IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JERROLD JACOBY, et al., Plaintiffs and Respondents, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant and Appellant.	Case No. A145044 (San Francisco Superior Court No. CGC-14-540709)
MARTIN J. COYNE, et al., Plaintiffs and Respondents, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant and Appellant.	Case No. A146569 (San Francisco Superior Court No. CPF-15-514382)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIRST **APPELLATE DISTRICT, DIVISION** 5	Court of Appeal Case Number: A145044 & A146569
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* J. David Breemer, No. 215039 Caleb R. Trotter, No. 305195 Pacific Legal Foundation 930 G Street, Sacramento, CA 95814 TELEPHONE NO.: (916) 419-7111 FAX NO. *(Optional):* (916) 419-7747 E-MAIL ADDRESS *(Optional):* jdb@pacificlegal.org; crt@pacificlegal.org ATTORNEY FOR *(Name):* Amicus Curiae Pacific Legal Foundation	Superior Court Case Number: CGC-14-540709 CPF-15-514382 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Jacoby RESPONDENT/REAL PARTY IN INTEREST: City & County of San Francisco	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Amicus Curiae Pacific Legal Foundation

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Date: June 20, 2016

Caleb R. Trotter
(TYPE OR PRINT NAME)

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(SIGNATURE OF PARTY OR ATTORNEY)

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APPLICATION OF PACIFIC LEGAL FOUNDATION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE

Pursuant to California Rule of Court 8.200(c), Pacific Legal Foundation (PLF) requests leave to file the attached brief amicus curiae in support of Plaintiffs and Respondents Martin J. Coyne, *et al*. PLF is familiar with the issues and scope of their presentation in this case.

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of California, organized for the purpose of litigating important matters of public interest. PLF is headquartered in Sacramento, California, and has satellite offices in Washington, Florida, and Washington, D.C. Formed in 1973, PLF is the nation's most experienced public interest legal organization defending Americans' property rights. PLF frequently participates in cases defending the right of individuals to make reasonable use of their property. *See, e.g.*, *Levin v. City and Cty. of San Francisco*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014) (*appeal pending*, 9th Cir. No. 14-17283); *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

This case raises important legal issues of constitutional and property law, statutory interpretation, and policy considerations as to whether private individuals should bear the burden of paying for public concerns. PLF believes that its familiarity with the issues presented, litigation expertise, and

public policy perspective will provide a helpful viewpoint that will assist the Court in its adjudication.[1]

PLF respectfully requests this Court to approve this application to appear as Amicus Curiae and to accept the brief amicus curiae contained herein.

PACIFIC LEGAL FOUNDATION'S BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTRODUCTION AND SUMMARY OF ARGUMENT

Rental housing in San Francisco is very expensive due to the increasingly high demand for existing housing and the City's ordinances and policies that deter housing development. To make up for its policy failures, Appellant (San Francisco) passed an ordinance, contrary to state law, to force landlords who seek to take units off the rental market to shoulder the burden of mitigating for the high housing prices their former tenants face.

The Ellis Act, Cal. Gov't Code § 7060, *et seq.*, affirms that landlords can leave California's residential rental market; however, local governments may employ reasonable measures to mitigate for the impact on tenants of any property owner's decision to leave the rental market. Cal. Gov't Code

[1] Pursuant to Rule 8.200(c)(3), Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

§ 7060.1. San Francisco has attempted numerous times to lessen the impact of Ellis Act withdrawals by making landlords give money to displaced tenants. In 2005, San Francisco enacted Ordinance No. 21-05 (2005 Ordinance) to require landlords who remove rental units from the market to pay the displaced tenants $4,500 each, capped at $13,500 per unit. S.F. Ord. No. 21-05 (2005). In 2014, San Francisco amended the 2005 Ordinance to require landlords to pay the difference between the tenant's current rental rate and the market rate for a comparable unit, multiplied by twenty-four months. S.F. Ord. No. 54-14 (2014). Unlike the 2005 Ordinance, the 2014 Ordinance did not cap the amount tenants could receive. As a result, some landlords were required to pay nearly $118,000 to a single tenant, and over $1,000,000 to a group of tenants in a multi-unit building. *See Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1078-79 (N.D. Cal. 2014) (*appeal pending*, 9th Cir. No. 14-17283). However, the 2014 Ordinance was struck down. *See id.* at 1089; *Jacoby v. City & Cty. of San Francisco*, No. CGC-14-540709, slip op. at 2-3 (Cal. Super. Ct. Mar. 19, 2015).

In response to the federal District Court's ruling, San Francisco enacted the ordinance at issue here, Ordinance No. 68-15 (2015 Ordinance), capping the payment amount at $50,000 per unit. S.F. Ord. No. 68-15 (2015). The 2015 Ordinance is no more lawful than the 2014 Ordinance. The 2015 Ordinance violates the Unconstitutional Conditions Doctrine in the takings context because any exaction designed to mitigate for high, open market rents

lacks an "essential nexus" to withdrawal of rental units. The act of withdrawing a unit does not cause high San Francisco housing prices. Since property owners do not create the need for a payment condition mitigating for high rents, the imposition of such a condition under the 2015 Ordinance violates the Unconstitutional Conditions Doctrine. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987). Furthermore, because the 2015 Ordinance is retroactive, it also violates the Due Process Clause of the Fourteenth Amendment.

This Court need not, however, resolve the serious constitutional questions raised by the 2015 Ordinance. When a challenge to a statute can be resolved on state law grounds, courts can and should take that course to avoid serious constitutional questions. In this case, the Ordinance violates the Ellis Act. By so holding, this Court will give effect to the purposes of the Ellis Act—to allow people to stop being landlords—and avoid holding San Francisco liable for (again) violating the United States Constitution. Therefore, this Court should hold the 2015 Ordinance to be preempted by the Ellis Act and affirm the lower court.

ARGUMENT

I

THE 2015 ORDINANCE PLACES UNCONSTITUTIONAL CONDITIONS ON THE USE OF PRIVATE PROPERTY

The "unconstitutional conditions" doctrine prohibits the government from requiring a person to give up a "constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In *Nollan*, *Dolan*, and *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013), the Supreme Court articulated the scope of the Unconstitutional Conditions Doctrine in the land use context. In *Nollan*, the Court held that a government demand that a property owner cede a property interest to the government as a condition to a permit is just as unconstitutional as an outright taking of the interest unless there is an "essential nexus" between the purpose of the condition and the impact of the use of the property. *Nollan*, 483 U.S. at 833-37. In *Dolan*, the Court held that a city's permit conditions must be "roughly proportional" in both "nature and extent" to the projected impact of the proposed development. *Dolan*, 512 U.S. at 391. Finally, in *Koontz*, the Court held that the *Nollan*/*Dolan* tests apply to permit conditions that exact money when tied to a specific parcel of real property. *Koontz*, 133 S. Ct. at 2599-2600 (2013).

Here, the 2015 Ordinance violates the *Nollan* essential nexus prong of the Unconstitutional Conditions Doctrine. First, the permit condition or exaction at issue here is one that takes money. Because the required payment is tied to the use of real property, it is an exaction subject to the *Nollan* "essential nexus" test under *Koontz*. *Koontz*, 133 S. Ct. at 2599-2600.[2] Indeed, if San Francisco just ordered landlords to hand over money to would-be tenants to solve a general societal problem—like housing—it would commit a clear taking of property for a public purpose. *Koontz*, 133 S. Ct. at 2598-99. Accordingly, under *Nollan*, San Francisco can achieve the same result through the permit process only if the landlord's actions cause the need for the exaction. *Koontz*, 133 S. Ct. at 2600.

San Francisco cannot demonstrate the necessary connection between the 2015 Ordinance payment mandate and the impact of a landlord's withdrawal of units. Because the City admits that the purpose of the $50,000 payment mandate in the Ordinance is to mitigate the high, open market rent rates in the city. Appellant's Open. Br. at 36. The problem is that landlords do not cause the high, open market rent problem which the payment mandate

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[2] Under the Ellis Act, a property owner may obtain a permit to withdraw a specific unit from the rental market only on the condition that he pays the tenant of that unit up to $50,000. *See Levin*, 71 F. Supp. 3d at 1083; S.F. Ord. 68-15; S.F. Admin. Code § 37.9A(e)(3)(E)(iii). If the property owner refuses to make the required payment, then the City denies the proposed withdrawal of the unit from the rental market, and the tenant remains in the unit. *See Levin*, 71 F. Supp. 3d at 1083; S.F. Ord. 68-15; S.F. Admin. Code § 37.9A(e)(3)(E)(iv).

addresses by the mere act of leaving the landlord business. Without that causal link, the tenant payment mandate violates *Nollan*. 483 U.S. at 837 ("The evident constitutional propriety disappears, however, if the condition . . . fails to further the end advanced . . . .").

In *Levin*, the federal court held that the disconnect between the cause of high rents and withdrawal of rental units rendered the 2014 Ordinance unconstitutional under *Nollan*. 71 F. Supp. 3d at 1084. The court found that San Francisco's high housing prices and rent rates arise from market forces exacerbated by the City's failure to allow development to keep up with demand. *Id*. at 1084-85. There was no basis in logic or in the City's own legislative history to conclude that rental owners cause the affordability problem simply by choosing to repossess their property for non-rental uses.

The 2015 Ordinance suffers from the same constitutional infirmity. While San Francisco amended its tenant payment law after *Levin*, Appellant's Open. Br. at 18, the *purpose* of the payment mandate remained the same: to solve the rent affordability problem for tenants—a problem caused by general market supply and demand constraints. Appellant's Open. Br. at 36. Thus, the "nature of the exaction here [still] does not purport to have a nexus with anything the property owner actually caused, but rather with market forces unrelated to the impact of the property owner's use of the property." *Levin*, 71 F. Supp. 3d at 1087 (citing *Dolan*, 512 U.S. at 386). The absence of any direct link between withdrawing rental units and the rental affordability crisis for

which the 2015 Ordinance seeks to mitigate leaves San Francisco "'in the position of simply trying to obtain' tenant public assistance at the owner's expense, without compensation from the government." *Id*. (citing *Dolan*, 512 U.S. at 387). This violates *Nollan*.

That the 2015 Ordinance caps the payment at $50,000 per unit does not save it. A mandated payment of any amount that solves problems not caused by withdrawing landlords cannot survive the Unconstitutional Conditions Doctrine. *See Levin*, 71 F. Supp. 3d at 1087. In sum, because the 2015 Ordinance conditions receipt of an Ellis Act permit on landlords giving displaced tenants money to pay high, open market rents that are not caused by the removal of the unit from the market, the 2015 Ordinance places an unconstitutional condition on the permit and unconstitutionally exacts private property. *Koontz*, 133 S. Ct. at 2600. The Court must face this issue unless it disposes of the Ordinance on other grounds.

II

THE 2015 ORDINANCE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT IS UNCONSTITUTIONALLY RETROACTIVE

The 2015 Ordinance violates not only the *Nollan* Unconstitutional Conditions Doctrine, but also the Due Process Clause. This is because the Ordinance is retroactive, binding property owners who filed to withdraw their rental units prior to enactment of the 2015 Ordinance, as well as those

that might do so in the future. S.F. Ord. 68-15; S.F. Admin. Code § 37.9A(e)(3)(E).

The Due Process Clause protects individuals from being deprived of protected property interests, including money. *Eastern Enters. v. Apfel*, 524 U.S. 498, 547-48 (1998) (Kennedy, J., concurring). There is no dispute that the 2015 Ordinance deprives property owners of that interest. Therefore, the only real question here is whether the deprivation is unconstitutional.

Due Process claims are generally subject to a rational basis test, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-19 (1976). However, challenges based on retroactivity call for a stronger form of rational basis analysis than in other contexts because "[r]etroactivity is generally disfavored in the law," *Eastern Enters.*, 524 U.S. at 532 (citation omitted), due to its potential to "deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *see also*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

Given these concerns, courts treat due process challenges against retroactive laws "as serious and meritorious, thus confirming the vitality of our legal tradition's disfavor of retroactive economic legislation." *Eastern Enters.*, 524 U.S. at 548 (Kennedy, J., concurring); *see also*, *Usery*, 428 U.S. at 16-17

(retroactive legislation "must meet the test of due process"); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1052 (9th Cir. 2004) (Pregerson, J., concurring) ("The constitutionality of retroactive legislation is 'conditioned upon a rationality requirement beyond that applied to other legislation.'" (citation omitted)); *Van't Rood v. Cty. of Santa Clara*, 113 Cal. App. 4th 549, 561 (2003) (even if legislature is clear in its intent to apply law retroactively, "we may not give a statute retroactive effect if doing so offends constitutional principles" (citation omitted)).

Contrary to San Francisco's claims, the 2015 Ordinance is retroactive. A law has retroactive effect if it would "increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. The 2015 Ordinance, enacted on June 25, 2015, reaches back and imposes the payment requirement on property owners who took all necessary steps to withdraw units before June 1, 2014—more than one year before enactment of the 2015 Ordinance. S.F. Ord. 68-15; S.F. Admin. Code § 37.9A(e)(3)(E). When these owners acted, they were subject only to the 2005 Ordinance, which imposed tenant payment liability up to $13,500 per unit. Because the 2015 Ordinance dramatically increased the landlords' financial liability after the act of withdrawal, the Ordinance is retroactive.

The retroactive character of the 2015 Ordinance is inconsistent with fundamental due process protections because it is unfair and upsets landlord expectations. The Ordinance is inherently unfair because it forces landlords

to choose between suffering an unexpectedly and unreasonably high increase in mandatory payments to tenants or being forced to remain in the landlord business—something the Ellis Act specifically prohibits. After the 2014 Ordinance was declared unconstitutional, landlords operated under the expectation that they were liable to pay tenants up to $13,500 per unit. An invalidated ordinance does not put landlords on notice that their financial liability could increase. Instead, it confirms their expectation that $13,500 per unit is their maximum potential liability.

San Francisco cites two cases in support of the supposition that the retroactive payment requirement under the 2015 Ordinance is constitutional. *See* Appellant's Open. Br. at 48 (citing *Briarwood Properties, Ltd. v. City of Los Angeles*, 171 Cal. App. 3d 1020 (1985), and *People v. H & H Properties*, 154 Cal. App. 3d 894 (1984)). But those cases are not analogous to this case and predate the Ellis Act's operative date of July 1, 1986. Cal. Gov't Code § 7060.

In *Briarwood*, a property owner received tentative map approval for converting apartment units into condominiums in the City of Los Angeles. 171 Cal. App. 3d at 1025. After the property owner received tentative map approval, but before the final map was approved, Los Angeles enacted ordinances to provide relocation assistance to tenants displaced due to their units being converted to condominiums. *Id*. at 1025-26. The court upheld payments of $2,500 for "qualified"—i.e., elderly or disabled—tenants and

$1,000 for all other tenants, holding that the relocation assistance payments were not unlawful conditions imposed retroactively because Los Angeles granted final map approval and did not condition approval on the property owner's compliance with the new ordinances. *Id*. at 1025-26, 1029.

Similarly, in *H & H Properties*, a property owner received final map approval for converting apartments into condominiums in the County of Los Angeles. 154 Cal. App. 3d at 897. After the property owner received final map approval, Los Angeles County enacted an ordinance mandating relocation payments of $500 per household for moving costs and $1,000 per household for increased rent mitigation for tenants losing possession of their unit due to condominium conversions. *Id*. at 898 n.1. The court upheld the ordinance, holding that it was not retroactive because it only imposed the relocation payment requirement on condominium conversions taking place after enactment of the ordinance. *Id*. at 902.

Both of these cases are readily distinguishable from this case.[3] First, the courts held the ordinances were not retroactive because they did not impose conditions flowing from actions already taken, and only applied prospectively. Second, the tenant payment amounts authorized in *Briarwood* and *H & H Properties*—ranging from $1,000 to $2,500—are substantially less than the payments imposed by the 2015 Ordinance even after accounting for inflation.

[3] Likewise, San Francisco mistakenly looks to vested rights cases for additional analogous support. Appellant's Open. Br. at 49. But none of the cases cited raise retroactivity claims under the Due Process Clause.

Third, *Briarwood* and *H & H Properties* predate the Ellis Act. The potential for the financial impact of the tenant payments in those cases to cause property owners to stop converting apartments to condominiums was not at issue, but would certainly be an issue post-Ellis Act.

Because Ellis Act withdrawals do not cause higher rents, San Francisco acts arbitrarily and irrationally to retroactively single out landlords attempting to leave the rental market to bear the financial burden for problems they did not cause. It is also unfair and significantly upsets expectations. Thus, the 2015 Ordinance does not survive serious rational basis review and is, therefore, unconstitutionally retroactive.

III

THIS COURT CAN AND SHOULD AVERT A CONFLICT BETWEEN THE ORDINANCE AND THE CONSTITUTION BY HOLDING THE ORDINANCE PREEMPTED BY THE ELLIS ACT

The serious constitutional problems posed by the 2015 Ordinance can and should be avoided. "An established rule of statutory construction requires us to construe statutes to avoid 'constitutional infirmit[ies].'" *Myers v. Philip Morris Cos., Inc.*, 28 Cal. 4th 828, 846-47 (2002) (citation omitted). For more than a century, courts have recognized that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Att'y Gen. v. Delaware & Hudson Co.*, 213

U.S. 366, 408 (1909). The rule applies not only when a statute *is* clearly unconstitutional, but also when it is apparent that there are serious questions about the law's constitutionality. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

As demonstrated above, there are serious constitutional problems with the 2015 Ordinance. The Ordinance is inconsistent with the Unconstitutional Conditions Doctrine of *Nollan* and Due Process retroactivity principles. The Court can avoid these concerns if it invalidates the 2015 Ordinance under state law because it is inconsistent with, and preempted by, the Ellis Act. *Cf. R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 497-99 (1941) (holding that it is the Court's "duty" to first review potentially unconstitutional statutes under state law so as to avoid constitutional adjudication when possible).

A. Unreasonable Tenant Mitigation Conditions Conflict with the Ellis Act

"Local ordinances and regulations in conflict with general laws are void." *City of Santa Monica v. Yarmark*, 203 Cal. App. 3d 153, 161 (1988) (citing *Cohen v. Bd. of Supervisors*, 40 Cal. 3d 277, 290 (1985)). When, as here, there is no explicit conflict between the state and local law, courts must compare the purpose and scope of the legislation to determine if the local law is preempted by the state law. *Yarmark*, 203 Cal. App. 3d at 162.

The relevant state law in this case—the Ellis Act—is intended "to allow landlords who comply with its terms to go out of the residential rental business

. . . and withdraw[] all units from the market." *Id*. at 165. The Act allows governments to mitigate the impact of rental withdrawals on tenants, Cal. Gov't Code § 7060.1(c), but it forbids "unreasonable" conditions because such conditions impede the core right of withdrawal as a practical matter. *Pieri v. City & Cty. of San Francisco*, 137 Cal. App. 4th 886, 893-94 (2006) (upholding 2005 Ordinance's payment mandate under the Ellis Act because the payments for relocation expenses were reasonable when considering inflation and proportionality to pre-Ellis Act, court-approved payments). Therefore, to determine whether San Francisco's 2015 Ordinance violates the Ellis Act, this Court must determine whether the landlord-tenant payments imposed by the Ordinance are unreasonable. They are.

B. The 2015 Tenant Payment Mandate Unreasonably Burdens the Ellis Act Right of Withdrawal

The payments mandated by the 2015 Ordinance are unreasonable and inconsistent with the Ellis Act because: (1) they vastly exceed any landlord-tenant payment previously approved by California courts and impermissibly burden Ellis Act rights; and (2) the payments do not mitigate the effects of withdrawal of units and are not authorized by the Ellis Act.

First, the payment amount of up to $50,000 per unit in this case, even when considering inflation, *is* disproportionately higher than payments previously upheld.[4] *Pieri* approved $4,500 per tenant, with a cap of $13,500 per unit. 137 Cal. App. 4th at 889, 894. And previously, California courts approved payments of $2,500 for displaced tenants who were elderly, disabled, or with children, and $1,000 for all others in *Kalaydjian v. City of Los Angeles*, 149 Cal. App. 3d 690, 692 (1983); $500 in moving costs and $1,000 for relocation assistance in *H & H Properties*, 154 Cal. App. 3d at 897-98 & n.1; and $2,500 for "qualified" tenants and $1,000 for all others in *Briarwood*, 171 Cal. App. 3d at 1026. The $50,000 payment required by the 2015 Ordinance is more than three times the amount approved by any court in California.

Worse, this leap in liability is retroactive. Property owners who completed the withdrawal process under the 2005 Ordinance expected to make payments of around $3,000-$5,000; they are now bound to pay up to $50,000. Moreover, San Francisco does not permit an owner to retract a pre-Ordinance withdrawal, without penalty, to escape the new, retroactive liability. Property owners who completed the withdrawal application process prior to enactment of the 2015 Ordinance (again, under the expectation of limited, 2005-era tenant liabilities) became subject to property re-rental restrictions at that time. Cal.

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[4] Adjusted for inflation, $13,500 at the time of the *Pieri* decision in 2006 is the equivalent of $16,021.94 as of June 20, 2016. *See* United States Bureau of Labor Statistics, *CPI Inflation Calculator*, http://www.bls.gov/data/inflation_calculator.htm.

Gov't Code § 7060.2(a)(2)(A); S.F. Admin. Code § 37.9A(a)(1)(A)(i) (After landlord notifies tenant of intent to withdraw the unit, the City and landlord are required to record deed restriction notices stating the property is subject to constraints on rental rate increases for a five-year period regardless of whether the landlord actually withdraws the unit). The 2015 Ordinance thus traps property owners in an unconstitutional scheme; it demands they pay the new, retroactively-imposed amount or suffer re-rental restrictions and penalties. This catch-22 impermissibly burdens the owners' Ellis Act right to leave the rental market at their discretion.

Second, the payment mandate in the 2015 Ordinance is unreasonable and inconsistent with the Ellis Act because it does not mitigate for impacts of withdrawal. The need for a clear connection between exaction and the impacts of withdrawal arises directly from the Ellis Act (as well as the *Nollan*/*Dolan* doctrine). The Act states that local governments may impose tenant payments "to mitigate any adverse impact on persons displaced *by reason of the withdrawal* from rent or lease of any accommodations." Cal. Gov't Code § 7060.1(c) (emphasis added). As the prior discussion of *Nollan* shows, any payment designed to mitigate for high, open market rents (and San Francisco claims this is the purpose of the 2015 Ordinance) is not sufficiently connected to the withdrawal of rental units because withdrawal does not cause the affordability problem. *Supra* Part A; *see also*, *Levin*, 71 F. Supp. 3d at 1075; San Francisco Rent Board, *Rent Board Annual Report* 22 (2014-15).

San Francisco would like to ignore this issue in defending its payment mandate under state law, but the Ellis Act does not give it that luxury. Under the Act's plain language, reasonable mitigation must address tenant issues arising "by reason of the withdrawal." The 2015 Ordinance fails this basic Ellis Act standard, Cal. Gov't Code § 7060.1(c), and therefore violates the Act.

The Ellis Act calls for landlords to possess the "unfettered" right to remove rental units from the market. *Yarmark*, 203 Cal. App. 3d at 165. Yet San Francisco has conditioned landlords' right to remove units on making exorbitant payments to address high rental costs they do not cause. Stated differently, San Francisco unlawfully demands landlords make "ransom" payments to obtain a permit to withdraw their property even though high rental costs are the result of San Francisco's own failed policies and market conditions. *Bullock v. City & Cty. of San Francisco*, 221 Cal. App. 3d 1072, 1101 (1990). This brings the 2015 Ordinance into fatal conflict with the Ellis Act.

If San Francisco wants to assist tenants facing unexpected rent increases, it has lawful ways to help. It can (and indeed does) administer a tax-payer funded affordable housing program. It can permit more housing development. But it cannot require landlords who choose to exercise their right to stop being landlords to singularly bear responsibility for the cost, nor may it retroactively impose unreasonable payment mandates on landlords who

have already taken action to withdraw rental property. Such an imposition is unconstitutional, unreasonable, and preempted by the Ellis Act.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the lower court.

DATED: June 20, 2016.

Respectfully submitted,

J. DAVID BREEMER
CALEB R. TROTTER

By /s/ Caleb R. Trotter
CALEB R. TROTTER

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE is proportionately spaced, has a typeface of 13 points or more, and contains 4,331 words.

DATED: June 20, 2016.

/s/ Caleb R. Trotter
CALEB R. TROTTER

DECLARATION OF SERVICE

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On June 20, 2016, a true copy of APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND IN SUPPORT OF AFFIRMANCE was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

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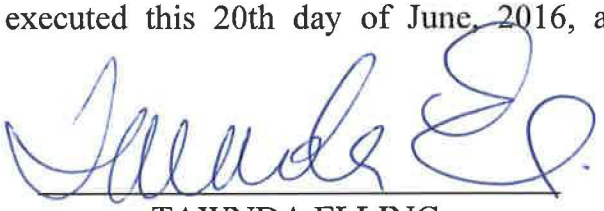
City and County of San Francisco

Court Clerk
San Francisco County Superior Court
400 McAllister St., Room 103
San Francisco, CA 94102

Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 20th day of June, 2016, at Sacramento, California.



TAWNDA ELLING