IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

Division 1

No. A172067

ERIC DEBBANE, et al.,
Plaintiffs and Respondents,

v.

CITY & COUNTY OF SAN FRANCISCO, et al.,
Defendants and Appellants.

On Appeal from the Superior Court of San Francisco County
(Case No. CGC-23-604600, Honorable Charles F. Haines, Judge)

BRIEF AMICUS CURIAE OF CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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Certificate of Interested Parties

Pursuant to California Rule of Court 8.208, amicus curiae California Apartment Association hereby states that it is a 501(c)(6) nonprofit organization. It does not have any corporate parents, subsidiaries, or affiliates. There are no entities or parties that have an ownership interest of 10 percent or more in California Apartment Association. There are no other entities or persons that must be listed in the Certificate of Interested Entities and Persons.

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Preliminary Statement

Imagine that a stranger walks into your house, unpacks all of their belongings, and starts living there. Day after day, week after week, invading your spare bedroom, your bathroom, and your kitchen, and there is absolutely nothing that you can do to stop it. Technically, you still own the house but at the same time, is it really "your home?" Or what if a stranger can climb into your car and simply drive it away? The title is still under your name and the monthly car payments still come to your door, but who drives the car and where is not your decision to make.

Your property is not really "your property" if you can't stop someone from taking possession of it without your consent. That is why the right to exclude is so important. It is the constitutionally protected property right that is responsible for ensuring that these examples are fanciful instead of real. It embodies what it means to own something and to say, "this is mine and no one else's." Without the protection of that right, the world is a very different place. It also makes the right to exclude the cornerstone on which all other property rights are based. The right to economic use is only an empty promise if the owner can't

control who possesses the property. Nor will anyone want to buy a property whose front door is forced open for anyone that wishes to enter.

For all of these reasons, the right to exclude has been protected by the Constitution since the beginning of the republic. If the government takes away a property owner's fundamental right to exclude, in whole or in part, it is a categorical physical taking that is contrary to the Fifth Amendment without regard to any other facts or circumstances. As one commentator succinctly said, "[g]ive someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998).

In this case, the Appellant City of San Francisco believed that the owner's right to exclude was creating a particular problem. And so it took it away.

The problem was a lack of available housing, which the Appellant said "runs counter to the City's objectives." Housing, though, is a multi-faceted issue. Excess demand is not always a

bad thing; it is what motivates builders to build. Moreover, there is no single answer as to why there are fewer units to rent than those that want to rent them at any particular point in time. Like any other marketplace, housing availability is fluid and dependent upon a large multitude of factors.

Nonetheless, in the City's eyes, the property owner's right to exclude was both the cause of, and the solution to, housing unavailability. It claimed that vacant residential units—the product of the owner's right to exclude—were the cause.[1] But in

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[1] The City's legislative findings do not discuss other potential causes of housing unavailability. Volume 4 of Appellants' Appendix (hereinafter "4AA") at 00776. Or the degree to which the existence of vacant units contributes to the problem, if at all. *Ibid.* For example, excessive land use regulation frequently prevents needed housing from being built. *See* Joseph Gyourko & Jacob Krimmel, *The Impact of Local Residential Land Use Restrictions on Land Values Across and Within Single Family Housing Markets*, National Bureau of Economic Research, Working Paper 28993, at *3–4 (July 2021) (finding the "San Francisco area housing market to be the most strictly regulated in the country" which results in a "zoning tax" of over $400,000 per quarter acre, the highest in the nation); Mercatus Center, Snapshot of State Regulations 2024 Edition (Aug. 6, 2024), *https://www.mercatus.org/regsnapshots24* (noting that California is the most regulated state in the nation with 420,434 regulatory restrictions and that "regulatory accumulation worsens economic conditions, inadvertently increasing poverty rates, destroying jobs, and raising prices"). San Francisco also maintains a robust rent control regime despite economic studies that show that rent control regulations reduce housing supply. *See, e.g.*,

this context, "vacant" was not the same as unoccupied. The City deemed units to be "vacant" if they were devoid of third-party renters, regardless of whether that residence happened to be occupied. Therefore, to cure the ills of housing unavailability the City's solution was to force these residential doors open to third-party renters and simultaneously exclude those who were no longer welcome, whether the property owners wanted to or not.[2]

Specifically, the City took control of the right to exclude through its Empty Homes Tax ordinance to compel private property owners to rent their homes against their consent. The City now decides who *must* be excluded and who *cannot* be

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Rebecca Diamond, Tim McQuade & Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, American Economic Review vol. 109, no. 9, September 2019, at pp. 3365–94 (finding that rent control in San Francisco decreased rental housing supplies by 15 percent, drove up market rents in the long run, and undermined the goals of the rent control law).

[2] The City's legislative findings do not disclose how the Empty Homes ordinance will alleviate the problem. 4AA at 00776. For those in need of a place to live, the forced rental of a vacant apartment only solves the problem if the prospective tenant is both suited for that apartment and able to pay that unit's fair market rent. A family of four in need of housing has scant need for a vacant studio apartment. Nor could that family take advantage of a new penthouse apartment whose door was forced open by the Empty Homes ordinance if its fair market rental value exceeds their economic capabilities.

excluded from residential units. Property owners must allow third-party renters to take occupancy regardless of the owner's consent. At the same time, co-owners and family must be excluded from these units to make way for the new tenants. By *ipse dixit*, what is "vacant" must now become tenanted; and what was formerly the owner's right to exclude is subjugated to the City of San Francisco's larger purpose.

As with many physical takings, the taking itself is not difficult to see. Before the Empty Homes ordinance was enacted, residential property owners had the right to exclude. Their property was theirs to possess as they wished, which included the right to leave their unit vacant for any reason or for no reason. But after the enaction of the Empty Homes ordinance, that fundamental property right no longer existed. The decision about whether the front door must be open or instead can be held shut is the City's to make and property owners are now compelled to do what the City demands.

The proverbial elephant-in-the-room is that the City has called its ordinance a "tax." Although as a general matter taxes are not takings, the City's self-designation of this regulation as the "Empty Homes Tax" does not mean that it is one. The

government can name its laws, regulations, and ordinances whatever it wants to and for whatever reason it sees fit. But regardless, laws are evaluated by what they do, not the label that the government unilaterally chooses. Otherwise, the government could bestow upon itself complete immunity from constitutional safeguards simply by calling its regulations something other than what they actually are.

Here, the purpose and essential feature of the City's Empty Homes "Tax" is not to raise revenue. It is to take dominion and control of property owners' right to exclude and to force third-party renters into vacant city apartments. By contrast, raising revenue is the antithesis of what the government wants to do. Success is defined by more available housing, not money, and the more revenue that this ordinance raises the greater its failure will be.

Considering this, the payment from the owner to the government is not a "tax" but the charge for the licensing of the City's right to exclude for the remainder of the tax year. After all, the government retains dominion and control whether the owner pays the tax or not. Similar to other market transactions, the payment allows the licensee to utilize the government's right to

exclude for a proscribed fee and a proscribed period of time. The larger the property and the longer the owner wants to exercise the right to exclude, the larger the licensing fee that will have to be paid, as annually adjusted according to the Consumer Price Index.

Lastly, even if this Court determines that the Empty Homes Tax is not a categorical physical taking, the City's regulation still must be struck down. It is well established that the government cannot do indirectly what it is already prohibited from doing directly. In other words, the City cannot take away a property owner's right to exclude without the payment of just compensation that the Fifth Amendment requires. But short of actually taking that right, the City is equally prohibited from coercing property owners into waiving their right to exclude by fining them if they refuse to do so. Under the Supreme Court's unconstitutional conditions doctrine, the government cannot so compel the waiver of fundamental rights.

Whether viewed as a physical taking or an unconstitutional condition, the City of San Francisco's exercise of dominion and control over the property owner's fundamental right to exclude commandeers private property for public use. While the lack of available housing may be a public problem, these private property

owners cannot be singled out to bear the burden of fixing it. That is what the Fifth Amendment is here to remedy. The trial court's decision should be affirmed.

Interest of Amicus Curiae

The California Apartment Association ("CAA") is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property-owners and operators, who are responsible for nearly two million rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing, and to promote and aid in the availability of high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local forums. Many of its members are located in local jurisdictions that have adopted stringent housing and land use regulations over the past few years, including San Francisco, Los Angeles, and Oakland, and the State of California.

Since mid-2022, CAA has been litigating, on behalf of its affected members, the constitutionality of the most extreme of these regulations (*see, e.g.*, *Williams v. Alameda Cnty.*, 642 F.

Supp. 3d 1001, 1017 (N.D. Cal. 2022)), of which this regulation is certainly one. CAA's members have a strong interest—just like property owners in San Francisco—in the standards applicable to the taking of private property for public use.

California Apartment Association also states that no party, nor party's counsel, participated in preparation of or contributed funds for the brief, and that no person or entity aside from amicus curiae contributed funds for the brief.

Argument

The purpose of the Empty Homes Tax is to compel the occupancy of residential units against the property owner's will. It is now the City that controls the right to exclude with respect to residential units. And with that power, it has decided that every "vacant" unit will be possessed by a third-party renter whether the property owner wants that to happen or not.

But the government cannot simply disappear the property owner's right to exclude without consequence. As the Supreme Court has held, "the right to exclude is [not] an empty formality, subject to modification at the government's pleasure. On the contrary, it is a 'fundamental element of the property right,' that

cannot be balanced away." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 158 (2021) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979)); *Kaiser Aetna*, 444 U.S. at 176 (The hallmark of a protected property interest is the right to exclude others. That is "one of the most essential sticks in the bundle of rights that are commonly characterized as property[.]").

Nor can the City self-designate its ordinance as a "tax" and then escape the scrutiny of the Fifth Amendment, particularly when the stated goal is not to raise revenue. *See* Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 Nw. U. L. Rev. 189, 190 (2002) ("A tax singling out one or a handful of citizens offends the constitutional principle the Supreme Court has repeatedly invoked: the Takings Clause … the notion that taxes are never takings is inconsistent with foundational takings law; the label 'tax' confers no immunity to the principles of the Takings Clause."). The trial court's decision should be affirmed.

I. The Empty Homes "Tax" Is a Categorical Taking of the Right to Exclude

A. The Right to Exclude, Generally

Property ownership is grounded in certain inherent and well-established rights: the right to possess what you own and to exclude others from it, the right to use property for your benefit, and the right to dispose of it as you wish. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). These property rights have always been afforded vigilant protection within American jurisprudence because "the protection of private property is indispensable to the promotion of individual freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Cedar Point*, 594 U.S. at 147 (quoting *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017)); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544, 552 (1972) (property rights are "an essential pre-condition to the realization of other basic civil rights and liberties").

Government regulations that impact property rights are of a "[near] infinite variety." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). To corral them, different legal standards have evolved to identify those regulations that have

"gone too far" and are "functionally equivalent to the classic taking." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

The loss of a property owner's right to exclude is "perhaps the most serious form of invasion of an owner's property interests." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). It violates "'one of the most treasured' rights of property ownership" and "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Cedar Point Nursery*, 594 U.S. at 149–50 (quoting *Loretto*, 458 U.S. at 435; *Kaiser Aetna*, 444 U.S. at 179–80). The impact of a physical taking is such that "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435. "The owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Ibid.* The owner is stripped of the power to control the economic use of the property. *Id.* at 436. And "even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value[.]" *Ibid.*

Consequently, physical takings are "per se" or "categorical" takings that require the payment of just compensation regardless of any other facts and circumstances. *Cedar Point Nursery*, 594 U.S. at 149 ("Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred[.]"); *Horne v. Dep't of Agric.*, 576 U.S. 350, 360 (2015) ("a physical *appropriation* of property gave rise to a *per se* taking, without regard to other factors"); *Loretto*, 458 U.S. at 434–35 ("In short, when the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.") (quoting *Penn Cent. Transp. v. City of New York*, 438 U.S. 104, 124 (1978)).

It does not matter whether the physical taking arose from a regulation or was the product of a direct occupation. *Cedar Point Nursery*, 594 U.S. at 149 ("Government action that physically appropriates property is no less a physical taking because it arises from a regulation."). Nor whether the taking is permanent or merely temporary. *See id.* at 153 ("a physical appropriation is a taking whether it is permanent or temporary") (citations omitted);

see First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 318 (1987) ("'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation").

Partial physical takings are also actionable. *See Cedar Point Nursery*, 594 U.S. at 152 (finding a physical taking where the regulation granted possession only to union organizers and only for certain time periods); *Loretto*, 458 U.S. at 421–22 (a physical taking of a portion of the exterior by cable companies). Lastly, the government does not need to invade property itself. A physical taking equally occurs when the government authorizes the public or third parties to invade private property. As *Loretto* explained, it is "without regard to whether the State, or instead a party authorized by the State, is the occupant." *Id.* at 432 n.9; *Cedar Point Nursery*, 594 U.S. at 149 (the essential question is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property"); *Kaiser Aetna*, 444 U.S. at 179–80 (pertaining to the physical taking of a navigational servitude on behalf of the public); *see also Nollan v.*

Cal. Coastal Comm'n, 483 U.S. 825, 833 (1987) (observing that a taking by physical occupation would exist if the government authorized individuals to traverse private land).

B. The City Has Categorically Taken the Right to Exclude

Before the Empty Homes Tax was enacted, residential property owners could freely exercise their right to exclude. They could choose to open their units to occupancy and possession, or alternatively, they could bar the doors shut and leave the property entirely unoccupied. These decisions could be made for any reason, or no reason, at the property owner's choosing.

After the enaction of the Empty Homes Tax, this fundamental property right no longer existed. It is the City that now decides the rules of exclusion by which the owner must abide. The property owner's consent is irrelevant and the owner must submit its property to what the City demands.

More specifically, third-party renters *cannot* be excluded. 4AA at 00776. Even if the property owner does not want to rent their residential unit, the door to any vacant unit must be held open to them. Conversely, co-owners and family *must* be excluded. *Ibid.* If a property owner has decided to grant occupancy to, say, their

mother or their sister, that still counts as "vacant" in the eyes of the City. Therefore, regardless of their residential occupancy, the property owner must evict them, and exclude them, in order to make way for the third-party renters that the owner is prohibited from excluding. In addition, the property owner must prove that their residential unit is not vacant. The Empty Homes ordinance carries with it a "Presumption of Vacancy" that the owner must rebut with "satisfactory evidence." *Id.* at 00777. The City has also taken control of the duration of the occupancy. No residential unit can be "vacant" for more than 182 non-consecutive days in any calendar year. *Id.* at 00776–77.

Taken together, the Empty Homes ordinance means that all vacant residential units must now be occupied by third-party renters. In seizing the owner's fundamental right to exclude, the City has forcibly contributed the physical space of private residences to the City's public purpose of alleviating housing shortages. It is a categorical physical taking. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) ("If a legislature … declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically

appropriated it or destroyed its value by regulation."); *Horne*, 576 U.S. at 362 ("The Government's formal demand that the [owners] turn over [their private property] without charge, for the Government's control and use, is 'of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.'") (quoting *Loretto*, 458 U.S. at 432); *see also Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021) (per curiam) (the government's prohibition of evictions "intrudes on one of the most fundamental elements of property ownership—the right to exclude"); *Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 876–77 (1983) (Rehnquist, J., dissenting from dismissal for want of jurisdiction) (arguing that the forced renewal of rent controlled leases "deprives appellant of the use of its property in a manner closely analogous to a permanent physical invasion").

The compelled renting of private property was already determined to be a physical taking by the U.S. Supreme Court in *Yee v. Escondido.* 503 U.S. 519 (1992). Therein, the property owner alleged that a rent control ordinance was constitutionally infirm. *Id.* at 525. The Court held otherwise. *Id.* at 532. But in issuing its decision, the Court also explained that circumstances

similar to those at issue here would, in fact, be contrary to the requirements of the Fifth Amendment absent the payment of just compensation.

A physical taking occurs when the regulation demands "required acquiescence," or in other words, "where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527 (quoting *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987)). And that condition is satisfied when "the statute, on its face or as applied, … compel[s] a landowner over objection to rent his property[.]" *Id.* at 528. That is exactly what is happening in this case—by compelling private property owners to submit to the occupancy of third-party renters against their will.

A decision from New York's highest court is equally on point. In *Seawall Associates*, a state law required property owners to offer their vacant residential units for rent to alleviate a housing shortage. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 100 (1989). The court held that this mandatory renting "compels them to surrender the most basic attributes of private property, the rights of possession and exclusion." *Id.* at 102. Accordingly, the government's "forced occupation" was categorically unconstitutional. *Id.* at 106.

The City's dominion and control over the right to exclude looks very much like an easement under California law.[3] The owner's servient estate must submit to physical occupancy for the benefit of the dominant estate, that is the City. *See Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 48 (1902) ("An easement is 'an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another.'") (citation omitted). A compelled easement is clearly a taking, *Nollan*, 483 U.S. at 831; *Kaiser Aetna*, 444 U.S. at 165–66.

But that said, matching the government action to a specific property interest under local law, whether it's an easement, or a leasehold, or something else, is unnecessary when it comes to physical takings. A compelled physical invasion without the payment of just compensation is per se unconstitutional without regard to how that invasion is categorized or any other facts and circumstances. As the Court explained in *Cedar Point*, "the

[3] Which, in turn, can often be transformed into a life estate for the tenant. *See, e.g.*, *Mosser Companies v. San Francisco Rent Stabilization & Arb. Bd.*, 233 Cal. App. 4th 505 (2015); *T & A Drolapas & Sons, LP v. San Francisco Residential Rent Stabilization & Arb. Bd.*, 238 Cal. App. 4th 646 (2015).

[government] cannot absolve itself of takings liability by appropriating the [owner's] right to exclude in a form that is a slight mismatch from state easement law. Under the Constitution, property rights 'cannot be so easily manipulated.'" *Cedar Point Nursery*, 594 U.S. at 155 (quoting *Horne*, 576 U.S. at 164). Thus,

> We have recognized that the government can commit a physical taking either by appropriating property through a condemnation proceeding or by simply entering into physical possession of property without authority of a court order. In the latter situation, the government's intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold. Yet we recognize a physical taking all the same. Any other result would allow the government to appropriate private property without just compensation so long as it avoids formal condemnation. We have never tolerated that outcome. For much the same reason, in *Portsmouth*, *Causby*, and *Loretto* we never paused to consider whether the physical invasions at issue vested the intruders with formal easements according to the nuances of state property law (nor do we see how they could have). Instead, we followed our traditional rule: Because the government appropriated a right to invade, compensation was due.

Id. at 155–56 (cleaned up).

The City remains liable regardless of the fact that the taking is for a third party's benefit. *Loretto*, 458 U.S. at 432 n.9; *Cedar Point Nursery*, 594 U.S. at 149. Likewise, it is no less a physical taking because property owners have the right to exclude for a period of time each year. In *Cedar Point Nursery*, the government regulation deprived the property owner of the right to exclude for up to 120 days per year, 3 hours at a time. 594 U.S. at 144. For all other times, and for all interlopers other than union organizers, the owner maintained the right to exclude in full. *Ibid.* Nonetheless, it was a categorical physical taking. *Id.* at 149. As the Court noted, "there is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364." *Id.* at 153. Accordingly, "what matters is not that the [invasion] notionally ran round the clock, but that the government had taken a right to physically invade the [owner's] land. … The fact that a right to take access is exercised only from time to time does not make it any less a physical taking." *Id.* at 154 (citations omitted).

In sum, the Fifth Amendment's Takings clause is about who must bear the cost of creating public benefits. The City could have

chosen to build more affordable housing on its own. Or to provide public funding for the construction of new affordable units. Or to provide subsidies and funding to renters. Or to reduce regulation to induce more housing to be built. Each of these choices would have spread the cost across the public at large.

But instead, the Empty Homes ordinance reflects a governmental choice to shift the cost from the public to the private owners. In compelling private owners to house third-party occupants against the owners' will, these owners have been singled out to shoulder the burden of alleviating a housing shortage, with nothing in return but the uncompensated sacrifice of their private property rights to this public cause. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (a taking occurs when there is no "'average reciprocity of advantage' as between the owner of the property restricted and the rest of the community"); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591, 646 (1998) ("The Court has repeatedly stated that the constitutional defect with the regulations at risk is that they single out property owners. In singling out property owners, these new regulatory

forms conflict with the rule of law principles of formality, generality, and equality.") (footnote omitted).

While government is entitled to make that choice because it believes that it will have a public benefit, "the government does not have unlimited power to redefine property rights." *Loretto*, 458 U.S. at 439. Rather, the Fifth Amendment requires the government to pay Just Compensation for the property rights that it takes. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). The trial court's determination that the Empty Homes Tax was an unconstitutional physical taking should be affirmed.

II. The "Tax" Is Really a Licensing Fee

A. Labeling a Regulation as a Tax Does Not Mean that It Is a Tax

The City has labeled its Empty Homes ordinance as a tax. 4AA at 00777. Generally speaking, taxes are not a taking of property under the Fifth Amendment. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013). Yet at the same time, the name cannot obscure the act. If dispositive status is

given to the label that the government chooses for its actions, then the role of the judiciary and our system of checks and balances becomes meaningless. The government would have unchecked power to avoid constitutional limits simply by affixing a particular name to a particular action regardless of what the regulation actually does.

Accordingly, as the Supreme Court has often said, property rights "cannot be so easily manipulated." *Horne*, 576 U.S. at 365 (quoting *Loretto*, 458 U.S. at 439 n.17). Whether a particular municipal ordinance is constitutional or unconstitutional is based upon what it does, not by what it calls itself.

In tax cases, the government's self-designated label does not take precedence over the government act. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Congress cannot change whether an exaction is a tax or a penalty for constitutional purposes simply by describing it as one or the other. Congress may not … expand its power under the Taxing Clause, or escape the Double Jeopardy Clause's constraint on criminal sanctions, by labeling a severe financial punishment a 'tax.'"); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) ("[In] passing on the constitutionality of a tax law 'we are concerned only with its

practical operation, not its definition or the precise form of descriptive words which may be applied to it.'") (citation omitted). As such, the Court has determined on more than one occasion that a regulation that was labeled as a "tax," was not really a tax but something else. *See, e.g.*, *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 (1994) (striking down Montana's "Dangerous Drug Tax Act" because it was not a tax but a criminal penalty that violated Double Jeopardy); *Bailey v. Drexel Furniture Co. (U.S. Reps. Title: Child Lab. Tax Case)*, 259 U.S. 20, 38 (1922) (holding that a claimed tax was actually a penalty and that "to give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress"). And it has equally decided that legislative acts not specifically labeled as a tax, were, in fact, a tax. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 563.

Likewise, for Takings cases, it is what the municipality does that controls the outcome, not the label. Liability under the Takings Clause is premised upon the government *act*. *See Stop the Beach Renourishment, Inc.*, 560 U.S. at 713–14 ("The Takings Clause … is concerned simply with the act[.]"). Accordingly, as the Court said in *Webb's Fabulous Pharmacies v. Beckwith*, the

government cannot avoid takings liability by simply "recharacterizing" its actions as something other than what they are and then ignoring their "practical effect of appropriating [the property at issue.]" 449 U.S. 155, 164 (1980). Or in other words, "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Id.* at 164.

For example, in *Cedar Point Nursery*, the dispute pertained to a state ordinance that allowed union organizers onto private property without the owner's consent. 594 U.S. at 144. The regulation was entitled "Solicitation by Non-Employee Organizers" and promulgated by the California Agricultural Relations Board "to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing." *Ibid.*; Cal. Code Regs. tit. 8, § 20900. But regardless of what it called itself, or its claimed purpose, it was held to be a categorical physical taking and an easement. 594 U.S. at 155.

In two separate cases, *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Webb's Fabulous Pharmacies*, 449 U.S. 155, the Court "treated confiscations of money as takings despite their functional similarity to a tax."

Koontz, 570 U.S. at 616. In *Webb's*, the "clerk's fee" and the government retention of accrued interest on court deposited funds was held to be an unconstitutional taking. 449 U.S. at 164. And in *Phillips*, the Court held that interest income generated by IOLTA funds is private property that cannot be taken without just compensation. 524 U.S. at 171.

Therefore, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652–53 (1981) (Brennan, J., dissenting). Labelling an ordinance as a "tax" does not make it sacrosanct, nor preclude a judicial determination that the regulation is really an unconstitutional taking. Karl Manheim, *The Health Insurance Mandate—A Tax or A Taking?*, 42 Hastings Const. L.Q. 323, 385 (2015) ("Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other."); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 479, at ch. XIV, 598 (Alexis C. Angell ed., 6th ed. 1890) ("Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that

an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property.").

Considering the above, the City's designation of its Empty Homes ordinance as a tax does not exempt it from the Fifth Amendment. "Teasing out the difference between taxes and takings is more difficult in theory than in practice," *Koontz*, 570 U.S. at 616, and here, looking at the purpose of the regulation and what it does, it does not constitute a tax.

The Empty Homes ordinance was enacted into law in December 2022. Volume I of the Appellants' Appendix at 01822, *et seq*. Its undisputed goal was to eliminate residential vacancies because the City contended that units "held vacant by choice" reduced available housing and decreased economic activity. 4AA at 00776. The City's solution was to eliminate the owner's choice. Property owners could no longer decide to exclude third parties from their property. Instead, the City took control of that right to compel occupancy and third-party rentals against the owner's will.

The properties deemed by the City to be vacant are then subject to a "tax."[4] Depending on the size of the unit, the vacancy tax imposed is between $2,500–$5,000 per year. 4AA at 00777. That tax also escalates for each year that the unit remains vacant, with a ceiling of $20,000 for units greater than 2,000 square feet. *Ibid.* The vacancy tax is additionally adjusted upwards each year in accordance with the CPI. *Ibid.* After administrative costs, the tax proceeds are to be spent on rent subsidies for individuals 60 and older or low-income households; or for acquiring, rehabilitating, and operating multi-unit buildings for affordable housing. 4AA at 00778.

The City's stated purpose of the Empty Homes Tax is not to raise revenue. 4AA at 000776. It is to put third parties into vacant residential apartments whether the property owners want them there or not. Indeed, the official Controller's Statement advised that the purpose of the Empty Homes Ordinance is "reducing the number of residential vacancies[.]" *Ibid.* Thus, success means raising no revenue in perpetuity; and conversely, any revenue

[4] Exceptions are made for certain circumstances, for example, if there is a pending building permit or on-going construction, or if the owner is in a medical care facility, none of which can exceed one year. 4AA at 00777.

gained is only an indicator of the City's failure to achieve its goals. As one legislative supporter said, "[w]e hope no one pays this tax. We want every vacant unit filled with people who need homes." 4AA at 000769.

Because the City does not actually want the funds but the forced third-party rental of "vacant" homes, the Empty Homes Tax ordinance is not a tax. It is not a revenue-based classification or distinction, but the unwanted byproduct of the property owners' dissension over the City's public purpose for taking the right to exclude. *Compare Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 564 (the essential feature of a tax is to raise revenue); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) ("[A] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.") (citation omitted); *Hill v. Kemp*, 478 F.3d 1236, 1244 (10th Cir. 2007) ("If revenue is the primary purpose, the imposition is a tax") (quoting 1 Thomas M. Cooley, *The Law of Taxation* 98 (4th ed. 1924)).

B. The "Tax" Is a Licensing Fee that Permits Owners to Exercise the Government's Right to Exclude

The City retains dominion and control over the right to exclude regardless of any payment by the owner. In other words, even if an owner pays the "tax" and refuses to submit to compelled occupation, the City still decides who must be excluded from residential units, who cannot be excluded, the circumstances, and the duration. Thus, the property owner gains no lasting rights through the act of paying money to the government. Instead, the owner merely gets the ability to utilize the City's right to exclude for the remainder of the tax year. There is no bargaining (as in a lease), and the terms and conditions by which the owner may utilize that right are unilaterally dictated by the City.

Therefore, in paying the City, the owner is getting a license to exclude in return.[5] In California, a license is a "privilege" to use the property. *Von Goerlitz v. Turner*, 65 Cal. App. 2d 425, 429 (1944). It authorizes the bearer "to do a particular act or acts on the property of another" but "without conferring any interest in the land." *Jenson v. Kenneth I. Mullen Inc.*, 211 Cal. App. 3d 653,

[5] It could equally be argued that the mandatory payment was a penalty imposed by the City.

657 (1989). The license requires the owner's assent. *Eastman v. Piper*, 68 Cal. App. 554, 560 (1924). And it is unassignable. *Gamerberg v. 3000 E. 11th St., LLC*, 44 Cal. App. 5th 424, 429 (2020); *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1040 (2009).

This exchange between City and property owner has the characteristics of an economic transaction. The more that the private owner needs, the more that the City charges, i.e., the larger the property, the larger the licensing price; and the longer the duration, the larger the licensing price. 4AA at 00777. Further, the charge for the use of the government's right to exclude is unconnected to any particular revenue target. Instead, similar to the charge for a leasehold, the owner's payment amount is to be adjusted in accordance with the Consumer Price Index, *ibid*, a factor that is aligned with market economics. To this end, it is also noteworthy that the City's Rent Stabilization Ordinance limits rent increases for tenants using a CPI-based metric. By charging property owners in a manner similar to how landlords are required to charge their tenants, it reinforces the fact that the "tax" is not a tax, but a payment by the owner for the limited use of the City's right to exclude.

Considering the above, the Empty Homes "Tax" is a licensing fee that the property owner must pay in exchange for the unassignable privilege to utilize the City's right to exclude for a limited period of time, and with ultimate dominion and control resting in the City's hands.

III. The Government Cannot Coerce Property Owners into Waiving Fundamental Rights

If this Court were to determine that the property owners' right to exclude has not been taken, then the City's demand that owners waive that fundamental right, or else pay the punitive Empty Homes Tax, is an unconstitutional condition. *See Yee*, 503 U.S. at 534. The Supreme Court has long understood that constitutional protections are meaningless if government can simply coerce individuals into waiving them. The unconstitutional conditions doctrine, firmly rooted in Supreme Court jurisprudence, provides that "the controlling influence of the Constitution may not be destroyed by doing indirectly that which it prohibits from being done directly." *Pullman Co. v. Kansas ex rel. Coleman*, 216 U.S. 56, 70 (1910). This foundational principle recognizes that government cannot evade constitutional constraints merely by structuring its demands as conditions

rather than direct mandates. As the Supreme Court emphasized in *Koontz*, the doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." 570 U.S. at 604. Here, the City has structured its Empty Homes Tax to accomplish precisely what the Fifth Amendment would prohibit if attempted directly: forcing property owners to allow third parties to physically occupy their private residential spaces.

The threshold question under the unconstitutional conditions doctrine is whether the government could constitutionally impose the challenged restriction directly. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 59–60 (2006). If the answer is no, then the government cannot impose it indirectly through conditions on benefits. The California Supreme Court has articulated this principle with particular clarity, explaining that the doctrine "imposes special restrictions upon the government's otherwise broad authority to condition the grant of a privilege or benefit when a proposed condition requires the individual to give up or refrain from exercising a constitutional right." *California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 457 (2015). Further, the courts have

interpreted the doctrine broadly. For example, a water authority was prohibited from requiring customers sign a rate contract that included a restriction on the constitutional right to petition the court for grievances. *San Diego Cnty. Water Auth. v. Metro. Water Dist. of S. California*, 12 Cal. App. 5th 1124, 1156–59 (2017), *as modified on denial of reh'g* (July 18, 2017).

Applied to the Empty Homes Tax, this inquiry reveals a fatal constitutional defect. The City could not directly enact an ordinance requiring property owners to surrender possession of their vacant residential units to third-party occupants. Such a mandate would constitute a categorical physical taking under *Cedar Point Nursery*, 594 U.S. 139, and *Loretto*, 458 U.S. 419, requiring payment of just compensation. The City does not dispute this fundamental proposition, nor could it. A direct ordinance stating "all property owners must allow others to reside in their residential units" would unquestionably effect a physical appropriation of one of the most fundamental property rights: the right to exclude. *Kaiser Aetna*, 444 U.S. at 176.

Accordingly, even were the Empty Homes ordinance not deemed to be a *direct* categorical physical taking, the City's use of a tax to coerce a waiver of that right does not transform this

unconstitutional mandate into a permissible regulation. The Empty Homes Tax imposes financial penalties specifically calibrated to compel property owners into allowing third parties to occupy their units, thereby achieving through economic pressure what could not be accomplished through direct command.[6] The tax structure demonstrates this coercive intent with unmistakable clarity. As discussed above, property owners face escalating annual charges ranging from $2,500 to $20,000 depending on unit size, with amounts increasing each year a unit remains vacant and adjusted annually for inflation. This is not a generally applicable tax on property ownership or use; it is a penalty specifically designed to punish property owners for exercising their constitutional right to exclude others from their property and to therefore compel them to surrender that right. The City's own legislative findings confirm that the tax exists not primarily to raise revenue, but to "disincentivize prolonged vacancies, thereby increasing the number of housing units available for occupancy." 4AA 000776. This express purpose of forcing

[6] Nor could the City directly demand that individual landowners hand over a large monetary sum. *Horne*, 576 U.S. at 357 (holding that the Fifth Amendment's prohibition on the taking of private property applies equally to both real and personal property).

occupancy by others reveals the tax as an indirect mechanism to accomplish what the City acknowledges it cannot require directly: physical appropriation of private property for third-party occupation.

The Supreme Court's decision in *Koontz* makes clear that government cannot evade constitutional scrutiny simply by demanding money instead of property. In *Koontz*, the Court explained that the constitutional analysis applies equally whether government demands the landowner to deed over a portion of his property or simply appropriates the same share of property without the formality of a transfer of title. 570 U.S. at 605. The *Koontz* Court recognized that allowing government to avoid constitutional constraints through creative structuring would render the Takings Clause a nullity. So too here, the City's decision to structure its physical appropriation as a tax-for-non-compliance scheme rather than a direct occupancy mandate cannot immunize it from constitutional review. The essential character of the government action remains unchanged: the City is forcing property owners to allow third parties to physically occupy their residential units, in violation of the owners' fundamental right to exclude.

Moreover, the chilling effect of the Empty Homes Tax on property owners' constitutional rights occurs regardless of whether any particular owner ultimately chooses to pay the tax or surrender possession. As the Supreme Court explained in *Perry v. Sindermann*, constitutional injury occurs from the very existence of an impermissible condition that burdens the exercise of constitutional rights. 408 U.S. 593, 597 (1972). The fact that property owners theoretically can pay the tax and maintain their vacant units does not cure the constitutional violation. The City has created an impermissible binary choice: either allow strangers to physically occupy your private property, or pay escalating financial penalties for asserting your constitutional right to exclude. This forced choice itself violates the unconstitutional conditions doctrine, which prohibits government from demanding that citizens "give up a constitutional right … 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). Here, the "benefit" is simply being permitted to exercise one's pre-existing constitutional right to exclude others from one's property without facing punitive taxation.

The City cannot credibly argue that the Empty Homes Tax imposes only an economic burden rather than compelling physical occupation.[7] The tax structure makes clear that the only practical way to avoid the escalating financial penalties is to surrender the right to exclude and allow third parties to occupy the property. A tax of $20,000 per year, increasing annually with inflation, for a residential unit would quickly exceed the value of retaining ownership of the vacant property, effectively forcing property owners to comply with the City's occupancy mandate and lose their constitutional right to exclude. This economic coercion accomplishes precisely what a direct mandate would achieve: third-party physical occupation of private residential property. The unconstitutional conditions doctrine forbids precisely this type of governmental overreach.

Conclusion and Prayer

Amicus Curiae California Apartment Association respectfully submits that this Court should affirm the November 26, 2024, Order of the California Superior Court together with such

[7] As mentioned above, imposing a financial burden on individual landowners absent some justification would itself violate the takings clause. *Horne*, 576 U.S. at 357.

other and further relief as the Court deems reasonable, proper, and just.

DATED: October 17, 2025.

Respectfully submitted,

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/s/ Jeremy Talcott
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**pro hac vice pending*

Certificate of Compliance

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF PLAINTIFFS-RESPONDENTS is proportionately spaced, has a typeface of 13 points or more, and contains 8,116 words.

DATED: October 17, 2025.

/s/ Jeremy Talcott
JEREMY TALCOTT

Declaration of Service

I, Tawnda Dyer, 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 555 Capitol Mall, Suite 1290, Sacramento, California 95814.

On October 17, 2025, a true copy of BRIEF AMICUS CURIAE OF CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF PLAINTIFFS-RESPONDENTS was electronically filed with the Court through Truefiling.com. Notice of this filing will be sent to counsel below if registered with the Court's efiling system. If counsel is not registered, counsel 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 Roseville, California.

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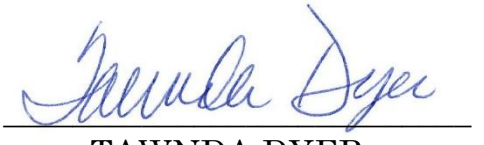
I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 17th day of October, 2025, at Roseville, California.



TAWNDA DYER