.<sup>135</sup> Therefore, a mountain town like Breckenridge or Aspen would be able to test and perfect a standalone MIH policy, while Denver might consider rent stabilization and MIH in combination with public housing investments. Colorado will be better off with localities having the flexibility to experiment and meet their own needs. It is time for the state legislature to fully empower municipalities to experiment and utilize all the tools in their toolbox, including local rent regulation.<sup>136</sup>

Supporters of the ban on rent regulation may argue that, while experimentation and tailored solutions do matter for affordable housing policy, the state legislature needs to protect localities from the knee-jerk reaction to enact rent control policies that have deleterious economic impacts.<sup>137</sup> This argument

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133. Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 192 (2017).

134. Blevins, *supra* note 63.

135. Caroline Tracey, *White Privilege and Gentrification in Denver, 'America's Favourite City'*, GUARDIAN (July 14, 2017, 2:30 PM), <https://www.theguardian.com/cities/2016/jul/14/white-privilege-gentrification-denver-america-favourite-city> [https://perma.cc/C87R-57XN].

136. See Lydia DePhillis, *Colorado Became One of the Least Affordable Places to Live in the U.S.*, CNN MONEY (Nov. 1, 2017, 6:09 AM) <https://money.cnn.com/2017/11/01/news/economy/colorado-housing-prices/index.html> [https://perma.cc/YXT2-T5NE] (contrasting Denver to other major cities and quoting Jonathan Cappelli, “If you don’t have rent control, and you don’t have strong incentives for developing affordable housing, and you don’t have a fund to fund it, you just don’t have any tools.”); CHRISTIANA K. MCFARLAND ET AL., LOCAL TOOLS TO ADDRESS HOUSING AFFORDABILITY: A STATE-BY-STATE ANALYSIS 27 (2019), [https://www.nlc.org/sites/default/files/2019-03/SMLReport2019\\_FINAL\\_0306\\_32pgs.pdf](https://www.nlc.org/sites/default/files/2019-03/SMLReport2019_FINAL_0306_32pgs.pdf) [https://perma.cc/9WQ7-LCK9] (“The local housing context varies not only by regional housing market types, but also by the tools available to cities, towns and villages to address the needs of their communities.”).

137. Noah Smith, *Yup, Rent Control Does More Harm Than Good*, BLOOMBERG (Jan. 18, 2018, 3:00 AM), <https://www.bloomberg.com/opinion/articles/2018-01-18/yup-rent-control-does-more-harm-than-good> [https://perma.cc/MC8V-7C5X].

tracks with the majority view of economists that rent regulation can compound housing shortages and negatively impact those in unregulated units.<sup>138</sup> However, this economic argument fails to recognize the social benefits that rent regulation provides and the positive effects of stable communities for everyone living in a city. For example, New York City conducted thorough research into the impacts of economic diversity in neighborhoods and determined that MIH was a useful tool to address the particular housing-access issues that can lead to negative economic and social outcomes for individuals.<sup>139</sup> The deployment of this rent regulation policy was part of a “multifaceted approach to promoting neighborhood economic diversity”—not an outcome being used to measure success by rent control opponents.<sup>140</sup> This example suggests that Colorado municipalities should be able to make their own determinations about desired policy outcomes that impact their local communities, even if those outcomes prioritize socioeconomic diversity and equal opportunity over market performance.

Of course, experimentation is both data intensive and politically risky—it requires a careful understanding of the locality and its interest groups. Municipal officials can better address these tensions as they are more responsive to the tides of local interest groups.

### *C. Political Responsiveness and Balancing Interests*

Lastly, municipalities are also equipped to balance competing political interests and respond to locally changing housing markets. In essence, the politics of rent regulation represent a power struggle between landlords and tenants and a values war over economic liberty and social welfare.<sup>141</sup> While landlords argue that their property rights are at stake, those in the tenant movement argue that regulation is necessary for the general

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138. See Diamond et al., *supra* note 11, at 3365 (“[W]hile rent control prevents displacement of incumbent rents in the short run, the lost rental housing supply likely drove up market rates in the long run, ultimately undermining the goals of the law.”); Chicago Booth, “Rent Control,” IGM FORUM (Feb. 7, 2012), <http://www.igmchicago.org/surveys/rent-control> [<https://perma.cc/Z389-HYFG>] (81 percent of economists disagree or strongly disagree that rent control ordinances have had a positive impact on New York and San Francisco affordable housing).

139. N.Y.C., MANDATORY INCLUSIONARY HOUSING, *supra* note 6, at 9.

140. *Id.* at 75.

141. See KEATING ET AL., *supra* note 11, at 80–87 (recounting the social arguments for rent control).



welfare of the public.<sup>142</sup> Both sides can point to studies as to the efficacy—or not—of rent regulation as a housing solution.<sup>143</sup> In the end, the political decision to enact rent regulation entails the balancing of these and other competing interests.<sup>144</sup> The balance of these interests will ebb and flow in response to the realities of the housing market and other economic or political factors, and local governmental bodies are well-positioned to respond to such changes.<sup>145</sup> Thus, the decision to enact, amend, or repeal rent regulations should be left to municipalities where these interests can be balanced within the unique context of the local housing market.

Critics could certainly counter that representative democracy has already played out at the statewide level when state-elected officials decided to ban municipal rent control. However, the nature of affordable housing as a community concern makes the value of *municipal-level* democracy particularly relevant to this issue. The more engagement at the community-level over affordable housing policies, the more those policies will reflect the “diverse needs of the communities.”<sup>146</sup> Municipal leaders are much more attuned to the varying needs of the community and are better positioned to respond to constituents’ needs in a representative system for community-level decisions.

Critics could also argue that Colorado voters should pursue reform by overturning the prohibition through a statewide referendum. California voters will see a similar issue on their ballots in 2020—whether to repeal the Costa Hawkins Rental Act that prevents local governments from implementing rent

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142. *Id.* at 14.

143. Compare Diamond et al., *supra* note 11 (finding rent control in San Francisco has led to the short-term benefit of people staying in their homes but the long-term negative impact of reduce affordable housing supplies), with Favilukis et al., *Affordable Housing and City Welfare* (Columbia Bus. Sch., Research Paper No. 17-88, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3265918](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265918) [<https://perma.cc/KD56-E9PL>] (finding that the “expansion of housing affordability policies can be welfare improving”).

144. See Rajasekaran et al., *supra* note 31, at 8 (recognizing that the different definitions of success for rent control lead to varied research conclusions).

145. See generally Christine Kelleher Palus, *Responsiveness in American Local Governments*, 42 ST. & LOC. GOV. REV. 133 (2010) (arguing that local government spending better reflects citizen desires).

146. See Kerry A. Burchill, *Madison’s Minimum-Wage Ordinance, Section 104.001, And the Future of Home-rule in Wisconsin*, 2007 WIS. L. REV. 151, 191 (discussing the negative impacts of Wisconsin’s minimum-wage preemption law on home-rule principles).

stabilization policies.<sup>147</sup> But these ballot initiatives can be costly and distracting in an election year.<sup>148</sup> In Colorado's 2018 election cycle, individuals, nonprofit organizations, and corporations spent \$33 million on ballot measure campaigns.<sup>149</sup> Out of this \$33 million, oil and gas companies spent \$21 million alone to defeat a ballot measure to distance drilling operations from homes and sensitive locations, drawing into question whether ballot initiatives better reflect the desires of voters or corporations.<sup>150</sup> As political scientist Robert Duffy questioned, "is that [much money spent] really consistent with notions of direct democracy?"<sup>151</sup> Thus, while an initiative approach in Colorado could eventually result in the legislative change needed—either directly or through indirect pressures on legislators in the process—it could come at the expense of both significant money and even direct democracy as a whole.

Finally, the Colorado legislature has recently recognized the importance of community decision-making and taken two major actions to give more control to home-rule municipalities. First, it increased local control over oil and gas drilling. Colorado recently enacted a new law that makes it clear that home-rule municipalities have the authority to regulate the locations and impacts of oil and gas sites.<sup>152</sup> The law came about as a compromise—with environmental advocates securing greater land use regulatory powers for municipalities but falling short of allowing municipalities to ban oil and gas extraction entirely.<sup>153</sup>

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147. This question appeared on California's 2018 ballot already; after \$100 million in fundraising around the proposition, making it one of the most expensive campaigns in California's history, it failed. See Hannah Wiley, *Rent Control Will be on the California Ballot Again*, SACRAMENTO BEE (Feb. 4, 2020, 2:09 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article239950073.html> [https://perma.cc/U4DH-X9P5]; CAL. CIV. CODE § 1954.50 (West 2020).

148. John Herrick & Shannon Mulane, *Key Colorado Ballot Initiatives Have Corporations Spending Tens of Millions for Your Vote*, COLO. INDEP. (Sept. 11, 2018), <https://www.coloradoindependent.com/2018/09/11/colorado-november-ballot-measures-contributions-expenditures/> [https://perma.cc/UST8-2SMN].

149. *Id.*

150. *Id.*

151. *Id.*

152. S.B. 19-181, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2019).

153. Blair Miller, *Colorado Governor Signs Local Control Oil and Gas Bill, Calling an End to State's 'Oil and Gas Wars'*, THE DENVER CHANNEL.COM (Apr. 16, 2019, 6:02 PM), <https://www.thedenverchannel.com/news/politics/colorado-governor-signs-local-control-oil-and-gas-bill-calling-an-end-to-states-oil-and-gas-wars> [https://perma.cc/KCV4-2SZJ].

Second, the legislature repealed the ban on local minimum wage regulation. Similar to oil and gas, the law repealing the statewide prohibition on local minimum wage laws gives municipalities significant control to allow room for local policymaking.<sup>154</sup> The amendment to local minimum wage laws puts in place an annual cap on local wage increases of “up to one dollar and seventy-five cents or fifteen percent, whichever is higher.”<sup>155</sup> Both new laws, passed by the Democratic majority legislature and signed by Democratic Governor Jared Polis,<sup>156</sup> signal an interest, from one party at least, in giving home-rule municipalities *more* control over issues impacting public safety and general welfare. It is important to note that both the oil and gas regulation and local wage laws are not the legislature itself choosing whether to regulate this drilling activity or increase the minimum wage. Instead, the legislature left the decision to regulate up to home-rule municipalities. The General Assembly can import the same principles of self-governance into the affordable housing policy arena.

Further, drawing on the compromises used to limit the reign of home-rule cities for oil and gas drilling and minimum wage laws, there is opportunity to compromise on a rent regulation bill. Rather than repeal the state law on rent regulation entirely, the legislature could restrict when and how municipalities can pass rent regulation. For instance, the legislature could allow regulations only on new housing units or set a lower limit for rent stabilizing percentages to prevent municipalities from overly burdening landlords. Alternatively, the legislature could stick to the approach of the 2020 bill that only allowed MIH policies and maintained a prohibition on rent stabilization.<sup>157</sup> Overall, the legislature has options to maintain some control while giving authority to municipalities to balance competing interests and respond to the local housing markets themselves.

For the reasons noted above, the General Assembly should repeal or amend the ban to give municipalities the authority to consider enacting rent regulation. In the event that the General Assembly does so, the following Part puts forth a brief guide for municipalities in choosing, drafting, and defending rent regulations.

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154. H.B. 19-1210, 72d Gen. Assemb., 2d Reg. Sess (Colo. 2019).

155. *Id.*

156. *Id.*; Colo. S.B. 19-181.

157. H.B. 20-1351, 72d Gen. Assemb., 2d Reg. Sess (Colo. 2020).

#### IV. A MUNICIPALITY'S GUIDE TO CHOOSING, DRAFTING, AND DEFENDING RENT REGULATIONS

Assuming the General Assembly either repeals or amends its statewide ban to allow municipalities to pass rent stabilization and/or MIH policies, Colorado municipalities would face two general questions: (A) which policies to enact and (B) how to craft those policies so as to survive common legal challenges. This Part provides a basic guide to both questions, first explaining the pros and cons of rent stabilization and MIH policies before offering advice for municipalities to avoid common legal challenges to rent regulation.

##### A. *Choosing the Type of Rent Regulation: Rent Stabilization or MIH Policies*

As noted above, rent stabilization policies set an allowable percentage increase in rent on an annual basis that landlords cannot exceed<sup>158</sup> and may also include provisions that cap the number of rent increases during the year<sup>159</sup> or allow for the roll-over of unused annual increases to another year.<sup>160</sup> These regulations seek to protect renters from sudden increases in rent while allowing landlords to generate needed rental income.<sup>161</sup> Many large cities with limited availability of affordable rental units have adopted or are considering rent stabilization policies for these exact reasons.<sup>162</sup> Such policies could prevent Dana Gilbert's landlord from raising her rent so steeply and suddenly, potentially giving Dana time to adjust income sources and stay in her neighborhood or giving her family time to plan ahead for her move to somewhere cheaper. However, opponents of rent stabilization argue that the benefits of these regulations are not actually delivered to low-income residents and that those not in rent-stabilized units may experience higher rents as a result of

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158. See, e.g., Residential Rent Stabilization and Arbitration Board, *Allowable Annual Rent Increases*, CITY & CTY. S.F. (Nov. 11, 2018), <https://sfrb.org/topic-no-051-years-annual-allowable-increase#:~:text=The%20annual%20allowable%20increase%20amount,when%20renting%20a%20vacant%20unit.> [https://perma.cc/2JBE-U84R].

159. See, e.g., L.A., Cal., Ordinance No. 2018-0045 (Nov. 20, 2018).

160. See, e.g., S.F. RENT BD., *Topic No. 053 Banked Rent Increases*, CITY & CTY. S.F. (Nov. 11, 2018), <https://sfrb.org/topic-no-053-banked-rent-increases> [https://perma.cc/4PDK-WUNC].

161. Rajasekaran et al., *supra* note 31, at 1.

162. *Id.*

stabilization's overall effect on the market.<sup>163</sup> For example, data on Manhattan apartments showed that a majority of people in rent-regulated apartments earn incomes above the poverty line.<sup>164</sup> Municipalities should thus carefully consider and continuously monitor whether and how to target their stabilization policies to low-income residents.

Likely, rent stabilization is a more attractive option for Colorado's larger municipalities where tenants need swift protection from rapidly changing rental markets. Los Angeles's rent stabilization policy illustrates how a large Colorado city might implement this type of rent regulation. Los Angeles's rent stabilization ordinance "prohibit[s] rent increases in excess of three percent (3%) above the monthly rent in effect on September 11, 2018, [and] prohibit[s] more than one rent increase in any 12-month period."<sup>165</sup> The impacts of rent stabilization in the Los Angeles rental market have been documented over time by the City with the "greatest effect appear[ing] to [be] in smoothing the impacts of housing market fluctuations," acting as insurance to tenants "in the face of locally hot markets."<sup>166</sup> Many jurisdictions in close proximity to major urban areas have also adopted rent stabilization provisions.<sup>167</sup> Thus, larger urban and suburban municipalities in Colorado could avoid steep increases in the rental market and protect tenants across the area with rent stabilization policies.

Colorado municipalities could include a sunset clause in their ordinances. Sunset clauses, often included in rent stabilization ordinances, set a point in time for when the law will expire.<sup>168</sup> This regulatory mechanism originated with the advent of rent control as an emergency measure during or following war times and has been maintained in many regulations.<sup>169</sup> For instance, the City Council of D.C. recently renewed a rent stabilization program but clarified that it "shall terminate on

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163. See Adam Davidson, *The Perverse Effects of Rent Regulation*, N.Y. TIMES (July 23, 2013), <https://www.nytimes.com/2013/07/28/magazine/the-perverse-effects-of-rent-regulation.html> [<https://perma.cc/GNJ4-MR2T>] ("There are, effectively, two rental markets in Manhattan. Roughly half the apartments are under rent regulation, public housing or some other government program. That leaves everyone else to compete for the half with rents determined by the market.").

164. *Id.*

165. L.A., Cal., Ordinance No. 2018-0045 (Nov. 20, 2018).

166. KEATING ET AL., *supra* note 11, at 140.

167. See, e.g., JERSEY CITY, N.J., CODE § 260-3 (2020).

168. *Sunset provision*, BLACK'S LAW DICTIONARY (10th ed. 2014).

169. KEATING ET AL., *supra* note 11, at 5.

December 31, 2030.”<sup>170</sup> If the Colorado legislature permits local rent regulation, the incorporation of sunset clauses into municipal ordinances could help ease concerns about the permanence of regulation in the housing market and encourage short-term experimentation by municipalities.

Finally, in considering whether rent stabilization is the appropriate policy approach, municipalities must be aware of the risk that landlords may respond to stabilization policies by instead converting their rental units to condominiums. The purpose of rent regulation is, obviously, to increase the stock of affordable rental units. However, rent regulation could potentially lead to the decrease of available affordable housing where the regulation incentivizes developers to convert rent-controlled units into un-regulated condominiums, allowing them to put those units back on the market for full price.<sup>171</sup> Though the incentive to convert units to condos was strongest under earlier iterations of strict rent control, more modern rent stabilization policies can also lead to increased rates of conversion.<sup>172</sup> To protect rental housing stock from condo conversion, Colorado municipalities could consider several policy tools such as requiring that developers receive a development permit to convert buildings with conditions to prevent the net loss of affordable housing units,<sup>173</sup> offering property tax relief for maintaining affordable rental units,<sup>174</sup> or requiring a majority of rental tenants in the building to purchase condos before the conversion can move forward.<sup>175</sup> These additional policies have been used in other jurisdictions to accompany rent stabilization and have made it more difficult for landlords to circumvent the regulation by converting rental units to condos.

While rent stabilization targets landlords, inclusionary housing policies take another approach in regulating developers.

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170. Legis. B. 760, 23d Council Period § 2182 (D.C. 2020).

171. See, e.g., Josh Barbanel & Will Parker, *New York Condo Conversions Near the End, a Casualty of Rent Reform*, WALL ST. J. (July 9, 2019, 2:24 PM), <https://www.wsj.com/articles/new-york-condo-conversions-near-the-end-a-casualty-of-rent-reform-11562583612> [<https://perma.cc/V69K-7U9E>].

172. *Id.*

173. See, e.g., CAL. CIVIL CODE § 1954.52 (West 2020); METRO. CTR. AT FLA. INT’L. UNIV., RENTAL HOUSING STUDY: PALM BEACH AND MARTIN COUNTIES ii (2008), <http://www.hlcpbc.org/wp-content/uploads/2018/04/the-rental-housing-study-palm-beach-and-martin-counties.pdf> [<https://perma.cc/SPU8-2KJV>].

174. See, e.g., *Chicago Area Fights Wave of Condo Conversions with Property Tax Incentives*, 29 No. CD-52 HDR CURR. DEV. 8 (April 29, 2002).

175. See, e.g., N.Y. GEN. BUS. LAW § 352-eeee (McKinney 2020).

As previously described, MIH policies require a set number or a percentage of new housing units to be rented at below-market prices whereas voluntary inclusionary housing (VIH) programs offer incentives for developers to do similar set asides.<sup>176</sup> But the distinction between MIH and VIH policies has blurred through practice as localities add more teeth to voluntary programs, making them more practically binding.<sup>177</sup> The goal of MIH policies is to develop below-market housing units in new developments to address the supply of affordable housing in a particular neighborhood or across a jurisdiction.<sup>178</sup>

MIH programs could be a key solution for Colorado's mountain towns to address the split between vacation homes and housing for sizable tourist-economy workforces.<sup>179</sup> When the cost of construction increases in a locality due to "dense development, scarcity of sites, cost of land, and high costs of materials and labor," the price of new housing increases and "threaten[s] the access that low and moderate-income households have" to certain neighborhoods.<sup>180</sup> This lack of access can have "profound implications for quality of life and economic well-being," depending on the neighborhood where one resides, which stem from access to schools, transportation, public parks, city services, healthcare, and more.<sup>181</sup> In Colorado, Breckenridge reports that locals face a housing market driven by "the premium that housing marketed to second homeowners can demand."<sup>182</sup> The Town has "avidly encourage[ed the] development of workforce housing" to better serve the local population and has successfully

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176. *Inclusionary Housing: The Basics*, *supra* note 17 (discussing both mandatory and voluntary housing programs).

177. See *Meyerstein v. City of Aspen*, 282 P.3d 456 (Colo. App. 2011) (remanded for additional findings to be made regarding voluntariness, but holding that a current owner would be bound if the agreement between the government and the property owner was voluntary).

178. *Inclusionary Housing: The Basics*, *supra* note 17.

179. See Andrew Kenney, *After 20 Years, Colorado May Reverse Decision That Limits Cities' Affordable Housing Powers*, CPR NEWS (Feb. 3, 2020), <https://www.cpr.org/2020/02/03/after-20-years-colorado-may-reverse-decision-that-limits-cities-affordable-housing-powers/> [<https://perma.cc/CE9D-C7L3>] (quoting an affordable housing expert, Kimball Crangle, describing that "*Telluride* has given pause to communities to second-guess their capacity to actually create the affordable housing supply that they need").

180. N.Y.C., MANDATORY INCLUSIONARY HOUSING, *supra* note 6, at 8.

181. *Id.* at 9.

182. WENDY SULLIVAN, THE IMPACT OF AFFORDABLE WORKFORCE HOUSING ON COMMUNITY DEMOGRAPHICS, ECONOMIES, AND HOUSING PRICES AND OPTIONS 5 (2014), <http://www.townofbreckenridge.com/home/showdocument?id=8908> [<https://perma.cc/6N9E-MQ3S>].

counteracted the “second homeowner pressures” with the development of affordable workforce housing units.<sup>183</sup> Yet, “avidly encouraged” is much weaker than “requires”—the difference, in essence, between a voluntary and mandatory policy—and Breckenridge highlights that market intervention through local mandatory inclusionary housing regulations could provide needed relief to those who actually live in the community, as opposed to second homeowners.<sup>184</sup>

MIH programs around the country have seen success by offering developers multiple options—and, in some cases, relaxing some development standards—to incentivize continued housing development even under an MIH policy. For example, the MIH program in Montgomery County, Maryland—one of the oldest and most successful MIH programs in the country—has “produced more than 13,000 affordable housing units” as of 2012.<sup>185</sup> The County’s ordinance requires “all subdivisions of 20 or more dwelling units [to] include a minimum number of moderately priced dwelling units on-site, or under specified circumstances, provide appropriate units off-site or make a payment to the Housing Initiative Fund.”<sup>186</sup> Some cities have incentivized development by including in their MIH ordinances cost offsets for developers in the form of “density bonuses, modified development standards (e.g., reduced parking requirements), fee waivers, and expedited permit and/or approvals processes.”<sup>187</sup> These examples show how municipalities can compromise with developers to build consensus around creative MIH policies that may otherwise be opposed by that interest group.

Both rent stabilization and MIH programs could be deployed by Colorado municipalities to address skyrocketing rental markets that put renters at risk of displacement and

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183. *Id.* at 6, 8.

184. See Blevins, *supra* note 63 (explaining the mountain town housing crisis in Colorado and noting several successfully affordable housing development projects); Jason Blevins, *Telluride Isn't Immune to Colorado's High-Country Housing Problem. But It's Finding a Solution in Diversification*, COLO. SUN (Mar. 18, 2019), <https://coloradosun.com/2019/03/18/telluride-housing-crisis-colorado-solutions/> [https://perma.cc/T7BL-R2P3] (“Nearly every community is prowling for ideas that can help grow rental units and foster ownership.”).

185. URBAN INST., *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties*, U.S. DEPT. OF HOUS. & URBAN DEVELOP. 5 (Dec. 2012), [https://www.huduser.gov/portal/publications/HUD-496\\_new.pdf](https://www.huduser.gov/portal/publications/HUD-496_new.pdf) [https://perma.cc/XB3H-6QVL].

186. MONTGOMERY COUNTY, MD., COUNTY CODE § 25A-2(5) (2020).

187. STURTEVANT, *supra* note 39, at 9.



communities at risk of disruption. By empowering municipalities with these policy tools, they can tailor their approaches to best address their local rental market needs. It is worth emphasizing that such empowerment does not require municipalities to implement rent regulation of any kind. But for those that do, local officials can consider these forms of rent regulation and put in place policies that reflect their constituents' needs and balance competing interests.

### *B. Drafting Rent Regulations to Survive Legal Challenges*

Colorado municipalities that choose to implement rent stabilization or MIH policies should consider common constitutional challenges to such policies when drafting them. Specifically, municipalities should draft their rent regulations to withstand substantive due process and takings claims brought by landlords and developers. Such claims will be examined first for rent stabilization and then for MIH policies.

#### 1. Constitutional Challenges to Rent Stabilization Policies

Municipalities can avert due process challenges to rent stabilization policies by including in their rent regulations an explicit statement of the connection between the affordable housing policy and housing exigencies. Overwhelmingly, courts have held that rent control ordinances fall within the police powers of municipalities and do not violate substantive due process.<sup>188</sup> Courts used to consider an “emergency requirement” that stemmed from a post-World War I Supreme Court opinion by Justice Holmes, stating, “[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.”<sup>189</sup> However, the strict “emergency

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188. See RHYNE ET AL., *supra* note 41, at 7, 78 (citing several cases that held rent control is a valid exercise of police power and explaining the need for such power to address an emergency); *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905) (explaining the sources of police power).

189. Jakob S. Harle, *Challenging Rent Control: Strategies for Attack*, 34 UCLA L. REV. 149, 158 (1986); see also *Inganamont v. Borough of Fort Lee*, 120 N.J. Super. 286, 330 (N.J. 1972) (“[W]here a crisis in housing exists which requires broad powers of rent control, in the interest of protecting public health, safety and general welfare, local government has the right to control and regulate the rental of available houses in those respects that are local in nature and which do not infringe on state or federal authority.”).

requirement” has largely been discarded in favor of a more deferential standard.<sup>190</sup> This substantive due process analysis asks whether the challenged ordinances “were *designed* to accomplish an objective within the government’s police power, and [whether] a rational relationship existed between the provisions and the purpose of the ordinances.”<sup>191</sup> Under this analysis, municipalities can quite easily show the connection between a housing exigency and a regulation to control rent. Challengers could argue that the state has not expressly delegated related police powers to the municipality,<sup>192</sup> though this argument would likely be easy to defeat in Colorado due to the clear delegation of powers to home-rule municipalities under the Colorado Constitution.<sup>193</sup>

Additionally, municipalities most likely need not worry that their rent regulations would constitute a “physical taking” under the Takings Clause due to strong precedent. In *Yee v. City of Escondido*, the United States Supreme Court considered whether a rent regulation ordinance constituted a *physical* taking.<sup>194</sup> The ordinance functioned much like a modern rent stabilization policy where rent could be increased at “just, fair and reasonable” increments, but it had a unique provision that required the city council to approve any increases.<sup>195</sup> In analyzing the ordinance, the Court found that the policy did not constitute a physical taking on the basis that the “government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land,” which was not the case when regulating rent.<sup>196</sup> This case, among others, creates strong precedent for rent regulation ordinances to be found constitutionally valid under the Takings Clause.<sup>197</sup>

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190. See, e.g., *Apartment Ass’n of Greater Los Angeles v. City of Beverly Hills*, No. CV 18-6840 PSG (Ex), 2019 WL 1930136, at \*7 (C.D. Cal. Apr. 17, 2019).

191. *Id.* (emphasis in original).

192. See *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 765 (Fla. 1974) (finding that the state legislature properly delegated powers to the municipality); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (explaining that zoning ordinances relating to public health, safety, or general welfare are constitutional within the police power of a municipality).

193. COLO. CONST. art. XX, § 6.

194. 503 U.S. 519, 527 (1992).

195. *Id.* at 524–25.

196. *Id.* at 528 (emphasis in original).

197. See S. Keith Garner, “*Novel*” *Constitutional Claims: Rent Control, Means-Ends Tests, and the Takings Clause*, 88 CALIF. L. REV. 1547, 1548 (2000) (explaining why “constitutional challenges to rent control have proven difficult for property owners”).

The Court in *Yee* suggested in dictum that an analysis for whether a rent regulation ordinance constituted a *regulatory* taking would focus on “whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.” However, the Court did not conduct the regulatory takings analysis.<sup>198</sup> In addition, the *Escondido* decision did not address takings on the basis of “denial of a fair return” for landlords on their investments.<sup>199</sup> It leaves much to be determined, particularly without any indication on how the Court would treat the issue of fair return for landlords challenging rent stabilization.<sup>200</sup>

Nonetheless, municipalities can craft their rent stabilization policies to provide landlords with a fair return on investment by both using well-designed formulas that adjust for inflation and by including procedural provisions that allow those “who claim that their rents do not provide a fair return [to] apply for special hardship rent increases.”<sup>201</sup> A California Supreme Court case from the 1970s, *Birkenfield v. City of Berkeley*, makes clear that rent stabilization ordinances likely need to provide somewhat frequent adjustments to the allowable rent increase rate to ensure a fair return for purposes of avoiding constitutional claims.<sup>202</sup> In *Birkenfield*, a rent control charter amendment put in place by voter initiative ran afoul of the Takings Clause on “fair return” grounds.<sup>203</sup> The California Supreme Court explained that rent control “provisions are within the [City’s] police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property.”<sup>204</sup> But, the charter amendment at issue “drastically and unnecessarily restrict[ed] the rent control board’s power to adjust rents, thereby making inevitable the arbitrary imposition of unreasonably low rent ceilings.”<sup>205</sup> The lack of adjustment to the rent rates “would be or become confiscatory.”<sup>206</sup> The takeaway from *Birkenfield* is that municipalities should most likely tailor their rent

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198. *Escondido*, 503 U.S. at 530.

199. KEATING ET AL., *supra* note 11, at 30.

200. *See id.* at 31 (discussing Supreme Court precedent on takings claims).

201. *Id.*

202. 550 P.2d 1001 (Cal. 1976).

203. *Id.*

204. *Id.* at 165.

205. *Id.* at 169.

206. *Id.*

stabilization ordinances to provide somewhat frequent adjustments to the rent rate to protect against a fair return claim.<sup>207</sup>

## 2. Constitutional Challenges to MIH Policies

Both substantive due process and takings claims can arise in the MIH context as well. *Home Builders Association of Northern California v. City of Napa* is a useful example of how challenges to MIH programs are brought and considered by courts.<sup>208</sup> At issue in *Home Builders* was Napa's requirement for developers to make 10 percent of all newly constructed units affordable.<sup>209</sup> When developments meet the affordable housing requirement, they "are eligible for a variety of benefits including expedited processing, fee deferrals, loans or grants, and density bonuses."<sup>210</sup> The MIH program offers two alternatives to developers: (1) present an "alternative equivalent proposal" to dedicate land or develop off-site affordable units, or (2) pay an "in-lieu fee" that goes into a "housing trust fund, and may only be used to increase and improve the supply of affordable housing."<sup>211</sup> This MIH ordinance was challenged on the grounds that it violated the takings and due process clauses of the Constitution.<sup>212</sup>

On the takings claim, the court rejected a facial challenge to the MIH program.<sup>213</sup> It first reasoned that while the ordinance "imposes significant burdens on those who wish to develop their property," it also "provides significant benefits to those who comply with its terms." Developers can "appeal for a reduction, adjustment, or *complete waiver* of the ordinance's requirements."<sup>214</sup> Then, the court looked at whether the ordinance

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207. It is worth noting that after New York passed a package of tenant-backed reforms in 2019 that included a permanent rent stabilization measure, a landlord association filed suit claiming that the rent stabilization laws "effect a physical taking of property in violation of the Constitution's Takings Clause" and are "therefore unconstitutional." Complaint at 1, Cmty. Hous. Improvement Program v. City of New York, No. 1:19-cv-04087-MKB-RML (E.D.N.Y. 2019). There has not been a lower court decision yet in the case, and the decision could have significant ramifications for the constitutionality of rent stabilization policies.

208. 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001).

209. *Id.* at 192.

210. *Id.*

211. *Id.*

212. *Id.* at 193.

213. *Id.* at 194.

214. *Id.* (emphasis in original).

“substantially advance[s] legitimate state interests” and held that “it is beyond question that City’s inclusionary zoning ordinance will ‘substantially advance’ the important governmental interest of providing affordable housing for low and moderate-income families.”<sup>215</sup>

On the due process claim, the court outright rejected the contention that developers are “entitled to a ‘fair return’ under the due process clause.”<sup>216</sup> It went on to ground its decision in the two key aspects of the MIH programs that satisfy the due process clause—alternatives offered to developers and the City’s authority to “completely waive a developer’s obligations.”<sup>217</sup>

As described, this holding lays out important considerations for municipalities formulating MIH programs to avoid constitutional challenges. The United States Supreme Court declined to hear *Home Builders*, so it serves as a guide for courts to uphold MIH programs.<sup>218</sup> And, generally, courts have upheld mandatory inclusionary zoning laws “as a valid technique to further advance the legitimate state interest of affordable housing.”<sup>219</sup>

Drawing from *Home Builders*, municipalities considering MIH programs should contain an alternative, such as a fee in lieu, for developers to utilize if the construction of affordable units proves to be too costly.<sup>220</sup> It may also be wise for municipalities to offer a density bonus<sup>221</sup> or some other incentive to developers for meeting the requirement to avoid takings or due process claims.<sup>222</sup> The particulars of an MIH program can be

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215. *Id.* at 195.

216. *Id.* at 198.

217. *Id.* at 199.

218. Brian R. Lerman, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 384 (2006).

219. Michael Floryan, *Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices*, 37 PEPP. L. REV. 1039, 1046 (2010); see *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (creating the substantially related standard for zoning laws).

220. See Lerman, *supra* note 218, at 390 (explaining the difference between mandatory and voluntary inclusionary zoning and well-structured mandatory provisions).

221. A “density bonus” allows developers to increase the permitted density of dwelling units per acre (typically by between ten and twenty percent over the baseline allowable density) in exchange for the production of affordable housing units. *Density Bonus*, INCLUSIONARYHOUSING.ORG, <https://inclusionaryhousing.org/designing-a-policy/land-dedication-incentives/density-bonus/> (last visited Sept. 10, 2020) [<https://perma.cc/3S8A-QUK8>].

222. See Lerman, *supra* note 218, at 390.

properly tailored and refined by local officials to account for the local market.

In sum, rent regulation can be crafted to survive many constitutional challenges, but it should be expected that opponents will continue to bring such suits. Colorado municipalities should carefully consider the relevant—and continuing—case law as they craft affordable housing policies that best suit their local markets.

## CONCLUSION

To address the realities of Colorado's housing crisis and the impacts of the coronavirus pandemic on renters, municipalities need to be able to deploy a full range of affordable housing solutions. As a home-rule state, Colorado recognizes the value in local governance for issues that occur at the community level, and affordable housing is fundamentally a local issue.<sup>223</sup> The debate over whether to utilize rent regulation in a particular jurisdiction is far from over—but it is better suited to take place in city council meetings, town halls, and municipal administrations.<sup>224</sup>

Consider Dana. Though rent regulation policies incite intense political debate, their effects are far from political or abstract. Those in Dana's position—facing dramatic rent increases that result in displacement and disruption—are subjected to the reality of Colorado's housing crisis every day. While cities in Colorado are already identifying the need for local rent restrictions and programs that fall under broad interpretation of “rent control,” the current prohibition on rent regulation prevents municipalities from implementing these solutions.<sup>225</sup> Mandatory inclusionary housing programs and rent stabilization have

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223. Mutz, *supra* note 114, at 2771.

224. See Wiltz, *supra* note 116 (highlighting reasons that states should not replace cities in the housing policy arena).

225. See DENVER HOUS. ADVISORY COMM., *supra* note 61, at 35 (Denver's plan states that there is “a need exists for at least an additional 15,500 units for extremely low-income renters . . . Ideally, these units would come with income restrictions so households at those income levels do not have to compete with higher income households for these units.”); Blevins, *supra* note 63 (“If I had a magic wand, a social-justice wand, I would wave it and say you are buying into a community and let's focus on a wealth-creation model instead of wealth extraction.”); Erica Meltzer, *Why Denver Doesn't Have Rent Control and Probably Never Will*, DENVERITE (Aug. 29, 2016, 6:30 AM), <https://denverite.com/2016/08/29/denver-doesnt-rent-control/> [<https://perma.cc/82NV-3SUM>] (explaining that the *Telluride* case arose of Telluride's attempt to address its shortage of affordable rental units).

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successfully addressed specific housing issues like maintaining economic diversity and protecting renters from eviction or displacement. These tools should be available to Colorado localities.<sup>226</sup> The time has come for the Colorado legislature to end its broad prohibition and let cities decide whether to pursue rent regulation.

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226. *See supra* Part IV.