IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JENNIFER NOSALEK, RANDY HIRSCHORN and TRACEY HIRSCHORN, individually and on behalf of all others similarly situated, Plaintiffs, v. MLS PROPERTY INFORMATION NETWORK, INC., ANYWHERE REAL ESTATE INC. (F/K/A REALOGY HOLDINGS CORP.), CENTURY 21 REAL ESTATE LLC, COLDWELL BANKER REAL ESTATE LLC, SOTHEBY'S INTERNATIONAL REALTY AFFILIATES LLC, BETTER HOMES AND GARDENS REAL ESTATE LLC, ERA FRANCHISE SYSTEMS LLC, HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, POLZLER & SCHNEIDER HOLDINGS CORPORATION, INTEGRA ENTERPRISES CORPORATION, RE/MAX OF NEW ENGLAND, INC., RE/MAX INTEGRATED REGIONS, LLC, AND KELLER WILLIAMS REALTY, INC., Defendants.	No. 1:20-cv-12244-PBS

THE COUNCIL OF MULTIPLE LISTING SERVICES' MOTION FOR LEAVE TO SUBMIT AMICUS BRIEF IN RESPONSE TO THE STATEMENT OF INTEREST OF THE UNITED STATES

Non-party Council of Multiple Listing Services (CMLS) respectfully moves for leave to submit an amicus curiae brief and supporting expert declaration of economists John H. Johnson,

IV, and Michael Kheyfets (the "Johnson/Kheyfets Declaration")[1], in response to the Statement of Interest filed by the United States (the "DOJ") on February 15, 2024 (Dkt. No. 290) (the "SOI").

As explained more fully in the Memorandum in support of this motion, which is incorporated herein by reference, CMLS is an association of over 225 multiple listing services (MLSs) in North America, including Defendant MLS Property Information Network, Inc. of Shrewsbury, Massachusetts. In the SOI, the DOJ recommends changes to the Second Amended Stipulation and Settlement Agreement (Dkt. 268-1) reached by Plaintiffs and Defendant MLS Property Information Network, Inc. ("MLS PIN"). CMLS submits that these recommendations are based upon a flawed analysis, and that they would not have the effect that the DOJ predicts. CMLS is in a unique position to explain these issues with the DOJ's analysis as set forth in the SOI, and articulate why the DOJ's recommendations should not be adopted by the Court.

WHEREFORE, CMLS respectfully requests that the Court grant it leave to file the Proposed Amicus Memorandum attached hereto as Exhibit A, as well as the Johnson/Kheyfets Declaration incorporated therein. CMLS further requests that, to the extent necessary, the Court temporarily lift the administrative stay in this case for the limited purpose of allowing CMLS to file this motion and the Proposed Amicus Memorandum. *See* Dkt. 288 (order imposing administrative stay); Dkt. 289 (temporarily reopening the case to allow the DOJ to file the SOI).

[1] The proposed amicus brief, which is attached hereto as Exhibit A, is styled, "[Proposed] Memorandum of Amicus Curiae Council of Multiple Listing Services in Response to the Statement of Interest of the United States," and is referred to hereinafter as the "Proposed Amicus Memorandum." The Johnson/Kheyfets Declaration is attached to the Proposed Amicus Memorandum.

March 27, 2024

Respectfully submitted,

/s/Justin J. Wolosz
Justin J. Wolosz (BBO #643543)
Eric M. Gold (BBO #660393)
Max A. Jacobs (BBO #707327)
MANATT, PHELPS & PHILLIPS, LLP
One Beacon Street
Boston, MA 02108
Telephone: 617-646-1443
jwolosz@manatt.com
egold@manatt.com
mjacobs@manatt.com

Mitchell A. Skinner
(*pro hac vice* application forthcoming)
Brian N. Larson
(*pro hac vice* application forthcoming)
LARSON SKINNER, PLLC
7595 Currell Blvd, #251336
St. Paul, MN 55125
Telephone: 612-424-8660
mskinner@larsonskinner.com
blarson@larsonskinner.com

Counsel for non-party Council of Multiple Listing Services

LOCAL RULE 7.1 CERTIFICATION

I certify that I or my co-counsel have conferred with counsel for Plaintiffs and counsel for Defendant MLS PIN, and that Plaintiffs and MLS PIN do not oppose this motion.

/s/ Justin J. Wolosz
Justin J. Wolosz

CERTIFICATE OF SERVICE

I hereby certify that, on March 27, 2024, I caused a true and correct copy of the foregoing to be filed via the Court's ECF system, which will send notice to all counsel of record.

/s/ Justin J. Wolosz
Justin J. Wolosz

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JENNIFER NOSALEK, RANDY HIRSCHORN and TRACEY HIRSCHORN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MLS PROPERTY INFORMATION NETWORK, INC., ANYWHERE REAL ESTATE INC. (F/K/A REALOGY HOLDINGS CORP.), CENTURY 21 REAL ESTATE LLC, COLDWELL BANKER REAL ESTATE LLC, SOTHEBY'S INTERNATIONAL REALTY AFFILIATES LLC, BETTER HOMES AND GARDENS REAL ESTATE LLC, ERA FRANCHISE SYSTEMS LLC, HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, POLZLER & SCHNEIDER HOLDINGS CORPORATION, INTEGRA ENTERPRISES CORPORATION, RE/MAX OF NEW ENGLAND, INC., RE/MAX INTEGRATED REGIONS, LLC, AND KELLER WILLIAMS REALTY, INC.,

Defendants.

No. 1:20-cv-12244-PBS

[PROPOSED] MEMORANDUM OF AMICUS CURIAE COUNCIL OF MULTIPLE LISTING SERVICES IN RESPONSE TO THE STATEMENT OF INTEREST OF THE UNITED STATES

TABLE OF CONTENTS

I. INTRODUCTION

The Statement of Interest of the United States (SOI) proposes that the settlement between the parties to this dispute should include "an injunction that *prohibits* offers of buyer-broker compensation by MLS PIN participants."[1] The Council of Multiple Listing Services (CMLS) takes the extraordinary step of filing an amicus curiae brief before this Court to oppose this effort of the Antitrust Division (DOJ) to impose a policy preference on the U.S. residential real estate market that lacks empirical support, conflicts with principles of the Sherman Act, and has negative practical implications for consumers which DOJ has not taken into account.

II. INTEREST OF AMICUS

The Council of Multiple Listing Services (CMLS) is an association of over 225 multiple listing services (MLSs) in North America—including Defendant MLS Property Information Network, Inc. (MLS PIN) of Shrewsbury, Massachusetts—committed to high standards of professionalism and performance.[2] CMLS's business-technology partners include the leading technology firms in the residential real estate marketplace.[3] The information in databases of CMLS's MLS members is available to over 1.7 million subscribers (brokers, salespeople, and appraisers) and the home buyers and sellers they represent. Buyers around the country (and the

---

[1] Statement of Interest of the United States 20, ECF No. 290 [hereinafter SOI] (emphasis in original).

[2] Council of Multiple Listing Services, *CMLS Member Organizations as of June 1, 2023*, https://cdn.ymaws.com/members.councilofmls.org/resource/resmgr/cmls_members_6.1.23.pdf [https://perma.cc/W59J-MJ8X] (last visited Mar. 26, 2024).

[3] *Id.*

world) can also access MLS data through online services like Zillow, Redfin, and Homes.com, which share MLS data with millions of American consumers.

MLSs combine information about current listings and past home sales into regional electronic databases that provide *complete*, *accurate*, and *timely* information—creating a real estate information resource of unmatched ***transparency***. MLS databases are *complete* in that each MLSs compiles a list of practically every home for sale and previously for sale in the region;[4] *timely* in that each MLS requires that brokers enter and update listings, often within twenty-four hours of any status change;[5] *accurate* in that each MLS has rules imposing penalties on participating brokers who do not put accurate information into the service, creating a powerful incentive to share accurate information.[6] The utility of MLSs and the consumer benefits they provide are the product of deliberate efforts and of data governance rules the MLSs implement and maintain. CMLS leads MLSs to adopt the highest standards of

[4] *Cf.* Fed. Trade Comm'n & Dept. of Justice, Competition in the Real Estate Brokerage Industry 10 (Apr. 2007), https://www.ftc.gov/sites/default/files/documents/reports/competition-real-estate-brokerage-industry-report-federal-trade-commission-and-u.s.department-justice/v050015.pdf [https://perma.cc/NH7R-XEX9] (noting that the databases may exclude new construction and for-sale-by-owner properties).

[5] For example, one federal court of appeals has noted that "[t]he near-perfect market information created by [the MLS] is the result of a requirement that members place all listings in the MLS within five days." *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006). Since this 2006 case, many MLSs have reduced that five-day period for listings to twenty-four hours or the next business day.

[6] *See, e.g.*, Transcript, What's New in Residential Real Estate Brokerage Competition—An FTC–DOJ Workshop (June 5, 2018), https://www.ftc.gov/system/files/documents/public_events/1361534/ftc-doj_residential_re_brokerage_competition_workshop_transcript_segment_1.pdf [https://perma.cc/AQJ7-KSLE] (MLS executive Art Carter explaining that "when a listing enters into our system, we are, as MLSs across this country, very keenly interested in making sure that that listing adheres to a wide variety of rules, and making sure that it fits into the data models that each MLS has set up," and that the MLS "mak[es] sure that the listing has met all of its obligations to the rules and regulations that it is subject to" before entering it into the MLS).

professionalism and offers guides to best practices—including compliance with antitrust and competition laws—for MLSs.[7]

CMLS's interest in the proposed settlement stems from the fact, as DOJ highlights, that "several pending cases" are adjudicating MLSs' adoption of the mandatory-compensation rule of the National Association of REALTORS® or similar policies.[8] The SOI represents the Department of Justice Antitrust Division's policy statement about how it would prefer every residential real estate market in the United States to function. Given that CMLS's members help those real estate markets function, CMLS is duty bound and uniquely situated to advise this Court about operational implications of the Second Amended Stipulation and Settlement Agreement (Proposed Settlement)[9] in this matter—and implications of the national policy preference DOJ expresses in the SOI.[10]

III. ARGUMENT

The Court should evaluate the Proposed Settlement without reference to the SOI. "When—as in this case—'the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable.' A party seeking to

---

[7] Council of Multiple Listing Services, *Resources*, https://www.councilofmls.org/resources [https://perma.cc/H78J-4S6E] (last visited March 26, 2024).

[8] *See* SOI 18–19; Notice of Related Action, Attach. 2: Proof of Service, ECF No. 483 (Mar. 5, 2024), *In re Real Estate Comm'n Antitrust Litig.*, MDL No. 3100 (2023) (naming more than twenty related actions as of the date of filing).

[9] Second Am. Stipulation & Settlement Agreement, ECF No. 268-1 [hereinafter Proposed Settlement].

[10] See *Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 42 (1st Cir. 2009) (holding "impacted non-parties can seek to intervene or otherwise express their views in litigation that may affect their practical interests" and "the fairness hearing required by Rule 23(e)(2) provides just such a mechanism").

overcome such a presumption faces a steep uphill climb."[11] The SOI "does not scale those heights."[12]

The Proposed Settlement includes two key categories of policy change (Proposed Settlement Policies). First, MLS PIN agrees to change its rule for acceptance of listings from participating brokers by requiring them to obtain certifications that their seller clients understand: (a) MLS PIN does not require sellers to offer compensation to buyer brokers; and (b) though buyers may seek compensation from sellers for their buyer brokers in an agreement of purchase, sellers are not required to compensate buyer brokers (Proposed Certification Rule).[13] Second, MLS PIN agrees to change its rule regarding cooperative compensation so that the listing broker need not express any offer of compensation on a listing, and that any offer made comes from the seller and is entirely at the seller's discretion (Proposed Compensation Rule).[14] The SOI attacks these two Proposed Settlement Policies, arguing they would not deliver value to consumers of real estate brokerage services, relying in part on a comparison to similar policies adopted in 2019 and 2022 by the Northwest Multiple Listing Service (NWMLS) in Washington State.[15] The Court should not credit DOJ's arguments because they suffer from three critical flaws:

---

[11] *Cohen v. Brown Univ.*, 16 F.4th 935, 951 (1st Cir. 2021) (citations omitted) (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009); *see also National Ass'n of Chain Drug Stores*, 582 F.3d at 44 (citations omitted) ("[T]he ultimate decision by the judge involves balancing the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement."); *Durrett v. Housing Auth*., 896 F.2d 600, 604 (1st Cir.1990) ("[T]he district court's discretion is restrained by 'the clear policy in favor of encouraging settlements . . . .'") (quoting *Metro. Housing Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir.1980)).

[12] *Cohen v. Brown Univ.*, 16 F.4th at 951.

[13] Proposed Settlement, Exhibit 3a, "Change #2: Section 5.0."

[14] Proposed Settlement, Exhibit 3a, "Change #1: Section 1.0(c)."

[15] SOI 16–18.

First, the timing of those NWMLS rule changes exposes the inability of DOJ's empirical evidence[16] to evaluate the changes. Instead, data that is or could have been readily available to DOJ show that the NWMLS 2019 rule change caused commission offers in NWMLS to decrease faster than they had in the prior two decades.

Second, though DOJ rejects the Proposed Settlement Policies, its own policy preference would undermine the competition-enhancing principles of the Sherman Act. The SOI proposes that MLS PIN should prohibit a wide swath of brokerage business practices—offers of compensation from sellers and brokers to buyer brokers[17]—that are lawful throughout the MLS PIN service area. MLSs have historically faced antitrust litigation when they have adopted restrictions on lawful brokerage practices.

Third, DOJ's policy preference will potentially create significant negative effects for tens of thousands of consumer transactions just in the MLS PIN service area, and on millions of transactions in the nationally critical residential real estate industry, because it assumes a smooth transition to the model the SOI proposes among the many thousands of third-party businesses and entities involved in real estate in transactions. DOJ incorrectly predicts a glitchless transition without accounting for the complexity of the real estate transaction (and without citing any sources).[18]

For these reasons, the Court should evaluate the Proposed Settlement based on its merits, not DOJ's unsupported arguments and its incongruous recommendation from a federal antitrust enforcement agency that an MLS impose restrictions which could be held to violate the antitrust laws. The balance of this argument explores each of the three flaws in turn.

---

[16] *See* Decl. of Erik A. Schmalbach, ECF No. 290-1 [hereinafter Schmalbach Decl.].
[17] SOI 20.
[18] SOI 21–22.

A. DOJ lacks empirical evidence for its criticism of the Proposed Settlement Policies and for its policy preference.

An objection to a settlement "must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them."[19] As a preliminary matter, the SOI makes a number of empirical claims that it sources only to the popular media;[20] to blog or podcast posts;[21] to the press releases of lobbying groups;[22] and to pleadings in this case, allegations that the plaintiffs here have not yet proved.[23] None of these "authorities" is evidence on the record in this case (or any other), and the Court should not accept them as evidence.

When DOJ does rely on learned studies and other quantitative evidence to criticize the Proposed Settlement Policies and to advance its own policy preference, it offers three arguably systematic empirical studies: a published paper in an economics journal titled "Conflicts of Interest and Steering in Residential Brokerage (the Barwick study);[24] an unpublished paper entitled "Et Tu, Agent? Commission-Based Steering in Residential Real Estate" (the Barry study);[25] and the "Antitrust Division's own analysis of buyer-broker prices in large

---

[19] *Ponzio v. Pinon*, 87 F.4th 487, 500 (11th Cir. 2023) (quoting Fed. R. Civ. P. 23(e)(5)(A), Advisory Comm.'s Note to 2018 Amend.); *see, e.g.*, *1988 Trust for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 521 (4th Cir. 2022) ("The showing necessary to prevent an objection from derailing a settlement will, of course, vary with the strength of the objection itself; frivolous objections may need very little to overcome them, while weightier objections will require more.").

[20] *See, e.g.*, SOI 4 n.1, 17 n.10.

[21] *See, e.g.*, *id.* at 8 n.4, 16, 20 n.15.

[22] *See, e.g.*, *id.* at 4 n.2, 17 n.10.

[23] *See, e.g.*, *id.* at 4 n.1, 13.

[24] Panle Jia Barwick, Parag A. Pathak, & Maisy Wong, *Conflicts of Interest and Steering in Residential Brokerage*, 9 Am. Econ. J.: Applied Econ. 191 (2017), https://doi.org/10.1257/app.20160214 [hereinafter Barwick et al., *Conflicts*].

[25] Jordan M. Barry, Will Fried, & John William Hatfield, *Et Tu, Agent? Commission-Based Steering in Residential Real Estate* (USC Ctr. for L. & Soc. Sci. Rsch. Paper Series, Paper No. 24-7, Jan. 12, 2024), https://ssrn.com/abstract=4596391 [hereinafter Barry et al., *Et Tu*]. Note that the SOI cites the October 9, 2023, version of this paper. SOI 14.

metropolitan areas in NWMLS's region"[26] (the Schmalbach Declaration). These studies, however, fail to assess the likely effects of the Proposed Settlement Policies. Meanwhile, more comprehensive evidence from NWMLS that CMLS's economists have analyzed demonstrates probable positive effects for consumers from the rule changes in the Proposed Settlement Policies.[27]

CMLS offers the report of its economists on the record here in the Declaration of John H. Johnson, IV, and Michael Kheyfets, filed concurrently with this brief. As explained further below, the Johnson/Kheyfets Declaration demonstrates that the Barwick study and Barry study are inapposite to analysis of the Proposed Settlement; and that the internal DOJ study suffers from conceptual and methodological problems and does not provide sufficient information for the Court to evaluate its claims. The empirical study offered on the record in the Johnson/Kheyfets Declaration, by contrast, applies appropriate methods and shows that the NWMLS rule changes have resulted in significant decreases in the compensation offered to buyer brokers in the NWMLS service area, reducing such offers by $1,000 per transaction, on average, since NWMLS adopted the rules.

This Court's analysis of DOJ's concerns will benefit first from consideration of the importance of timing in assessing NWMLS's rule changes.

[26] SOI 17 (citing Schmalbach Decl.).

[27] *See* concurrently filed Declaration of John H. Johnson, IV, and Michael Kheyfets [hereinafter Johnson/Kheyfets Decl.].

1. Timing is everything in evaluating the effects of the NWMLS rule changes.

DOJ opposes the Proposed Settlement Policies by focusing its criticism on the effect of rule changes in NWMLS that "mirror the proposed settlement here."[28] The timing of NWMLS's rule changes is important for the Court's understanding of DOJ's argument:

- "In October 2019, NWMLS removed the requirement that a seller make a minimum offer of compensation when listing a property for sale."[29] This NWMLS 2019 rule change closely corresponds to the Proposed Compensation Rule.
- "Then, in October 2022, NWMLS made another rule change, purportedly 'to ensure that the buyer understands the buyer brokerage firm compensation and to create an opportunity for discussion and negotiation.'"[30] This NWMLS 2022 rule change closely corresponds to the Proposed Certification Rule.

The timing is critical because the gravamen of the plaintiffs' claims in this case is that MLS PIN *required* listing brokers to make a non-zero offer of compensation to buyer brokers.[31] The NWMLS 2019 rule change eliminated that requirement for the Seattle-based MLS, while allowing sellers to make offers of compensation if they chose, as would the Proposed Compensation Rule here. The NWMLS 2022 Rule Change required additional efforts from the listing broker to ensure that sellers understand their options, as would the Proposed Certification Rule here.

---

[28] SOI 16.

[29] *Id.*

[30] *Id.*

[31] Second Am. Compl. ¶¶ 36, 69, 72–74, 76–77, 81, 83, 89, 103, ECF No. 150.

2. The Barwick and Barry studies are inapposite to evaluation of the effects of the NWMLS rule changes.

Neither the Barwick nor the Barry study examined effects of the NWMLS 2019 and 2022 rule changes. The Barwick study "analyzed the effect of steering on commissions using market data from the Greater Boston Area from 1998 to 2011."[32] The Barry study analyzed data from twenty-two metropolitan areas (including Seattle), "assembled by scraping all active listings on Redfin within a set of specified ZIP codes on a weekly basis between June 12, 2021, and February 3, 2022."[33] Given these time ranges, these studies cannot be used to assess what buyer-broker commission offers were *before* the October 2019 NWMLS rule change or whether those offers declined *after* the rule change.[34] The Barwick study is particularly inapposite to claims about the NWMLS rule changes, as the study did not even evaluate the Washington State market in the context of any rule or policy applicable to the Proposed Settlement.[35]

The SOI refers to the Barry study for the proposition that "the Seattle experience" supposedly suggests that "the minimum commission requirement is not driving sellers' current behavior."[36] However, the Barry study observes only that the data set they compiled reflects relatively few offers of compensation below 2.5%, and the authors there merely theorize that NWMLS's 2019 rule change "*seems* to have had little impact on buyer agent commissions"[37] without analyzing this proposition.[38] As for their observation that Seattle remains like other

---

[32] SOI 13, citing Barwick et al., *Conflicts.*
[33] Barry et al., *Et Tu*, at 24.
[34] Johnson/Kheyfets Decl. ¶¶ 31–32.
[35] Johnson/Kheyfets Decl. ¶ 18.
[36] SOI 17 n.10, citing Barry et al., *Et Tu*, at 82.
[37] Barry et al., *Et Tu*, at 81 (emphasis added).
[38] Johnson/Kheyfets Decl. ¶ 13.

markets in that the bulk of commission offers was at the "going rate,"[39] the very definition the Barry study imposed on the term "going rate" fore-ordained that it would be the largest category of listings.[40]

The Barwick and Barry studies did not assess any change in the NWMLS commission rates before or after the 2019 or 2022 rule changes, and they made no effort to isolate the effects of the NWMLS rule changes. They are therefore neither relevant nor insightful for assessing whether the proposed rule changes here will lead to the outcome (i.e., lower commission rates) that DOJ seeks.

3. The internal DOJ analysis the SOI cites fails to assess the likely effects of the Proposed Settlement Policies.

As the Johnson/Kheyfets Declaration shows, DOJ's internal analysis suffers from even greater reliability issues than the other studies. First, DOJ's analysis does not disclose several critical pieces of information necessary for the Court to rely on the analysis.[41] It is missing, for example, any data about average prices or commissions; who the single real estate broker was that it used for analysis; how representative that broker's experiences are of brokerage firms generally; which thirty-one other markets DOJ analyzed; or how many transactions were analyzed in any market at any time.[42] These shortcomings make it impossible to assess the

---

[39] Barry et al., *Et Tu*, at 81.

[40] *Id.* at 28. Interestingly, the study defined "going rate" in such a way that all higher-commission listings were grouped with the most-common-commission listings, meaning there could be no such thing as a commission that is *higher* than the going-rate, a counter-intuitive definition for "going rate," and one that might be useful for the Barry et al. study but that yields no information about the effect of the NWMLS rule changes.

[41] *See In re Pharma. Indus. Average Wholesale Price Litig*., 491 F. Supp. 2d 20, 85–86 (D. Mass. 2007) ("[T]he court may reject testimony for which the data relied upon is flawed or the methodology used is 'internally inconsistent or unreliable.'") (quoting *Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 124 F.3d 252, 260 (1st Cir.1997)).

[42] Johnson/Kheyfets Decl. ¶ 29.

Schmalbach Declaration's external validity, that is, whether the results "can be used to draw any general conclusions about the effects of the NWMLS policy change, rather than the alleged experience of one particular broker being analyzed in a specific part of Washington."[43] For example, an analysis of all NWMLS listings between January 2016 and November 2023 combined with the Schmalbach Declaration's data restrictions suggests that DOJ's analysis may have included as little as 3% of the NWMLS listings during that period.[44]

Worse, like the Barry study, the empirical evidence that the SOI offers does not compare the situation in Washington State *before* and *after* the NWMLS 2019 rule change. Instead, it compares commission offers in the NWMLS market to other markets only after that change, assuming that the markets are the same for the proposes of analysis, what the analysis refers to as a "difference-in-differences analysis."[45] But the gist of a difference-in-differences analysis is that the analyst treats the NWMLS market as having received a treatment and the other markets as a control.[46] Of course, such an analysis works only if one assumes that the markets are all otherwise the same.[47]

DOJ's analysis indeed assumes all real estate markets are the same, but ample evidence shows that they are not. In fact there is "substantial variation in economic trends in residential

---

[43] Johnson/Kheyfets Decl. ¶ 30.

[44] Johnson/Kheyfets Decl. ¶¶ 42–44, fig. 4 (citing Schmalbach Decl. ¶¶ 2, 8d, 9).

[45] Schmalbach Decl. ¶ 3.

[46] *E.g.*, *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 817 (7th Cir. 2012) (explaining that the expert's difference-in-differences analysis "would compare prices at Northshore's hospitals with prices at a control group of comparable area hospitals not party to the merger but otherwise presumably subject to the same market forces affecting prices in hospitals.").

[47] For example, if you took thirty people of different weights, activity levels, health quality, and age, treated one of them with a diet medication and did not treat the others, you could not be confident that any change in weight in the treatment case was due to the medication as opposed to one of the many other differences among the subjects. *See* Johnson/Kheyfets Decl. ¶¶ 22–23 (further discussing these design matters).

real estate markets across the United States" during the applicable period.[48] For example, the Seattle housing price index has a markedly different trend line than the national average.[49] County-level home values changed differently in Seattle than in other markets.[50] And housing starts in Seattle followed a different trend line than the rest of the country.[51] Consequently, DOJ's failure to perform a robust difference-in-differences analysis that compares NWMLS with a proper control market means it cannot isolate the effect of any NWMLS rule change from any other factors in the residential real estate industry. This flaw renders DOJ's empirical work unworthy of the Court's reliance.[52]

In short, the SOI purports to provide empirical evidence to support its claims, but the Court should credit none of it; all of it is either not empirical evidence at all, chronologically or geographically inapposite, or methodologically flawed.

4. Evidence from the Northwest Multiple Listing Service shows the probable positive effects of the rule changes in the Proposed Settlement Policies.

DOJ's choice of the difference-in-differences method is surprising, especially given that it had data from its single broker from "between January 2016 and November 2023,"[53] and therefore could have compared the NWMLS data from three years *before* the NWMLS 2019 rule change and with data from four years *after* it. CMLS's economists have looked at a full set of data—consisting of all listings from NWMLS in Washington and Oregon sold since 2000—

---

[48] *Johnson/Kheyfets Decl.* ¶ 36.

[49] *Id.* ¶ 37, fig. 1.

[50] *Id.* ¶ 38, fig. 2.

[51] *Id.* ¶ 39, fig. 3.

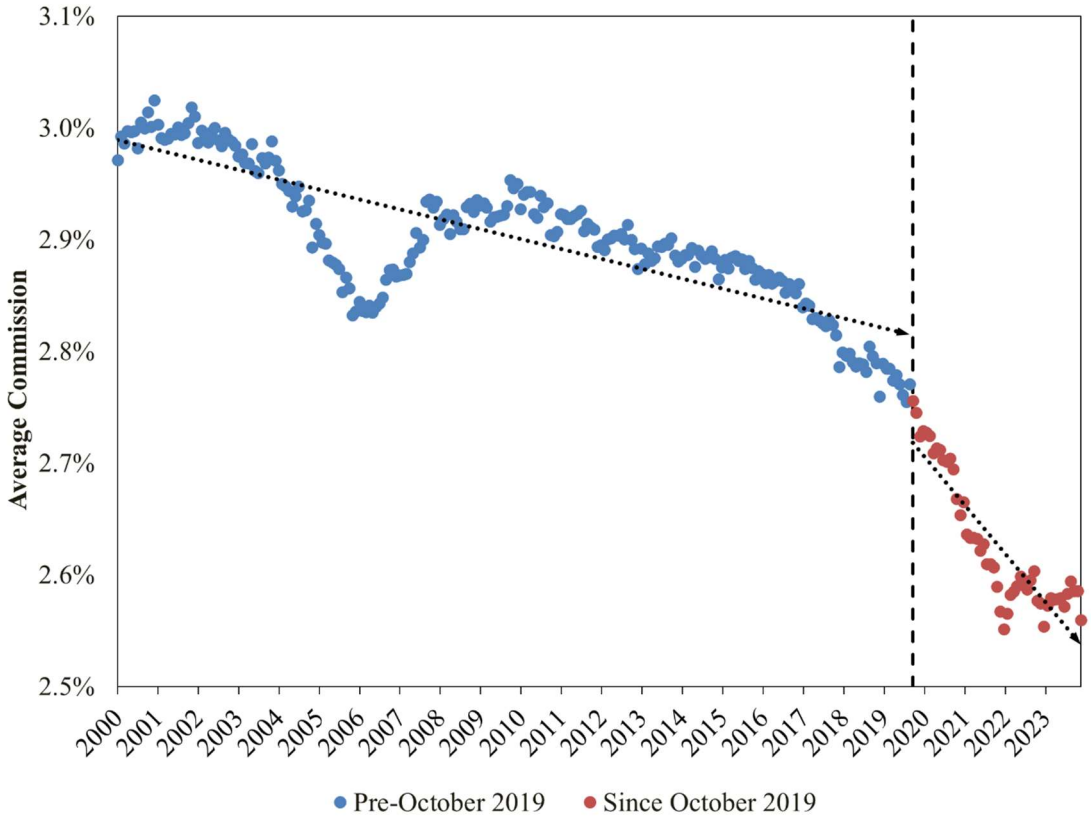
[52] *Massachusetts Mut. Life Ins. v. Residential Funding Co.*, 989 F. Supp. 2d 165, 171 (D. Mass. 2013) ("*Daubert* . . . demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.") (quoting *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998)).

[53] Schmalbach Decl. ¶ 4.

to reveal the likely effects of the Proposed Settlement Policies. As CMLS's analysis reveals, those effects are desirable for the plaintiffs here and consumers like them.

First, the Johnson/Kheyfets Declaration demonstrates that cooperative compensation offers have been declining in NWMLS since 2000, but they have declined markedly faster since the NWMLS 2019 Rule Change. "Buyer-broker compensation rates through NWMLS were declining at an average of 0.4% per year from 2000 to 2019. After the 2019 rule change, the decline increased to an average of 1.5% per year."[54] The following figure illustrates the trends.[55]

Average Buyer-Broker Commission Rate for Residential Properties Sold Through NWMLS, January 2000 – December 2023



[54] Johnson/Kheyfets Decl. ¶ 45.

[55] *Id.* fig. 5.

Second, using an econometric statistical-regression model, the Johnson/Kheyfets Declaration presents an assessment of the effect of both NWMLS rule changes, controlling for a large variety of other variables.[56] The results of this model are statistically significant at the 95% level.[57] Based on the model's results, the NWMLS 2019 rule change has led to a decline in commission offers of 0.118% (e.g., 2.382% instead of 2.500%), and the NWMLS 2022 Rule Change has led to a further decline of 0.021%.[58] These declines are on top of the declines in rates that were already in progress.[59] The data thus support a reasonable estimate that the buyer's broker received an average reduction in commission on the sale of a $750,000 home (the average sale price in NWMLS) of more than $1,000 (e.g., $17,708 instead of $18,750) *as a result of the NWMLS rule changes*.

The more rapid decline in buyer broker commission rates since the NWMLS 2019 rule change offers a reasonable preview of the likely effects of the more significant of the Proposed Settlement Policies in this case, the Proposed Compensation Rule. The regression model prepared by CMLS's economists shows the NWMLS 2019 and 2022 rule changes reduced

---

[56] Johnson/Kheyfets Decl. ¶ 49 (noting that model controls for "(i) property characteristics, such as location, number of bedrooms and bathrooms, square footage, lot size, property type, and property age; (ii) transaction characteristics, such as month of sale, whether the property was sold at auction, a short sale, or was bank-owned, as well as whether the same brokerage represented both buyer and seller; (iii) macroeconomic factors, such as mortgage rates and statewide housing starts; (iv) brokerage/agent-specific factors measuring quality and experience, such as agent's past sales in NWMLS, brokerage firm size, and share of broker's listings successfully sold; and (v) the overall declining trend in compensation of buyer brokers since 2000").

[57] Johnson/Kheyfets Decl. ¶ 51 n.45. *See Jones v. City of Boston*, 752 F.3d 38, 43 (1st Cir. 2014) (A "finding of statistical significance means that the data casts serious doubt on the assumption that the disparity was caused by chance.") (citing David H. Kaye & David A Freedman, *Reference Guide on Statistics, in Reference Manual on Scientific Evidence* 211, 251 (Fed. Jud. Ctr. & Nat'l Rsch. Council of the Nat'l Acads. eds., 3d ed. 2011)) .

[58] Johnson/Kheyfets Decl. ¶ 45 (referring to the reduction in terms of "basis points" which are 1/100th of a percent).

[59] *Id.* ¶ 49 (explaining that the model accounted for the preexisting "declining trend in compensation of buyer brokers").

buyer broker commissions by more than $1,000 on an average transaction in NWMLS. Given the average home price in MLS PIN today is in the same range as those in NWMLS,[60] consumers buying through MLS PIN under the Proposed Settlement Policies are likely to experience similar savings.

B. DOJ's policy preference violates principles of the Sherman Act.

DOJ's policy preference—stated late in the SOI—is that the Court should issue "an injunction that *prohibits* offers of buyer-broker compensation by MLS PIN participants."[61] Such a rule, if an MLS adopted it, would violate the competition-enhancing principles of the Sherman Act, because it would mean that competitors—brokers who participate and operate the MLS—would be agreeing to dictate that competing seller brokers cannot engage in lawful marketing of property.

If MLS PIN were to adopt DOJ's policy preference, it would likely fail a rule-of-reason analysis, the "means for distinguishing between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[62] Where the burden imposed by the restraint would have "substantial anticompetitive effect," the restraint's proponent must "show a procompetitive rationale for the restraint," but this showing is undermined if "the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[63] Given the anticompetitive effects of MLSs restraining brokers' lawful business practices, the unquestionable lawfulness of listing brokers and sellers offering to pay buyers' brokers, the uncertain rationale for DOJ's position, and the fact that the

[60] *See* SOI 21 n.16.
[61] SOI 20 (emphasis in original).
[62] *Nat'l Collegiate Athletic Assn. v. Alston*, 594 U.S. 69, 96 (2021) (citations and quotations omitted).
[63] *Id.* at 96–97.

SOI's policy proposal is not tailored to achieve the results DOJ seeks, this Court should not adopt DOJ's policy preference as part of any approved settlement in this matter.

1. Offers of compensation to buyer brokers are lawful.

As a preliminary matter, offers of compensation between brokers and from sellers to buyers' brokers are lawful in Massachusetts and all other jurisdictions relevant to this suit. DOJ has offered no authority or evidence to support any claim that it is unlawful for listing brokers and sellers to offer compensation to buyer brokers. Moreover, the SOI concedes that sellers may do so during purchase-agreement negotiations if DOJ's policy preference is adopted.[64] A review of the statutes and case law of Massachusetts, Connecticut, Maine, New Hampshire, New York, Rhode Island, and Vermont reveals that these practices are lawful.

2. MLSs engage in anticompetitive restraints of trade when unnecessarily prohibiting brokers from engaging in lawful business practices.

MLSs have faced antitrust challenges when they attempt to regulate lawful business practices of brokers that are not closely related to the MLSs' procompetitive business purpose.[65] This is a common thread of antitrust cases involving MLSs that the SOI cites.[66] Associations of competitors, such as MLSs, may adopt policies with anticompetitive effects if necessary for them to achieve their procompetitive purposes.[67] But MLSs that attempt to adopt policies that control lawful broker conduct outside the narrow purposes of the MLS have come

---

[64] SOI 21.

[65] Though the SOI characterizes the "industry" as having a "history of resisting commission competition," SOI 6, that claim unfairly paints all modern MLSs with a brush consisting of cases that are more than fifty years old or represent the practices of a small number of industry actors. *See* SOI 7. Given the number and ubiquity of MLSs, real estate brokers, and the transactions in which they are involved, it is a testament to the professionalism of the industry that such cases have been and are—and will likely continue to be—rare.

[66] *Id*. *See, e.g.*, Am. Compl. ¶ 29, *United States v. Nat'l Ass'n of Realtors*, No. 05-cv-5140 (N.D. Ill. Oct. 5, 2005) (alluding to alleged suppression of lawful but allegedly disfavored "'referral' business model" as anticompetitive effect of NAR policy).

[67] *Nat'l Collegiate Athletic Assn.*, 594 U.S. at 96.

repeatedly come under antitrust scrutiny. For example, the Fourth Circuit held that class action plaintiffs who purchased brokerage services alleged a plausible Sherman Act section 1 claim where the MLS required, among other things, that its participants maintain a physical office in the area and use only a standard, pre-approved contract form.[68] Similarly, the Sixth Circuit held that the FTC was justified in finding an MLS liable for an FTC Act section 5 violation where the MLS policy reduced display prominence of listings a brokerage obtained via a legal, but disfavored, business model.[69] Likewise, a requirement that MLS participants use only a "standard" type of "For Sale" sign was held a section 1 violation by a federal district court.[70] Federal courts have also found plausible section 1 violations (1) where an MLS adopted a listing policy allegedly making it harder for real estate agents to move from one brokerage firm to another,[71] and (2) where MLS rules allegedly "prohibit[ed] any MLS participant . . . from using the email addresses of other MLS participants . . . in [the] MLS's . . . database" and prohibited "unsolicited electronic mail messages containing job recruitment notices or other advertisements."[72]

Because of these holdings and from a commitment to the competition policies they embody, CMLS's members take pains to consider the business necessity of MLS rules that

---

[68] *Robertson v. Sea Pines Real Est. Cos.*, 679 F.3d 278, 289 (4th Cir. 2012). *See also* Brief for the United States as Amicus Curiae in Support of Plaintiffs–Appellees at 12, *Robertson v. Sea Pines Real Est. Cos.*, 679 F.3d 278 (Nos. 11-1538, 11-1539, 11-1540, 11-1541) ("The district court correctly held that Section 1 of the Sherman Act can apply to the challenged CMLS and HHMLS rules limiting price competition among its members and excluding new, aggressive competitors from participating in the MLSs.").

[69] *Realcomp II, Ltd. v. F.T.C.*, 635 F.3d 815, 822 (6th Cir. 2011).

[70] *Cantor v. Multiple Listing Serv. of Dutchess Cnty., Inc.*, 568 F. Supp. 424, 430 (S.D.N.Y. 1983).

[71] *Compass, Inc. v. Real Est. Bd. of New York, Inc.*, No. 21-CV-2195 (AJN), 2022 WL 992628, at *2 (S.D.N.Y. Mar. 31, 2022), *reconsideration denied*, No. 21 CIV. 2195 (LGS), 2022 WL 2967566 (S.D.N.Y. July 27, 2022).

[72] *Multiple Listing Serv. of N. Ill., Inc. v. Amerihall of Ill., LLC*, No. 03 C 8934, 2004 WL 1656563, at *1 (N.D. Ill. July 22, 2004).

govern participating brokers and to tailor those rules narrowly to reach no more conduct than reasonably necessary.

3. DOJ's policy preference would require MLSs to impose restraints on brokers not necessary to advance MLSs' procompetitive purposes.

DOJ's policy preference is that this Court should impose "an injunction that *prohibits* offers of buyer-broker compensation by MLS PIN participants."[73] Prohibiting offers of compensation from brokers and sellers is a drastic imposition of MLS regulation on legal activities of listing brokers and sellers. DOJ offers no evidence that such a change is necessary to achieve procompetitive purposes. Furthermore, the SOI does not consider ways (perhaps today unimagined by DOJ, MLSs, and even brokers) that listing brokers might use offers of compensation to buyer brokers to spur *greater* price competition.

By contrast, as the analysis above and in the Johnson/Kheyfets Declaration shows, policies that mirror the Proposed Settlement Policies—making compensation optional and under the control and at the discretion of the seller and requiring greater efforts to disclose options to sellers—resulted in *lower* offers of compensation to buyer brokers in NWMLS, the very goal that the plaintiffs here and DOJ purport to be seeking. The Proposed Settlement Policies are thus likely to achieve significant procompetitive benefits without imposing the anticompetitive restraints DOJ requests.

C. DOJ's policy preference has practical implications for consumers that DOJ does not address.

The residential real estate industry is of critical importance. The SOI's brief treatment of the likely consequences of its policy preference fails, however, to account for the complexity of the industry and for negative potential consequences that economists have identified. Further,

[73] SOI 20.

the SOI offers no evidence that DOJ has sought input from third-party industry participants, including mortgage banker associations; appraiser associations; the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac, which purchase pools of conforming mortgages from lenders; the Federal Housing Administration (FHA); and the Department of Veterans Affairs (VA).[74] Meanwhile, the Proposed Settlement Policies mirror provisions in effect in Washington state for nearly five years without reports of negative consequences. This Court should prefer the proven track record of the Proposed Settlement Policies to the optimistic imaginaries of DOJ's policy preference.

DOJ would likely agree with CMLS on the importance of the real estate industry. As noted above, DOJ relies on the Barry study for the limited empirical support the SOI offers for its claims about the Proposed Settlement Policies.[75] That study notes the size and significance of the U.S. residential real estate market, the total value of which is in the "tens of trillions of dollars," of which "[m]illions [of units] . . . are sold each year, generating trillions of dollars for sellers."[76] It also notes that "for most Americans, their home is by far their largest asset," and it admits that "[f]ailed sales can be especially difficult for sellers, forcing them to pay mortgages on both their new and old properties, potentially for an extended period of time."[77]

In a single paragraph, however, the SOI blithely waives away any potential negative consequences of its policy preference on this critical industry:

> A change that makes it the buyer's responsibility to negotiate broker commissions directly with her buyer broker would not force buyers to pay those commissions out of pocket. While some buyers might choose to pay their buyer

---

[74] *See* Housing Finance Policy Center, Urban Institute, *Housing Finance at a Glance: A Monthly Chartbook* 8 (June 2023) (noting that Fannie Mae and Freddie Mac were responsible for 43% of the $291 billion in mortgage originations in 2022 Q1 and that FHA and VA accounted for 22.3%).

[75] SOI 13–14.

[76] Barry et al., *Et Tu*, at 8 (citations omitted).

[77] *Id.* (citations omitted).

> brokers out of pocket, other buyers might request in an offer that the seller pay a specified amount to the buyer broker from the proceeds of the home sale. *Thus, the current practice could continue, where the seller factors the commissions into the offer the seller is willing to accept.* If a buyer requests in an offer that the seller pay her buyer broker from the proceeds of the home sale, it would be straightforward for a seller to compare offers that include a request for the seller to pay the buyer's broker . . . with offers that do not include such a request . . . . A seller only has to compare net dollar amounts. This type of "conditional" offer is already permitted under federal government lending programs. Those programs do not require buyers to come up with additional funds at closing in order to compensate their brokers in these types of "conditional" offers. Buyers therefore would not need to come up with additional funds at closing in order to compensate their brokers. Instead, they and other buyers would benefit from increased competition between buyer brokers.[78]

The paragraph contains a single citation, but not to support any of these claims.[79] Nevertheless, there is reason to believe the scenario DOJ imagines may not come true if DOJ's policy preference prevails. And even if DOJ's expectations are correct, many parties will have to act to make the assertions in this paragraph true. DOJ appears not to have considered the effect of its policy preference on them.

Importantly, DOJ assumes that the seller will pay the buyer's broker as part of the negotiated deal. DOJ offers no evidence for why that will be the case, and other scenarios are possible, and perhaps likely. For example, if a seller receives two offers that are equally financially satisfactory, one where the seller must pay the buyer's broker and one where the seller need not, a seller might choose to go with the "cleaner" or "simpler" offer, just as sellers today may prefer a cash offer to one that is contingent on financing.[80]

---

[78] SOI 21–22 (emphasis added).

[79] SOI 21 n.16 (citing data for the average home price in the MLS PIN market, which DOJ used for an example omitted from the block quotation).

[80] *See* Dana Anderson, *All-Cash Homebuyers Are Four Times More Likely to Win a Bidding War*, Redfin.com, Mar. 11, 2022, https://www.redfin.com/news/2021-bidding-war-strategies-all-cash/ [https://perma.cc/SBZ4-ATLE] (summarizing Redfin data showing all-cash offers improve chances of winning a "bidding war" by 334%).

If the seller will not pay, or if the buyer does not ask for payment for fear of making a less-desirable offer, the buyer has two choices: (a) pay their broker in cash at closing or (b) finance their broker's fee in a mortgage. A study by Schnare et al. considers these scenarios and possible impacts of DOJ's policy preference if it were to have national scope.[81] The Schnare study concludes "that changing the current compensation structure would suppress homebuying opportunities for large segments of the potential market, and that minorities, lower income households, and first-time home buyers who rely more heavily on agent services would suffer the most" and "that requiring buyers to pay their agents' fee directly would not necessarily produce the large reductions in commission rates that decoupling proponents have envisioned, particularly for first-time home buyers."[82] The Schnare study is not the only source of such concerns, either. Reporting on a settlement proposal in other suits that implements something similar to the DOJ policy preference, a Boston.com article discloses concerns of a Wharton School professor, an Urban Institute expert, and a mortgage company representative, among others.[83]

CMLS acknowledges that a large brokerage firm funded the Schnare study[84] and that the study's authors might thus be thought prone to motivated reasoning. Nevertheless, the

---

[81] Ann B. Schnare, Amy Crews Cutts & Vanessa G. Perry, Be Careful What You Ask For: The Economic Impact of Changing the Structure of Real Estate Agent Fees (May 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4106600.

[82] *Id.* at 3.

[83] Ronda Kaysen &Rukmini Callimachi, *Could first-time home buyers lose out under new commission rules?*, Boston.com (Mar. 26, 2024 11:32 AM), https://www.boston.com/real-estate/home-buying/2024/03/26/could-new-commission-rules-hurt-firsttime-buyers/ [https://perma.cc/G64P-3PK3] [hereinafter Kaysen, *First-time buyers*] (reporting an observation of the founder of the Urban Institute's Housing Finance Policy Center that "[t]hey are ripping down the existing structure, but there is nothing in place" and noting that "[b]uyers did not have a seat at the [settlement] negotiating table").

[84] *Id.* at 1.

study's authors are well-trained,[85] it uses widely available data,[86] and CMLS is not aware of any evidence-backed rebuttal of it. The claims of the Schnare study and the concerns expressed by other industry participants warrant a rebuttal of similar quality, but the SOI does not even mention the potential harms to significant segments of homebuyers, including first-time, minority, and lower-income buyers.[87] Even the Barry study, which is careful to describe its methods and materials and acknowledges some of the potential harms identified by the Schnare study, attempts to dispel those concerns with a single citation to an unconventional broker's declaration about its anecdotal experiences in another lawsuit.[88]

The problems which may result from widespread adoption of DOJ's policy preference are not constrained to buyers *who might be able to finance* their brokers' fees. A considerable and important segment of the mortgage market, VA borrowers, *simply may not be able to finance broker fees at all*. Under U.S. Department of Veterans Affairs regulations, real estate broker fees are not listed among the closing costs that can be financed with a VA loan.[89]

---

[85] *Id.* at 2.

[86] *E.g., id.* at 8 n.10 (identifying the Urban Institute as a data source).

[87] SOI 20–22.

[88] Barry et al., *Et Tu*, at 88 (citing Decl. of Jack Ryan ¶ 1, *Moehrl v. Nat'l Ass'n of Realtors* (N.D. Ill. 2019) (No. 1:19-cv-01610), ECF No. 324-4 (including an anecdotal report by the CEO of brokerage REX—Real Estate Exchange, Inc.)). At the time of the declaration, REX was involved in litigation against the National Association of REALTORS®. *See* Am. Compl. for Injunctive Relief & for Damages, *REX—Real Est. Exch., Inc. v. Zillow, Inc.* (W.D. Wash. 2021) (No. 2:21-cv-00312), ECF No. 99. REX asserts that it was created "in 2015 to bring residential real estate into line with today's expectations by using AI and big data to push past the outmoded practices of traditional real estate brokers to provide a superior outcome for both buyers and sellers at one-third the cost." *About Us,* Rexchange.com, https://www.rexchange.com/about [https://perma.cc/J5YD-CKRM], last visited Mar. 26. 2023. It is unclear from REX's press how many transactions the company has done and whether its experiences are likely to be representative of real estate firms generally.

[89] 38 C.F.R. § 36.4313(a) (providing that "[n]o charge shall be made against, or paid by, the borrower incident to the making of a guaranteed or insured loan other than those expressly permitted under paragraph (d) or (e) of this section" but not including brokerage fees in paragraph (d) or (e)). *See also VA funding fee and loan closing costs*, U.S. Dep't of Veterans Affs., https://www.va.gov/housing-

To secure support for its policy preference, the Court might expect that DOJ would have reached out to the other parties in the real estate transaction—especially other federal-government-related entities—to secure their assurances that DOJ's policy preference will not disrupt transactions in one of the most important industries in the country, parties such as mortgage banker associations; appraiser associations; the GSEs; FHA; and VA. The SOI, however, cites no such communications, and CMLS is not aware of any public statements by any of these entities assuring that, if DOJ has its way, this critical industry will continue to function smoothly. This Court would be justified in concluding that it will not under DOJ's policy preference.

The Proposed Settlement Policies, however, "mirror" the policies adopted by NWMLS, one of which has been in operation for nearly five years, and the other for nearly two years.[90] CMLS is aware of no reports (made publicly or privately) of disruptions in the NWMLS market since the advent of the NWMLS 2019 rule changes. This Court should thus anticipate none here if it approves the Proposed Settlement.

IV. CONCLUSION

DOJ seeks to secure a major change in U.S. residential housing policy by commenting on a proposed antitrust settlement among private parties, instead of by an enforcement action of its own or by encouraging rulemaking by a federal agency empowered by statute to do so. The Court should decline to credit the SOI's arguments, given that DOJ lacks robust empirical

---

assistance/home-loans/funding-fee-and-closing-costs/ [https://perma.cc/AE4H-MZ59] (last visited Mar. 26, 2024) ("The seller must pay these closing costs (sometimes called seller's concessions): Commission for real estate professionals[;] Brokerage fee[;] Buyer broker fee . . . ."); Kaysen, *First-time buyers* (quoting a loan officer: "The rule 'is as crystal clear as it gets . . . Adjusting VA guidelines is not an easy thing to do.'").

[90] SOI 16.

evidence to support its policy preference, overlooks the anticompetitive nature of its policy preference, and does not have the institutional expertise to assess the effects of its policy preference on the real estate market.

Meanwhile, the NWMLS 2019 and 2022 rule changes have collectively resulted in an average savings of $1,000 in buyer-broker commission on each sale of an average-priced home in NWMLS. There is no evidence of disruption in the NWMLS market during the past five years resulting from the NWMLS rule changes. There is every reason to believe that the Proposed Settlement Policies will have a similar effect in the area covered by this suit and that the Proposed Settlement Policies will advance the procompetitive intentions of the plaintiffs and reward the class members with declining commission rates, all without the disruptive effects of unintended consequences that DOJ appears not to have considered.

March 27, 2024

Respectfully submitted,

/s/
Justin J. Wolosz (BBO #643543)
Eric M. Gold (BBO #660393)
Max A. Jacobs (BBO #707327)
MANATT, PHELPS & PHILLIPS, LLP
One Beacon Street
Boston, MA 02108
Telephone: 617-646-1443
jwolosz@manatt.com
egold@manatt.com
mjacobs@manatt.com

Mitchell A. Skinner
(*pro hac vice* application forthcoming)
Brian N. Larson
(*pro hac vice* application forthcoming)
LARSON SKINNER, PLLC
7595 Currell Blvd, #251336
St. Paul, MN 55125
Telephone: 612-424-8660
mskinner@larsonskinner.com
blarson@larsonskinner.com

Counsel for Non-party Council of Multiple Listing Services

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JENNIFER NOSALEK, RANDY HIRSCHORN and TRACEY HIRSCHORN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MLS PROPERTY INFORMATION NETWORK, INC., ANYWHERE REAL ESTATE INC. (F/K/A REALOGY HOLDINGS CORP.), CENTURY 21 REAL ESTATE LLC, COLDWELL BANKER REAL ESTATE LLC, SOTHEBY'S INTERNATIONAL REALTY AFFILIATES LLC, BETTER HOMES AND GARDENS REAL ESTATE LLC, ERA FRANCHISE SYSTEMS LLC, HOMESERVICES OF AMERICA, INC., BHH AFFILIATES, LLC, HSF AFFILIATES, LLC, RE/MAX LLC, POLZLER & SCHNEIDER HOLDINGS CORPORATION, INTEGRA ENTERPRISES CORPORATION, RE/MAX OF NEW ENGLAND, INC., RE/MAX INTEGRATED REGIONS, LLC, AND KELLER WILLIAMS REALTY, INC.,

Defendants.

No. 1:20-cv-12244-PBS

DECLARATION OF JOHN H. JOHNSON, IV AND MICHAEL KHEYFETS

TABLE OF CONTENTS

TABLE OF FIGURES

I. EXPERTS' QUALIFICATIONS AND ASSIGNMENT

1. We are economists and partners at Edgeworth Economics, L.L.C. ("Edgeworth"). Edgeworth is a consulting firm that provides expert economic research and analysis in the areas of antitrust, consumer protection, and labor and employment. Edgeworth has offices in Washington, DC, and Pasadena, CA.

A. John H. Johnson, IV

2. I received my B.A. *magna cum laude* with highest distinction in Economics from the University of Rochester and my Ph.D. in Economics from the Massachusetts Institute of Technology ("MIT"). My areas of specialization at MIT were econometrics—the application of statistics to economics—and labor economics. Prior to my employment as an economic consultant, I was an Assistant Professor of Economics and Labor and Industrial Relations at the University of Illinois at Urbana-Champaign, where I taught courses in labor economics.

3. Currently, I am the CEO of Edgeworth. I also teach a course called *Antitrust and Public Policy* as an adjunct professor at Georgetown University's McCourt School of Public Policy. During my career as a professional economist, I have provided economic analysis in a wide range of litigation matters involving class certification, antitrust, labor and employment, damages calculation, and statistics. I have been accepted as an expert in economics, econometrics, and statistics in Federal District Courts and have provided testimony at trial, at evidentiary hearings, and in depositions. I have testified in a wide range of antitrust matters on issues of class certification, liability, and damages, as well as in matters involving claims of coordinated behavior and monopolization.

4. I have written papers and given presentations on topics related to class certification, scientific standards in litigation, appropriate use of econometrics in litigation, and antitrust damages. I was previously an editor of the American Bar Association's *Antitrust Law Journal*. Additionally, I submitted

an amicus brief to the United States Supreme Court in *Comcast v. Behrend*[1] on the role of economic analysis in assessing the appropriateness of antitrust class certification.

B. Michael Kheyfets

5. I received my B.A., *magna cum laude* and with Phi Beta Kappa honors, and my M.A. in economics from Boston University ("BU"). At BU, my graduate-level training included coursework in game theory, industrial organization, statistics, and econometrics. Prior to joining Edgeworth, I was a senior analyst at NERA Economic Consulting. As a professional economist, my areas of specialization are applied microeconomics, the study of how individuals and firms make economic decisions, and econometrics, the application of statistical methods to economic data. In particular, I specialize in the application of economic tools to antitrust issues.

6. During my career as a professional economist, I have conducted economic analysis in a wide range of litigation matters involving class certification, antitrust, damages calculations, and statistics. In the area of antitrust and competition, I regularly work on data-intensive matters involving allegations of various types of anticompetitive conduct. I have served as a consulting expert in antitrust litigation matters involving a variety of industries, including broiler chickens, interior molded doors, packaged seafood products, mobile phones, electronic components, gypsum wallboard, auto parts, and pool products. I have also served as the testifying expert in several matters, where I offered opinions with respect to economic analysis of antitrust and damages issues.

7. I have published articles and given presentations on antitrust issues, as well as on the application of economic tools in complex litigation. I have also served in several leadership roles within the American Bar Association's Section of Antitrust Law, where I have educated antitrust practitioners about topics in data analysis, economics, and statistics.

[1] Brief of Economists as Amici Curiae in Support of Neither Party, *Comcast Corp. v. Behrend,* 569 U.S. 27 (2013) (No. 11–864).

C. Assignment

8. The United States Department of Justice ("DOJ") has filed a Statement of Interest ("SOI") in this matter.[2] In its SOI, DOJ discusses certain rule changes implemented in the past by the Northwest Multiple Listing Service ("NWMLS"), as well as the potential relevance of those rule changes to the proposed settlement at issue in this matter. The Council of Multiple Listing Services has asked us to assess DOJ's statements regarding the NWMLS rule changes.

II. DOJ'S ARGUMENTS AND ANALYSIS REGARDING THE NWMLS POLICY CHANGES

A. DOJ's Statement of its "Core Concern with MLS PIN's Rule"

9. In its SOI, DOJ discusses a concept known in the residential real estate industry as "steering"—the idea that buyer-broker commission offers may be inflated "out of fear that buyer brokers will direct buyers away from listings with lower commissions."[3] DOJ states that steering is a real (i.e., "not a theoretical"[4]) concern, citing economic research by Barwick et al. that "analyzed the effect of steering on commissions using market data from the Greater Boston Area from 1998 to 2011"[5] as well as research by Barry et al. that analyzed a sample of data "assembled by scraping all active listings on Redfin within a set of specified ZIP codes on a weekly basis between June 12, 2021 and February 3, 2022."[6]

---

[2] Statement of Interest of the United States, ECF No. 290. (February 15, 2024) [hereinafter SOI].

[3] SOI 2.

[4] SOI 13.

[5] SOI 13 (citing Panle Jia Barwick, Parag A. Pathak, & Maisy Wong, *Conflicts of Interest and Steering in Residential Brokerage*, 9 Am. Econ. J.: Applied Econ. 191 (2017), DOI: 10.1257/app.20160214).

[6] SOI 14 (citing Jordan M. Barry, Will Fried, & John William Hatfield, *Et Tu, Agent? Commission-Based Steering in Residential Real Estate* (USC Ctr. for L. & Soc. Sci. Rsch. Paper Series, Paper No. 24-7, Jan. 12, 2024), https://ssrn.com/abstract=4596391 [hereinafter Barry et al., *Et Tu*]). Note that the SOI cited the October 9, 2023, version of Barry et al., *Et Tu*.

10. DOJ states that "the only guaranteed 'benefit' to class members under the settlement is an injunction mandating certain changes to MLS PIN's buyer-broker commission rule."[7] Based on our review of the proposed Settlement Agreement,[8] we understand that at issue here are two rules that would:

a. authorize sellers to offer zero-dollar commissions to buyer-brokers, and

b. require the listing broker to certify in the MLS platform that the seller was notified that (1) the seller is not required to offer compensation to the buyer-broker, and (2) the seller can reject a buyer-broker's request for compensation.

11. DOJ states that "evidence demonstrates that the proposed [MLS PIN] rule will not change market participants' conduct or lower commissions."[9] Specifically, DOJ references two sets of buyer-broker commission policy changes made in recent years by Northwest Multiple Listing Service, based in the Seattle area and serving that market and adjacent markets in Washington and Oregon. In October 2019, NWMLS changed its rules to stop requiring sellers to offer compensation to buyer-brokers, a change we understand to be similar to the proposed rule described in paragraph 10.a, above.[10] In October 2022, NWMLS revised its listing agreement forms to add certain clarifications "to ensure that the buyer understands the buyer brokerage firm compensation and to create an opportunity for

[7] SOI 2.

[8] Second Amended Stipulation and Settlement Agreement at Exh. 3a, ECF No. 268-1 (Jan. 5, 2024) [hereinafter Proposed Settlement].

[9] SOI 16 (cleaned up).

[10] Press Release, Northwest Multiple Listing Service, Northwest Multiple Listing Service Again Updates Rules and Forms to Enhance Transparency and Flexibility for Brokers and Consumers (June 9, 2022), https://www.nwmls.com/northwest-multiple-listing-service-again-updates-rules-and-forms-to-enhance-transparency-and-flexibility-for-brokers-and-consumers/ [https://perma.cc/FH8P-TAMW].

discussion and negotiation."[11] DOJ states that NWMLS's rule changes "mirror the proposed settlement here."[12]

B. DOJ's Claims with Respect to NWMLS Policy Changes

12. DOJ states that "[n]either [NWMLS rule] revision appears to have led to a decrease in buyer-broker commissions."[13] With respect to NWMLS's 2019 rule change, DOJ states that "[a]cademic and media reports show that [this rule change] had no apparent effect on either the *portion of listings for which a buyer-broker commission offer was made* or in the *number of offers with zero compensation*."[14] As a threshold matter, we note the disconnect between the two parts of DOJ's statement: measuring the number (or portion) of listings that make buyer-broker commission offers does not measure whether there has been a *decrease in overall levels* of buyer-broker commissions.

13. Moreover, the SOI refers to the study by Barry et al. for the proposition that "the Seattle experience" supposedly suggests that "the minimum commission requirement is not driving sellers' current behavior."[15] However, Barry et al. simply observe that the sample of data set they compiled reflects relatively few offers of compensation below 2.5%. As we discussed above, their study is based on data from June 2021 to February 2022. That is, the data used in the Barry et al. paper cannot be used to assess what buyer-broker commission offers were *before* the October 2019 NWMLS rule change, or whether those offers *declined* after the rule change. The authors are simply theorizing that NWMLS's

[11] Northwest Multiple Listing, Frequently Asked Questions: October 3, 2022 Revisions at 2, NWMLS.com (June 2022), https://members.nwmls.com/wp-content/uploads/2022/06/NWMLS_FAQ_June2022-2.pdf [https://perma.cc/Y36Z-9QTF].

[12] SOI 16.

[13] SOI 16.

[14] SOI 16-17 (emphasis added).

[15] SOI 17 n.10 (quoting Barry et al., *Et Tu,* at 82).

October 2019 rule change "*seems* to have had little impact on buyer agent commissions,"[16] without empirically analyzing this proposition.

14. As we discuss in more detail below, our analysis shows that buyer-broker commissions in NWMLS listings declined after October 2019, even when accounting for the long-run decline in commissions that was already happening prior to this rule change.

15. With respect to NWMLS's 2022 rule change, DOJ states that its own analysis "found no meaningful difference between the change in buyer-broker prices in large metropolitan areas in NWMLS's region and the change in buyer-broker prices in other large metropolitan areas in the period after the October 2022 rule change."[17]

16. We discuss DOJ's original empirical work in more detail below. However, we first note that DOJ's discussion of buyer-broker commissions—and whether or not those declined as a result of certain NWMLS rule changes—is not dispositive with respect to its stated concerns about the issue of "steering." In prior work, DOJ's economists stated that the issue of steering is about whether "a smaller pool of potential buyers"—resulting from some prospective buyers being "steered away" from listings with low commission offers—"will result in a *greater time on market* or a *lower gross sales price*."[18]

17. Materials DOJ references in its SOI—including the economic research—do not purport to study whether NWMLS's 2019 and 2022 rule changes have affected the lengths of time homes in certain parts of the NWMLS area spend on the market or the prices at which homes in those areas sold.

18. As we discussed above, the study by Barwick et al. used data from the Greater Boston Area from 1998 to 2011—i.e., from a different geographic area and from more than a decade prior to the

[16] Barry et al, *Et Tu*, at 81 (emphasis added).

[17] SOI 17 (citing Decl. Erik A. Schmalbach, ECF No. 290-1 (Feb. 2, 2024) [hereinafter Schmalbach Decl.]).

[18] Matthew Magura, *How Rebate Bans, Discriminatory MLS Listing Policies, and Minimum Service Requirements Can Reduce Price Competition for Real Estate Brokerage Services and Why It Matters* 5 (Dep't of Just., Econ. Analysis Grp. Discussion Paper, Paper No. 07-8, May 2007) (emphasis added).

NWMLS rule changes (as well as before Zillow and similar platforms made residential real estate listings—and, more recently, buyer-broker compensation offers—broadly available to consumers). Research by Barry et al. used data from June 2021 to February 2022—i.e., no data either from before the October 2019 policy change or after the October 2022 policy change—meaning that study cannot be used to assess whether NWMLS's policy changes affected steering-related outcomes. Thus, there is a disconnect between the material DOJ presents as its evidence that proposed MLS PIN rule changes "will not change market participants' conduct"[19] and its stated concerns about buyer steering.

III. DOJ'S ANALYSIS OF NWMLS'S OCTOBER 2022 POLICY CHANGES

A. Explanation of DOJ's "Difference-in-Differences" Approach

19. DOJ's original empirical work of NWMLS's October 2022 policy change is contained in a Declaration submitted by Erik A. Schmalbach ("Schmalbach Declaration" or "Declaration"). We note that we have not been provided access to any materials or data used to conduct the analysis described in the Schmalbach Declaration. Thus, our assessment—as summarized below—is based on the descriptions of the analysis contained in the Declaration.

20. The stated purpose of the Schmalbach Declaration is to "analyze whether the NWMLS rule revisions in October 2022 impacted the prices paid for buyer brokerage by the buyer clients of one large residential real estate brokerage firm. . . ."[20] This calculation is implemented using "a difference-in-differences analysis . . . compar[ing] the change in buyer-broker prices in large core based statistical areas ('CBSAs') within NWMLS's region before and after October 2022 with the change in buyer-broker prices in other large CBSAs before and after October 2022."[21]

---

[19] SOI 16 (cleaned up).

[20] Schmalbach Decl. ¶ 2.

[21] Schmalbach Decl. ¶ 3. Per the Census Bureau, CBSAs "consist of the county or counties (or equivalent entities) associated with at least one core (urban area) of at least 10,000 population, plus adjacent counties having a high degree of social and economic integration with the core as measured through commuting ties." U.S. Census

21. "Difference-in-differences" (or "DiD") is a research design used to assess the effect of an intervention (like a policy change) by comparing two groups—a "treatment group" to which the intervention is administered and a "control group" to which it is not.[22] In this design, the researcher "examine[s] any change that occurs to the control group and compare[s] it to the change in the treatment group."[23]

22. Consider the following illustration of how a DiD approach may be applied. A pharmaceutical company would like to study the effect of a weight-loss drug it has developed. To do this, it gathers two groups of experiment participants: a "treatment" group that will take the drug, and a "control" group that will not take the drug to be used as a comparison. Then:

- The average pre-treatment weights are determined for each group.
- The drug is administered to the treatment group, a placebo is administered to the control group, and the average post-treatment weights are determined for each group.

Suppose the average weight of the treatment group declined by six pounds after the drug was administered, while the average weight of the control group declined by one pound over the same period. These are the "differences" for each group. The "difference-in-differences"—how much *more* the treatment group's weight declined compared to the control group's weight (five pounds in this example)—represents the effect of the weight-loss drug.

23. The DiD approach is based on a fundamental assumption known as the "parallel trend" assumption. This assumption entails that "if the treated [group] had not been subjected to the treatment,

---

Bureau, *Glossary*, https://www.census.gov/programs-surveys/metro-micro/about/glossary.html [https://perma.cc/A6A5-8TV7] (last visited Mar. 26, 2023).

[22] Michael Lechner, *The Estimation of Causal Effects by Difference-in-Difference Methods*, 4 Founds. & Trends in Econometrics 165, 167–68 (2010), DOI: 10.1561/0800000014 [hereinafter Lechner, *DiD*].

[23] R. Carter Hill, William E. Griffiths & Guay C. Lim., *Principles of Econometrics* 282 (4th ed. 2011).

both subpopulations . . . would have experienced the same time trends. . . ."[24] In our weight loss drug example, this would mean that the two groups being compared behaved in the same way other than the administration of the drug—e.g., there are no differences in their diets, exercise routines, or any other factors that could affect weight loss. That is, the analysis would be based on the assumption that the treatment group would have lost one pound, on average, if it had not been administered the drug.

24. If the parallel trend assumption does not hold, then the DiD methodology is not actually identifying the effects of the treatment as separate from the other differences between the treatment and control groups.

25. The Schmalbach Declaration applies the DiD methodology as follows:[25]

- The "treatment group" consisted of "NWMLS CBSAs";[26]
- The "control group" consisted of "Other CBSAs"; and
- The "treatment" applied to the treatment group but not the control group was NWMLS's October 2022 policy change.

[24] Lechner, *DiD*, at 179. See also Ariella Kahn-Lang & Kevin Lang, *The Promise and Pitfalls of Differences-in-Differences: Reflections on '16 and Pregnant' and Other Applications* 5–6 (Nat'l Bureau of Econ. Rsch. Working Paper Series, Paper No. 24857, July 2018), https://www.nber.org/papers/w24857 [https://perma.cc/R3T7-4MGV] [hereinafter Kahn-Lang, *Promise*] ("The key to identification in a DiD is that although outcome levels differ in the pre-period, outcomes between the pre-period and the treatment period . . . would have moved in parallel in the absence of treatment . . . ."); Joshua D. Angrist & Jörn-Steffen Pischke, *Mostly Harmless Econometrics: An Empiricist's Companion* 230 (2009) [hereinafter Angrist, *Mostly Harmless*] ("The key identifying assumption here is that employment *trends* would be the same in both states in the absence of treatment."). As we discuss below, "determining that two groups would have experienced parallel trends requires a justification of the chosen functional form." Kahn-Lang, *Promise*, at 4. That is, it is necessary to provide a justification for why this assumption is appropriate in a particular setting.

[25] Schmalbach Decl. ¶¶ 2-3, 9, 10.

[26] In the Schmalbach Declaration, the NWMLS CBSAs include the Seattle-Tacoma-Bellevue CBSA and the Olympia-Lacey-Tumwater CBSA. The Declaration also notes that another version of the analysis was performed dropping the Olympia-Lacey-Tumwater CBSA from the treatment group. Schmalbach Decl. ¶¶ 8d, 9, 15.

The concept apparently meant to be tested through this methodology is whether the October 2022 NWMLS policy change had an effect on "buyer-broker prices" that is distinguishable from changes that occurred in areas where no such policy change occurred. The Schmalbach Declaration concludes that "[t]he difference-in-differences was not statistically significant at the 95% level, meaning the difference between the change in the average buyer-broker prices in the NWMLS CBSAs and the change in the average buyer-broker prices in the Other CBSAs was not statistically different from zero after NWMLS's October 2022 rule revisions."[27]

B. Conceptual Issues in DOJ's Difference-in-Differences Analysis

26. There are three conceptual issues with the analysis described in the Schmalbach Declaration.

27. The first issue is that the Schmalbach Declaration does not describe a study of market outcomes DOJ economists have previously associated with the issue of steering, such as whether listings with lower commission offers tend to spend longer on the market and whether they tend to sell for lower prices.

28. The second issue, broader and more serious in terms of assessing the claims in the Schmalbach Declaration, is that it does not disclose any results or even key details of the analysis that would be necessary to evaluate its reliability. Presenting results is a basic step in the economic research process.[28] However, despite purporting to study "buyer-broker prices," the Schmalbach Declaration does not present any information about what "prices" any home buyer (or group of home buyers) paid to buyer-

[27] Schmalbach Decl. ¶ 12.

[28] *See, e.g.*, ABA Antitrust Section, *Econometrics: Legal, Practical, and Technical Issues* 8 (2d ed. 2014) [hereinafter ABA, *Econometrics*) ("[T]he presentation must . . . provide the audience with an understanding of what was done and why" and "the key results of the study should be presented."); *see also Reference Manual on Scientific Evidence* (Fed. Jud. Ctr. & Nat'l Rsch. Council of the Nat'l Acads. eds., 3d ed. 2011).

brokers anywhere at any point in time. Rather, the Declaration simply asserts a supposed absence of "statistically significant differences" between NWMLS and "other" unspecified markets.[29]

29. The Schmalbach Declaration also does not disclose for example: (i) who is the sole real estate broker being analyzed; (ii) how representative the experience of the sole broker being analyzed is of any geographic market at any point in time; (iii) which "thirty-one other large [non-Washington] CBSAs" comprise the "control" group; (iv) how many transactions are being analyzed in any geography at any point in time; or (v) the composition of these listings in terms of property type, etc.

30. Absent these types of disclosures, it is not possible to determine whether the results described in the Schmalbach Declaration have any "external validity"[30]—i.e., whether they can be used to draw any general conclusions about the effects of the NWMLS policy change, rather than the alleged experience of one particular broker being analyzed in a specific part of Washington.

31. The third issue is that the Schmalbach analysis appears to be based on a decision to exclude a substantial volume of relevant data. The Declaration describes access to "all the transactions between January 2016 and November 2023 on which the brokerage firm assisted."[31] However, the analysis described ignores the four years of available pre-2020 data.[32] That is, not only does the described analysis apparently ignore half of the available time period, but it suggests that DOJ had the ability to assess the effects of the October 2019 NWMLS rule change on Washington homebuyers by incorporating pre-October 2019 data but chose not to.

---

[29] Schmalbach Decl. ¶ 12.

[30] "External validity is the predictive value of the study's findings in a different context." Angrist, *Mostly Harmless*, at 111.

[31] Schmalbach Decl. ¶ 4.

[32] Schmalbach Decl. ¶ 8e. The analysis in the Schmalbach Declaration also "limited the set of transactions to those in which the brokerage firm acted only as the buyer broker," stating that this is "what is relevant for assessing buyer broker commissions." Schmalbach Decl. ¶ 8b. There is no indication of how many transactions where the brokerage firm acted as the listing broker this excludes, nor is there an explanation of why the buyer-broker commission information in those transactions should be ignored.

32. At most, the Schmalbach Declaration describes an attempt to study any *incremental* effect of the October 2022 rule change, comparing it to a world with the October 2019 rule changes *already in place*. Put differently, DOJ's analysis does not even attempt to study the *total* effect of NWMLS's 2019 and 2022 rule changes, which DOJ states collectively "mirror the proposed settlement here."[33]

C. Methodological Issues in DOJ's Difference-in-Differences Analysis

33. As we discussed above, the parallel trend assumption is fundamental to the DiD analytical framework, and if this assumption is incorrect, then the resulting analysis is not reliable. Recall our weight loss drug example and the "treatment" group that appeared to have lost five more pounds as a result of the drug than the "control" group. Now suppose the two groups were *not* actually "moving in parallel" when the drug was administered—e.g., because the "treatment" group was cutting weight for a wrestling tournament at the same time. Once the parallel trend assumption is violated, and the other differences between the groups are not accounted for, then the DiD framework will not reliably measure the effect of the treatment at issue.[34]

34. In the current instance, DOJ's application of the DiD framework relies on the assumption that changes in the economic conditions in "NWMLS markets" during the 2020 to 2023 period were *identical* (or "parallel") to those in the thirty-one "Other CBSAs" used as the "control" group. That is, the analysis fundamentally rests on the assumption that the *only* difference between NWMLS markets and "Other CBSAs" over the period of study is the October 2022 NWMLS rule change. If there were, in fact, other differences during this period between NWMLS markets and the other markets in the analysis, then this assumption does not hold, and what the Schmalbach Declaration analyzes is not the effect of the October 2022 NWMLS rule change but the sum total of the differences between the markets, including those unrelated to the changes in buyer-broker compensation rules.

---

[33] SOI 16.

[34] Kahn-Lang, *Promise*, at 5–6. *See also* Lechner, *DiD,* at 179.

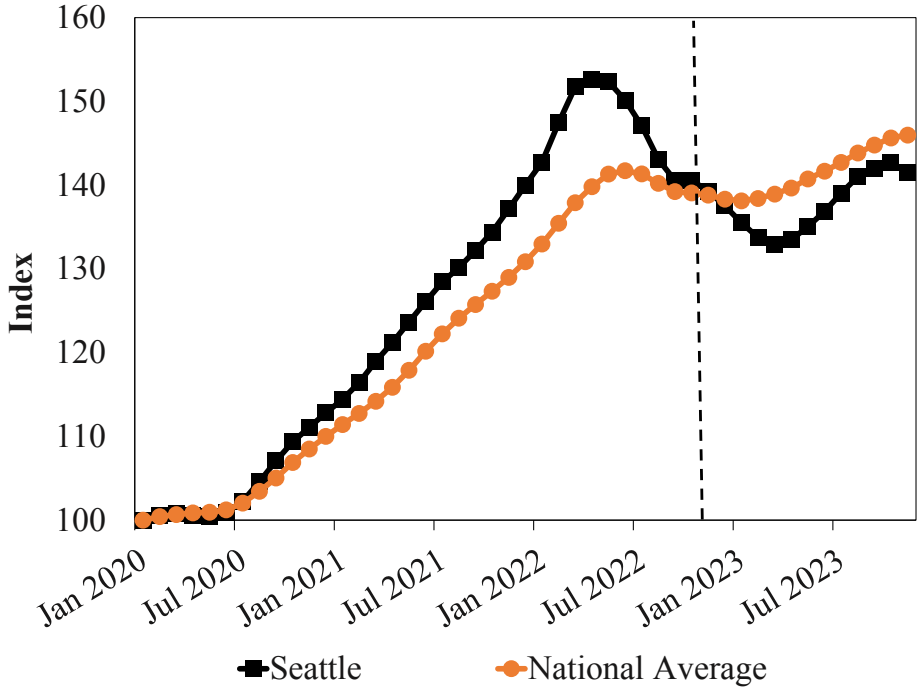
35. Because the difference-in-differences framework critically relies on the parallel trend assumption, "determining that two groups would have experienced parallel trends requires a justification."[35] However, as we discussed above, the Schmalbach Declaration does not even disclose which markets it uses as a control group, much less establish that these markets should have collectively moved "in parallel" to the NWMLS market over the relevant period.

36. Our analysis indicates substantial variation in economic trends in residential real estate markets across the United States, even since January 2020. Thus, there is no basis to simply assume—as the Schmalbach Declaration does—that but for the October 2022 rule change, buyer-broker commissions in NWMLS markets would have moved in parallel with any combination of other, undisclosed, markets.

37. For example, **Figure 1** compares trends in housing prices in the Seattle area to the nationwide average over the period of DOJ's analysis. Between January 2020 and April 2022, Seattle-area housing prices increased by 53%, outpacing the national average increase of 40%. Over the next year, Seattle-area housing prices fell by approximately 13%, while the national average was largely unchanged.

[35] Kahn-Lang, *Promise*, at 4.

FIGURE 1: HOUSING PRICE INDICES, SEATTLE VS. NATIONAL AVERAGE, JANUARY 2020–NOVEMBER 2023

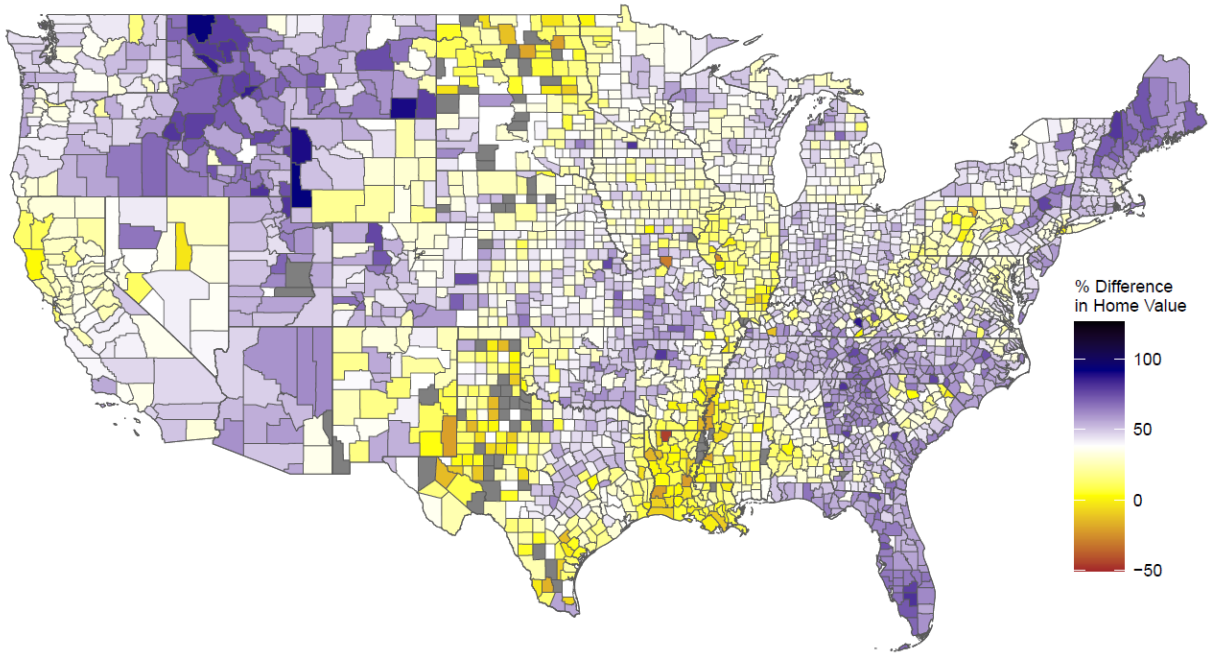


Note: Price indices seasonally adjusted and indexed to January 2020.

Sources: S&P Dow Jones Indices LLC, S&P CoreLogic Case-Shiller WA-Seattle Home Price Index [SEXRSA], and U.S. National Home Price Index [CSUSHPISA].

38. **Figure 2** shows trends in county-level home values across the United States over the period of DOJ's analysis. Between January 2020 and November 2023, home values in some areas more than doubled, while in others, values declined by over 40%.

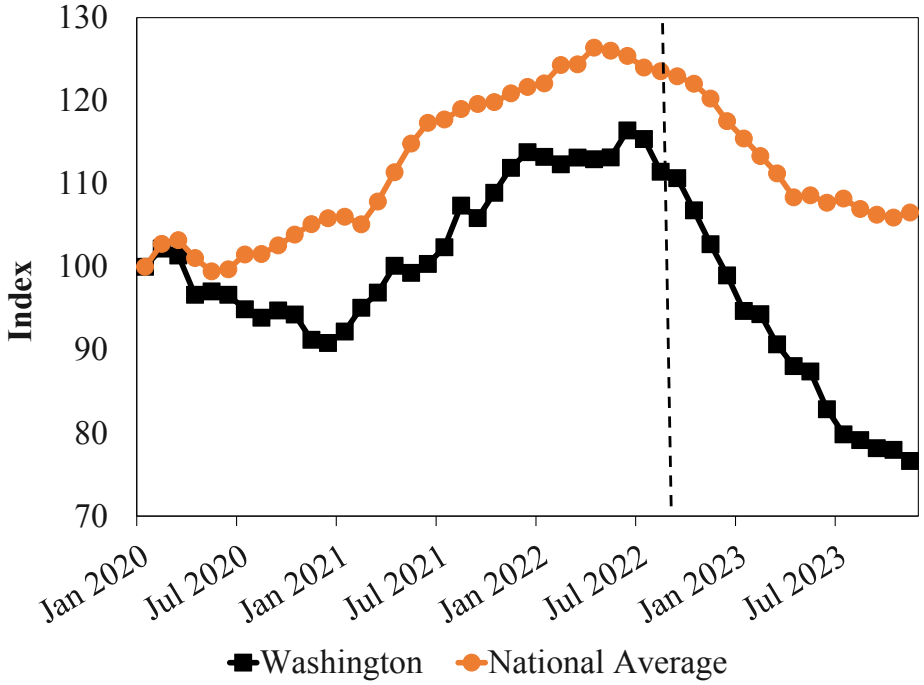
FIGURE 2: CHANGE IN HOME VALUES BY COUNTY, JANUARY 2020–NOVEMBER 2023



Source: Zillow Home Value Data.

39. **Figure 3** shows trends in housing starts (an indicator of economic activity in residential real estate) in Washington and nationwide over the period of DOJ's analysis. Between January 2020 and September 2022, Washington-area housing starts increased by 11%, lagging the national average increase of 23%. Between October 2022 and November 2023, Washington-area housing starts declined by 28%, substantially more than the national average decline of 13%.

FIGURE 3: HOUSING STARTS, WASHINGTON VS. NATIONAL AVERAGE, JANUARY 2020–NOVEMBER 2023



Note: 12-month moving average of the seasonally adjusted Washington state and national housing starts, indexed to January 2020.

Sources: U.S. Census Bureau, New Private Housing Units Authorized by Building Permits.

40. The patterns exhibited in **Figure 1** through **Figure 3** show important differences between NWMLS and national averages unrelated to the buyer-broker commission rule changes at issue. Consequently, there is no basis to assume the parallel trend assumption underlying DOJ's analysis is valid—or that the difference-in-differences analysis described in the Schmalbach Declaration reflects the effects of NWMLS's October 2022 rule changes.

IV. RIGOROUS STATISTICAL ANALYSIS OF NWMLS'S RULE CHANGES

A. Assessing Trends in NWMLS Listings

41. NWMLS has provided us with a data set of approximately 1.8 million residential property sales transactions that occurred in the states of Washington and Oregon since 2000. Each record in this data set reflects a listing in the NWMLS database and provides information such as: (i) the property's characteristics (e.g., number of bedrooms and bathrooms, square footage, etc.); (ii) transaction details

(e.g., including whether the transaction was a short sale, or sold at auction); (iii) the brokerage firms and agents involved on both sides of the transaction; and (iv) the commission rate offer made to the buyer-broker. This data set allows us to assess certain statements made in the SOI and the Schmalbach Declaration.

42. First, we note that DOJ's analysis is based on a portion of transactions from "one large residential real estate brokerage firm" with "operations in more than one hundred markets in the United States."[36]

43. Between January 2016 and November 2023 (the period covered by DOJ's data), the largest brokerage in NWMLS was Windermere Real Estate, a regional firm.[37] While it is unclear which broker DOJ uses in its analysis, it appears likely that it was not this one. Additionally, the Schmalbach Declaration describes including (i) only the Seattle and Olympia CBSAs in the NWMLS region, and (ii) only transactions where the same buyer-broker did not also act as the listing broker.[38]

44. Data provided to us by NWMLS reflects approximately 758,000 transactions between January 2016 and November 2023. Keller Williams, the largest of the national brokers in NWMLS, represented buyers in approximately 82,500 (or 11%) of these transactions. Applying DOJ's data restrictions (i.e., excluding transactions (i) before 2020, (ii) outside the Seattle and Olympia CBSAs, and (iii) where Keller Williams was also the listing broker) would leave approximately 22,500 transactions—only 27% of Keller Williams' transactions, and only 3% of all NWMLS transactions, during this period.[39] **Figure**

[36] Schmalbach Decl. ¶ 2.

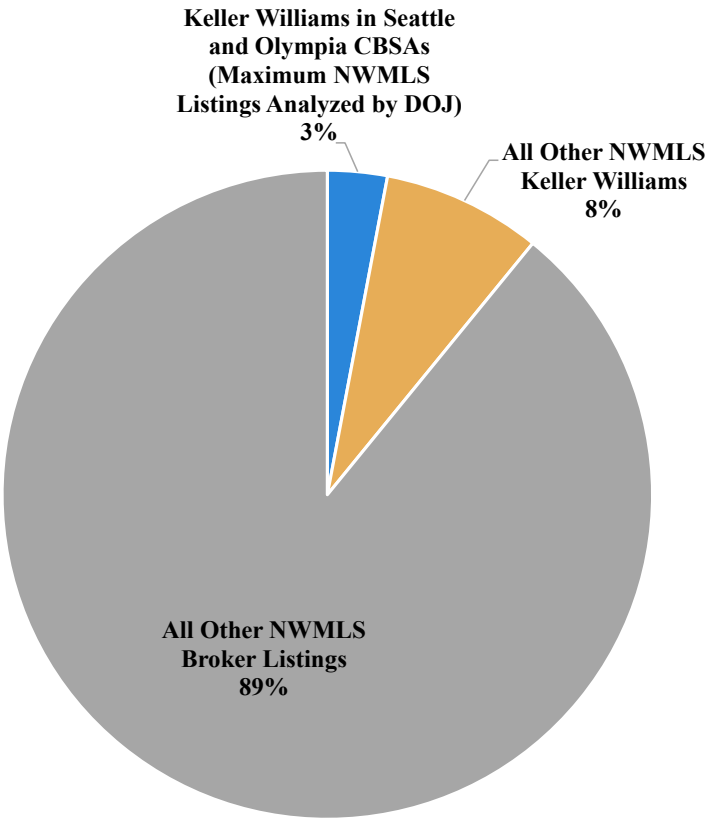
[37] Windermere Real Estate only has offices only in Washington, Oregon, California, Idaho, Nevada, Montana, Utah, Colorado, and Arizona. ("*Your Dreams, Our Obsession, Since 1972*,", Windermere Real Estate Website, https://www.windermere.com/about accessed on March 8[https://perma.cc/G736-MJYR] (last visited Mar. 26, 2024).

[38] Schmalbach Decl. ¶¶ 8b, 8d, 9.

[39] This would also reflect 1.2% of the approximately 1.8 million transactions since 2000 included in our analysis.

4 illustrates the share of NWMLS transactions from the January 2016 to November 2023 period we estimate was analyzed by DOJ.

FIGURE 4: TRANSACTIONS IN NWMLS DATABASE BY BUYER-BROKER, JANUARY 2016–NOVEMBER 2023



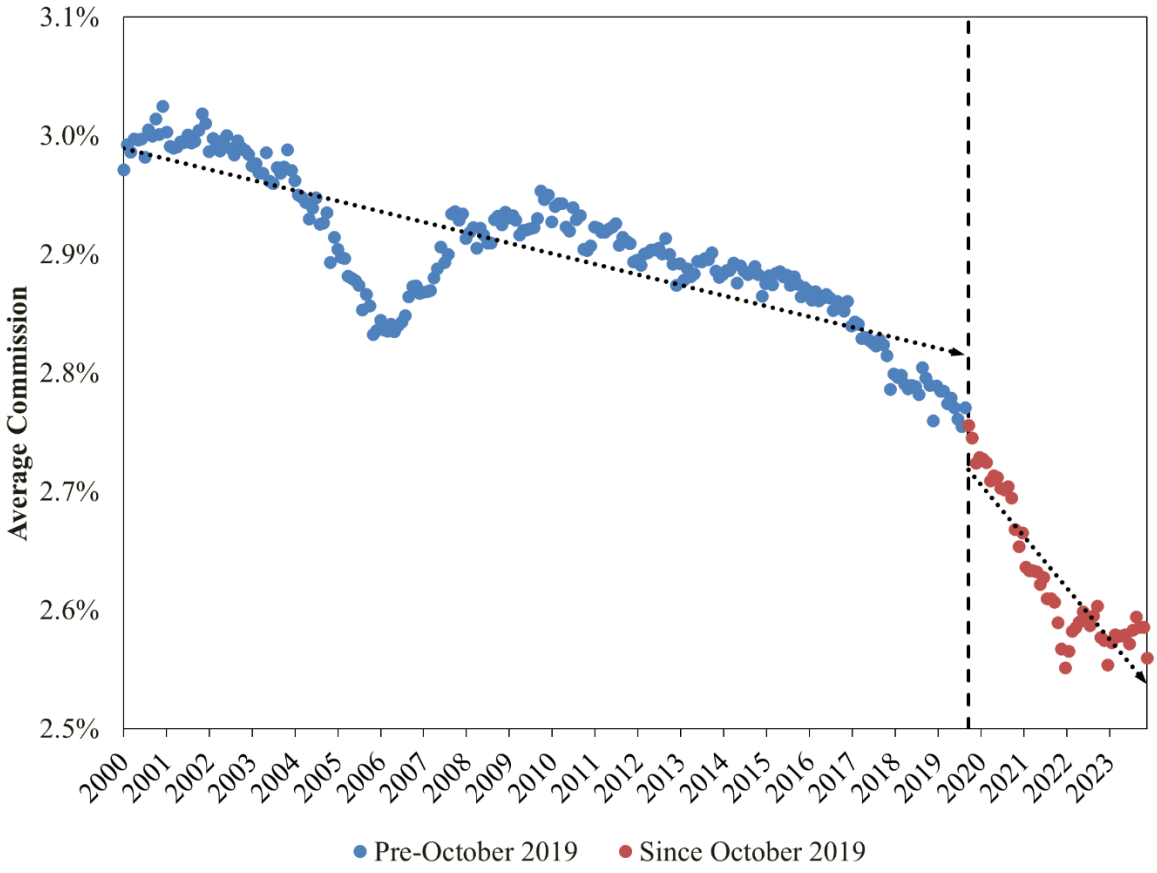
Sources: NWMLS data; Schmalbach Declaration, ¶¶ 8b, 8d-e.

45. Second, we assess DOJ's statement that "real-estate broker commissions have barely budged from the 5–6% charged for decades."[40] **Figure 5** summarizes the average buyer-broker commission rates across all sales in NWMLS since 2000. The average buyer-broker commission declined by 14% from approximately 3% in January 2000 to approximately 2.6% in December 2023, with the rate of decline after October 2019 being faster than over the prior 20 years. Average buyer-broker compensation rates through NWMLS were declining at an average of 0.4% per year from 2000 to 2019. After the 2019 rule change, the decline increased to an average of 1.5% per year. As **Figure 5** also

[40] SOI 3–4.

shows, from October 2019 to October 2023, the average commission rate declined from 2.8% to 2.6%—i.e., a decline of approximately 6%.

FIGURE 5: AVERAGE BUYER-BROKER COMMISSION RATE FOR RESIDENTIAL PROPERTIES SOLD THROUGH NWMLS, JANUARY 2000–DECEMBER 2023

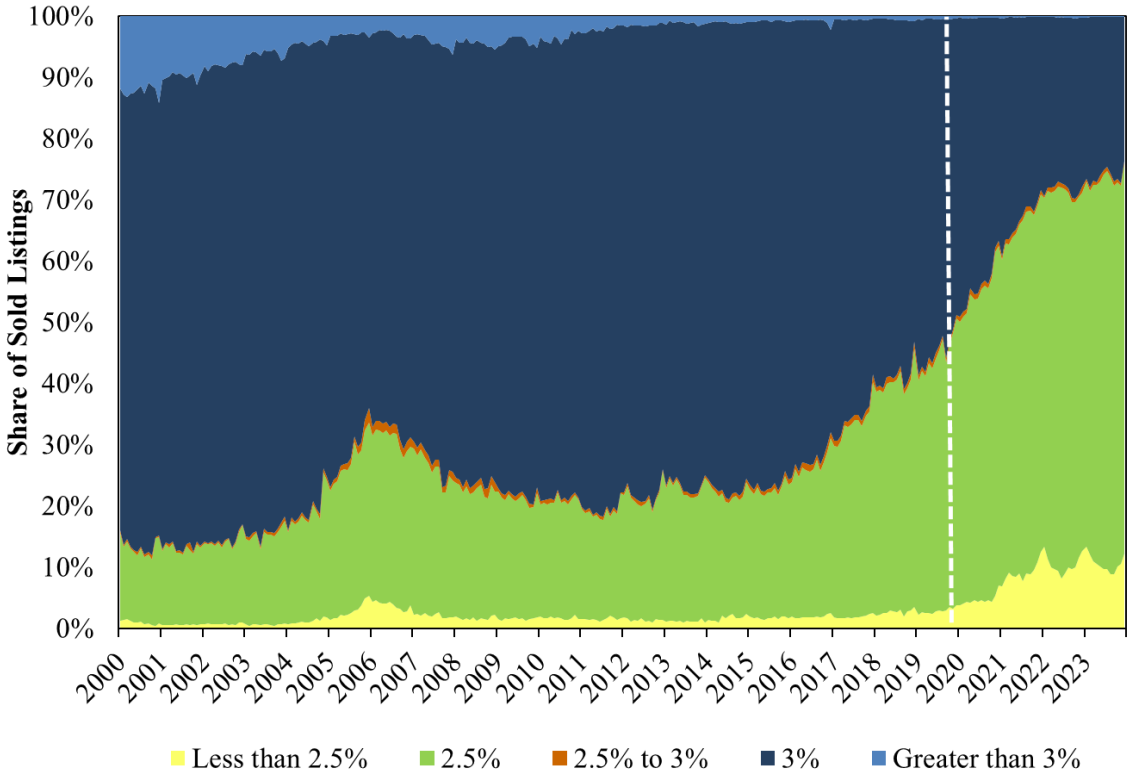


Source: NWMLS data.

Even seemingly small changes in the commission rate may have meaningful implications for homebuyers. For example, a commission rate decline from 2.8% to 2.6%—or 20 "basis points"—translates to a buyer-broker receiving $800 less in commission on a $400,000 home.

46. We also assessed the composition of buyer-broker commission offers since 2000, which are summarized in **Figure 6**. As this figure shows, a shift from predominantly 3% offers to predominantly 2.5% offers began around 2016. The share of sub-2.5% offers started to increase in late 2019, reaching around 10% by 2022.

FIGURE 6: BUYER-BROKER COMMISSION RATE OFFERS FOR RESIDENTIAL PROPERTIES SOLD THROUGH NWMLS, JANUARY 2000–DECEMBER 2023



Source: NWMLS data.

B. Econometric Model for Assessing How NWMLS Policy Changes Affected Buyer-Broker Compensation Offers

47. The practice of using statistical tools to study economic relationships is called "econometrics." As a general practice, econometric models may be used to study market outcomes and assess economic effects in antitrust disputes.[41] As the American Bar Association ("ABA") treatise on econometrics has noted, "[t]he value of econometrics is that it allows one to draw inferences about economic relationships from observed data on market outcomes, even when those outcomes are the result of complex

[41] *See, e.g.*, Jonathan B. Baker and & Daniel L. Rubinfeld, *Empirical Methods in Antitrust Litigation: Review and Critique*, 1 Am. L. & Econ. Rev. 386 (1999), DOI: 10.1093/aler/1.1.386; Daniel L. Rubinfeld, *Reference Guide on Multiple Regression, in Reference Manual on Scientific Evidence* 303 (Fed. Jud. Ctr. & Nat'l Rsch. Council of the Nat'l Acads. eds., 3d ed. 2011) [hereinafter Rubinfeld, *Reference Guide*]; ABA, *Econometrics*, Chapter 1.A.

interactions among numerous economic forces."[42] Moreover, "econometrics can add substantial value to an antitrust analysis because it provides objective, scientific, and quantitative answers to key antitrust questions."[43]

48. The question we have studied using econometric analysis is the same one DOJ states it has studied—i.e., how buyer-broker commissions were affected by NWMLS rule changes. We use NWMLS data on the approximately 1.8 million residential property sales transactions that occurred in Washington State and Oregon since 2000 to study this question. Because we study how commissions changed over time within NWMLS, our analysis does not require us to make assumptions about "parallel trends" between NWMLS and any other markets.

49. Our econometric model measures how (if at all) buyer-broker commissions in NWMLS changed after October 2019, and after October 2022—compared to a pre-October 2019 benchmark period. Our model controls for a variety of other factors that may potentially affect compensation offers:[44] (i) property characteristics, such as location, number of bedrooms and bathrooms, square footage, lot size, property type, and property age; (ii) transaction characteristics, such as month of sale, whether the property was sold at auction, a short sale, or was bank-owned, as well as whether the same brokerage firm represented both buyer and seller; (iii) macroeconomic factors, such as mortgage rates and statewide housing starts; (iv) listing brokerage/agent-specific factors measuring quality and

[42] ABA, *Econometrics*, at 1.

[43] ABA, *Econometrics*, at 1. *See also* Rubinfeld, *Reference Guide*, at 305. As the ABA Econometrics treatise has also stated, while "[n]o standard 'recipe' exists for conducting an econometric study" and "[e]ach study must be customized to the economics and factual circumstances specific to the situation at hand," there are nonetheless certain basic steps that econometric studies have in common. These are: (i) "articulating the question to be studied," (ii) "considering the underlying economics," (iii) "collecting relevant and useful data," (iv) "formulating and estimating an econometric model," (v) "interpreting the results," and (vi) "presenting the results." ABA *Econometrics*, at 3–9.

[44] *See, e.g.*, Kiah Treece, *What is the average real estate agent commission*, Forbes Advisor (Sep 22, 2023, 12:43 PM), https://www.forbes.com/advisor/mortgages/real-estate/real-estate-agent-commission/ [https://perma.cc/JB5D-9CU3]; Michael Yates, *Real Estate Commission Rates in Seattle, WA for 2024: What You Need to Know*, Virtuance (Feb. 22, 2024), https://www.virtuance.com/blog/real-estate-commission-rates-in-seattle-wa-for-2024-what-you-need-to-know/ [https://perma.cc/G95F-LW8B].

experience, such as agent's past listings in NWMLS, brokerage firm size, and share of broker's listings successfully sold; and (v) the overall declining trend in compensation of buyer-brokers since 2000.

50. Once all these factors are controlled for, our model seeks to answer the question of whether there are *additional* declines in commission rates after October 2019 and October 2022—corresponding to NWMLS rule changes.

C. Results From Buyer-Broker Compensation Regression Model

51. The results from our regression analysis are summarized in **Figure 7**. Our regression model finds that the October 2019 NWMLS policy change corresponds to an 11.8 basis-point decline in commission rates. Our regression model also finds that the October 2022 NWMLS policy change corresponds to an *additional* 2 basis-point decline in commission rates.[45] That is, the two NWMLS policy changes have collectively reduced commission rates by 13.8 basis points.

52. In 2023, the average sale price for homes listed on the NWMLS was approximately $750,000. Given our estimated effects of the NWMLS rule changes, we estimate that in 2023, the rule changes reduced average buyer-broker compensation in NWMLS by approximately $1,000 per transaction.

[45] Both of these estimates are statistically significant at the conventional 95% level, meaning these declines are not simply occurring by chance. *See, e.g.*, Damodar N. Gujarati, *Basic Econometrics* 128–33 (4th ed. 2002).

FIGURE 7: REGRESSION ANALYSIS RESULTS

Variables [a]	Coefficients [b]
October 2019 Policy Effect	-0.1183*
October 2022 Policy Effect	-0.0204*
Property Characteristics Controls	YES
Transaction Characteristics Controls	YES
Macroeconomic Factors Controls	YES
Brokerage and Agent-Specific Factors Controls	YES
Time trend	YES
Observations	1,758,697
Adjusted R^2	0.2235

Notes: Statistical significance at conventional levels of 5% is denoted by *. Standard errors clustered monthly. Only transactions with percentage commission rates are analyzed in the model.

Sources: NWMLS data; U.S. Census Bureau, New Private Housing Units Authorized by Building Permits for Washington; U.S. Census Bureau, New Private Housing Units Authorized by Building Permits for Oregon; Freddie Mac, 30-Year Fixed Rate Mortgage Average in the United States.

We declare under the penalty of perjury that the foregoing is true and correct.

Dated this 27th day of March 2024.

Dr. John H. Johnson, IV

Michael Kheyfets