CITY AND COUNTY OF SAN FRANCISCO

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VIA HAND DELIVERY

The Honorable Chief Justice Tani Gorre Cantil-Sakauye
The Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Coyne, Martin v. City and County of San Francisco*
California Courts of Appeal Case Nos. A145044 / A146569
Request for Depublication

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.1125(a) of the California Rules of Court, the City and County of San Francisco respectfully requests that this Court order depublication of the Court of Appeal's published opinion in this matter.

The City and County of San Francisco ("City") is the most densely populated city in California. Its housing stock consists primarily of multifamily-unit buildings, and more than half of its housing stock was constructed before World War II.[1] Because the City is so densely populated and must adapt an older housing stock to the needs of modern households, it has a strong interest in robust local planning and land use provisions. And because sixty-four percent of its housing units are occupied by renters,[2] the City also has a strong interest in providing robust protections to tenants.

The Court of Appeal's decision adversely impacts both of these interests through an interpretation of the Ellis Act, California Government Code §§ 7060 *et seq.*, that is unmoored from the Act's plain text. As discussed further herein, the Ellis Act broadly speaking prohibits local governments from compelling landlords to remain in the residential rental business. In prior cases, appellate courts have interpreted the Ellis Act to preempt local action that imposes a "prohibitive price" on the ability of landlords to exit the business, asking whether the ordinance indirectly compels landlords to remain in the business by exacting a price that, in practice, is high enough to compel them to remain. These cases appropriately focus on the extent of the burden on landlords that a local ordinance imposes.

[1] See Policy Analysis Report: Analysis of Tenant Displacement in San Francisco, Oct. 30, 2013, at p. 5, available at http://sfbos.org/sites/default/files/FileCenter/Documents/47040-BLA%20Displacement%20103013.pdf
[2] *Id.* at p. 6.

The case below, however, was a facial challenge that imposed a payment requirement on landlords who evicted tenants, and the amount of the payment varied based on the tenant's current rent as compared to the market rent of a comparable unit. Accordingly, no single burden on landlords was at issue; rather, the payment amounts would vary from a few thousand dollars to $50,000 per unit, based on individual facts. The Court of Appeal nonetheless struck down the City's ordinance based on its articulation of a new, qualitative "reasonableness" test that empowers courts to engage in policy analysis of whether local action is "reasonable" in light of the impacts of other policy decisions by the local government.

The Court of Appeal's decision crafts a new and unmoored standard for Ellis Act cases that may have broad impacts on San Francisco's ability to implement land use controls and tenant protections, which are frequently challenged by plaintiffs as preempted by the Ellis Act. This standard conflicts with the decisions of other courts. This Court should order depublication of the opinion.

I. The Court of Appeal's Decision Departs From Other Cases Interpreting The Ellis Act

This case concerns a San Francisco ordinance that requires landlords to compensate tenants for the costs they face as a result of eviction, including the higher housing costs they face from procuring market-rate housing upon eviction. The ordinance requires landlords to pay for two years' worth of the difference between a tenant's pre-eviction rent and the market rent for a comparably sized unit, but the payment is capped at $50,000 per unit, and an administrative procedure permits landlords to reduce the payment amount in cases of financial hardship. (See S.F. Admin. Code § 37.9A(e)(3)(E).) The plaintiffs, a group of landlords, claimed that the ordinance is facially invalid because it is preempted by the Ellis Act.

The Ellis Act forbids any city from enacting a law that "compel[s]" the owner of a residential unit to continue to offer that unit for rent. (Gov't Code, § 7060(a).) Since the Ellis Act was adopted in 1985, the courts of appeal have uniformly construed it to forbid laws that directly compel an owner to remain in the residential rental business, or that indirectly compel the same thing by "impos[ing] a ***prohibitive price*** on the exercise of the right under the Act." (*Javidzad v. City of Santa Monica* (1988) 204 Cal.App.3d 524, 531 [emphasis added]; see also *Bullock v. City & County of San Francisco* (1990) 221 Cal.App.3d 1072, 1100-01 [Ellis Act "prevent[s] public entities from . . . prevent[ing] landlords from withdrawing units," and a payment requirement that "impose[s] a prohibitive price" on the right to withdraw units from the rental market is invalid]; *Reidy v. City & County of San Francisco* (*Reidy*) (2004) 123 Cal.App.4th 580, 592 [local police regulations were not preempted by the Ellis Act "***so long as those regulations do not 'otherwise' prevent*** a residential landlord from going out of the rental business"] [emphasis added]; *Pieri v. City & County of San Francisco* (*Pieri*) (2006) 137 Cal.App.4th 886, 893 [local ordinance requiring landlord payments to tenants to mitigate evictions was valid on its face because it did not impose a "prohibitive price on the decision to go out of the residential rental business"].)

Here, the Court of Appeal nominally followed these cases by accepting the "prohibitive price" standard as the correct standard for determining whether a local ordinance indirectly does what the Ellis Act forbids, i.e. compels a landlord to remain in the residential rental business. (*Coyne v. City & County of San Francisco* (*Coyne*) (2017) 9 Cal.App.5th 1215, 1226.) But its application of the prohibitive price test marked a sharp departure from prior cases. Rather than adjudicating whether San Francisco's regulation "otherwise prevent[s]" a landlord from exiting the rental business (*Reidy, supra*, 123 Cal.App.4th at p. 592), or makes it "prohibitively expensive for anyone to leave the rental market," (*Pieri, supra*, 137 Cal.App.4th at p. 894, n. 6),

the Court of Appeal here concluded that any requirement placed on landlords exiting the rental market must also be "reasonable[]." (*Coyne*, *supra*, at p. 1227-28.)

Applying this standard, the Court of Appeal did not attempt to evaluate the quantitative amount of the burden placed on landlords by the San Francisco ordinance. Nor could it; this was a facial challenge adjudicating every application of the ordinance, and the evidence presented to the trial court demonstrated that in about 20% of cases the payment amount would be no higher than under a 2005 relocation payment requirement approved in *Pieri*, *supra*. Instead, the Court of Appeal's conclusion was wholly based on normative concerns:

> "We see the increased rent payment the City's ordinances obligate landlords to pay their former tenants as a form of ransom which interferes with and places an undue burden on landlords who seek simply to go out of business. We also view the payouts of two years of ongoing rental subsidies—whether or not they reach the $50,000 ceiling set by Ordinance 68-15—as a penalty . . . ." (*Coyne*, *supra*, 9 Cal.App.5th at p. 1230.)

The Court of Appeal further elaborated on why it viewed the City's ordinance as unreasonable in rejecting the City's claim that the landlord payment requirement was a permissible form of hardship mitigation under § 7060.1(c) of the Ellis Act. The Court held that "a tenant's future increased rent" is not reasonably attributable to his eviction by the landlord because the City's own policy choices must also be considered:

> "[The City's mitigation claim] ignores the impact of the City's policy decision to impose residential rent control . . . . [T]he high price of market-rate housing that a tenant faces upon eviction as permitted by the Ellis Act is the most immediate consequence, a common sense impact, of the artificially low rents a tenant pays as a [*sic*] provided by City-enacted rent control. In our view, the City's presumption that spiraling rents and high housing prices in San Francisco are an adverse impact of individual evictions statutorily permitted under the Ellis Act is a faulty one." (*Coyne*, 9 Cal.App.5th at p. 1230-31 [internal quotation marks omitted].)

In short, the Court of Appeal attributed the cost of market rate housing in San Francisco to the City's policy choice to have rent control. Accordingly, the court held, any payment by a landlord based on the cost of replacement housing imposes an unreasonable price, regardless of whether the payment is a few thousand dollars or $50,000. This analysis is far removed from the Ellis Act itself, which forbids "compel[ing]" the owner of rental property to remain in the business but provides no warrant for courts to pass on the market effects of local housing policies.

Compounding the Court of Appeal's error was the fact that it adopts the analysis of a district court decision concerning a previous version of the San Francisco ordinance at issue in this case, *Levin v. City & County and San Francisco* (2014) 71 F.Supp.3d 1072, a federal Takings Clause case which held that the cost of tenants' replacement housing does not share an essential nexus with the landlord's decision to evict, because the high cost of replacement housing is instead attributable to the City's policy choices.[3] Bay Federal Credit Union and the

[3] The City appealed the district court's decision, but that appeal was dismissed as moot by the Ninth Circuit Court of Appeals because the City had superseded the prior ordinance with the new version that capped landlords' payments at $50,000 per unit. (*Levin v. City & County of San Francisco* (9th Cir. Mar. 13, 2017) 2017 WL 957211.) The City's motion to the *Levin* district court to vacate its prior decision on grounds of mootness is pending.

City of Carson cogently describe the errors in *Levin* in their letter of May 18 to this Court requesting depublication. The City joins that analysis and does not repeat it here.

Notably, however, *Levin* is not only at odds with federal unconstitutional exactions jurisprudence, as Bay Federal and Carson describe. It is also at odds with California courts' exactions jurisprudence. In *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, this Court declined to consider whether residential hotel owners were root causes of poverty when it held that a San Francisco ordinance requiring those owners to mitigate the impacts of converting affordable housing into tourist hotel rooms was not an unconstitutional exaction. (*Id.* at p. 677.) And in *Home Builders Association of Northern California v. City of Napa* (2001) 90 Cal.App.4th 188, the First District Court of Appeal refused to consider whether a city's "prior policies contributed to a scarcity of available land and a shortage of affordable housing" in deciding whether an inclusionary zoning ordinance was an unconstitutional exaction. (*Id.* at p. 198.) The Court of Appeal's decision in this case stands in sharp contrast with both these decisions.

II. The Court of Appeal's Erroneous Decision May Have Impacts Beyond This Case, Including in Planning and Land Use Cases

By grafting a policy-oriented "reasonableness" standard onto the Ellis Act's prohibition against compelling landlords to remain in business, the Court of Appeal invites courts in future cases to apply their qualitative understandings of policy and markets to Ellis Act cases, striking down restrictions that are "unreasonable" in the court's judgment even if they impose only a negligible burden on a landlord's decision to exit the market. This error could have effects not only on other cases regulating landlords' duties to mitigate the adverse impacts of eviction under Government Code § 7060.1(c), but also on cases concerning land use and planning controls. Many Ellis Act cases have arisen in the land use and planning contexts. (See, e.g., *Javidzad v. City of Santa Monica, supra*, 204 Cal.App.3d 524 [demolition controls]; *First Presbyterian Church of Berkeley v. City of Berkeley* (1997) 59 Cal.App.4th 1241 [demolition controls]; *San Francisco Apartment Ass'n v. City & County of San Francisco* (2016) 3 Cal.App.5th 463 [merger controls].) The "prohibitive price" standard for addressing whether indirect compulsion has occurred applies in these cases as well. The Court of Appeal's decision invites courts in similar cases in the future to assess the "reasonableness" of local planning restrictions as they apply to units that have been subject to Ellis Act evictions. In addition, as Bay Federal Credit Union and the City of Carson point out, the decision may have effects on cases construing other statutes relating to relocation, eviction, or mitigation, such as the manufactured home park conversion cases that they describe.

III. Independently, the Court of Appeal's Dicta Concerning the Ordinance's Procedural Requirements Should Be Depublished

The plaintiffs in this case argued not only that the Ellis Act substantively preempted the requirement that evicting landlords pay mitigation based on the cost of new housing, but also that the procedural requirements of the City's ordinance were preempted. For instance, plaintiffs argued that a landlord could not be required to calculate the amount of a mitigation payment or to provide the tenant with notice of his or her rights to a mitigation payment.

At Part I.D. of its opinion, the Court of Appeal, in light of its facial invalidation of the ordinance, "recognize[d] that we need not address these challenged procedural requirements." (*Coyne, supra*, 9 Cal.App.5th at p. 1233.) "Nevertheless," the court went on, "we express our concern about the validity of such procedures, should the parties consider the enactment of similar remedies in future efforts to mitigate the adverse impacts of Ellis Act evictions." (*Id.*) This Court should order the depublication of the several pages of the opinion that followed. This

extensive dicta, expressly intended to influence San Francisco's future policy choices concerning landlord-tenant relationships, has no place in a published opinion.

For the reasons offered above, the City and County of San Francisco respectfully requests that this Court order depublication of the opinion.

Very truly yours,

DENNIS J. HERRERA
City Attorney

CHRISTINE VAN AKEN
Deputy City Attorney

cc: [See attached Proof of Service]

CORRECTED PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102.

On May 22, 2017, I served the following document(s):

APPELLANT CITY AND COUNTY OF SAN FRANCISCO'S REQUEST FOR DEPUBLICATION

on the following persons at the locations specified:

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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☒ **BY E-SERVICE**: I served the above documents through TrueFiling E-Service System.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed May 22, 2017, at San Francisco, California.

Pamela Cheeseborough