No. 20-3366

In the United States Court of Appeals
For the Second Circuit

COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., *et al.*,
Plaintiffs and Appellants,

v.

CITY OF NEW YORK, *et al.*,
Defendants and Appellees,

BRIEF OF THE SAN FRANCISCO APARTMENT ASSOCIATION & CALIFORNIA APARTMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS/APPELLANTS AND REVERSAL

On Appeal from the United States District Court
for the Eastern District of New York
The Honorable Eric Komitee, Presiding
District Court No. 19-cv-4087-EK-RLM

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP
Christopher E. Skinnell, CA SBN 227093
2350 Kerner Boulevard, Suite 250
San Rafael, California 94901
Tel: (415) 389-6800
Fax: (415) 388-6874

Attorneys for Amici Curiae
SAN FRANCISCO APARTMENT ASSOCIATION &
CALIFORNIA APARTMENT ASSOCIATION

CORPORATE DISCLOSURE STATEMENT
FED. R. APP. PROC. 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned, counsel of record for *amici curiae* SAN FRANCISCO APARTMENT ASSOCIATION ("SFAA") and CALIFORNIA APARTMENT ASSOCIATION ("CAA"), certifies that neither SFAA nor CAA has "any parent corporation [or] any publicly held corporation owning 10% or more of its stock." Fed. R. App. Proc. 26.1(a).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The San Francisco Apartment Association ("SFAA") is a full-service, non-profit trade association founded in 1917 of persons and entities who own residential rental properties in San Francisco. SFAA currently has more than 2,800 active members. The association is dedicated to educating, advocating for, and supporting the rental housing community, and preserving the property rights of all residential rental property providers in San Francisco. SFAA and its members have a strong interest in a preserving their ability to purchase, sell, manage, and otherwise control real property and to exercise their constitutional and statutory rights with respect to real property they own or manage in San Francisco.

The California Apartment Association ("CAA") is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property

[1] SFAA and CAA's counsel authored this brief in whole. No party, party's counsel, or other person besides SFAA and CAA contributed money that was intended to fund preparing or submitting this brief.

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 fora. Many of its members are located in local jurisdictions that are subject to rent control laws, including San Francisco, obviously, but also Los Angeles, San Jose, Oakland, Santa Monica, Berkeley, and others. Moreover, in 2019 Governor Newsom signed Assembly Bill 1482, Cal. Stats. 2019, ch. 597, which is a new statewide rent control bill.

SFAA's members and CAA's members have a strong interest—just like landlords in New York—in the standards applicable to the alleged taking of private property for public use. *Amici* write to emphasize two key points: (1) this court should reject the mode of analysis adopted by the district court in which past invasions of property rights are used to justify new invasions; and (2) strict rent control regimes like

those in New York and San Francisco are essentially designed to shift the cost of public subsidies to private actors, mandating that a subset of property owners bear the cost of a public benefit that, under our Constitution, should be borne by the public as a whole.

BACKGROUND & SUMMARY OF ARGUMENT

San Francisco, like New York, has one of the most stringent rent control regimes in the country, dating back decades. Tenants dominate the electorate in San Francisco and elected officials are well aware of this political reality.[2] The political dominance of renters in San Francisco has resulted in an increasingly hostile atmosphere where pro-

[2] According to the Census Bureau, tenants substantially outnumber landlords in San Francisco. Of the 365,851 occupied residential units in the City, 229,999 (62.9%) are tenant-occupied. *See* U.S. Census Bureau, 2019 American Community Survey 1-Year Estimates, Table DP04, *online at* https://data.census.gov/cedsci/table?text=DP04&g=0500000US06075&tid=ACSDP1Y2019.DP04&hidePreview=false (last visited Jan. 15, 2021). And of course, not all of the remaining 37.1% are landlords—many are people who own their own homes.

tenant regulations proliferate and rental property owners are pilloried for the lack of low cost rental units, even though the causes of these problems more accurately lie in restrictive and burdensome land use policies and a booming tech economy that has brought tens of thousands of new workers (*i.e.*, renters) to the City. The City's history of anti-landlord legislation is well-documented in numerous reported cases.[3]

---

[3] *See, e.g.*, *S.F. Apartment Ass'n v. City & Cty. of S.F.*, 881 F.3d 1169 (9th Cir. 2018) (ordinance placing stringent restrictions on landlords' ability to negotiate a voluntary "buyout" of tenants' leases); *S.F. Apartment Ass'n v. City & Cty. of S.F.*, 20 Cal. App. 5th 510, 229 Cal. Rptr. 3d 124 (2018) (ordinance prohibiting no-fault evictions of families with children and educators during the school year); *Levin v. City & Cty. of S.F.*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014) (ordinance imposing requirement that landlords pay lawfully evicted tenants "amounts that range to hundreds of thousands of dollars per unit"), *appeal dismissed as moot,* 680 Fed. Appx. 610 (9th Cir. 2017); *San Remo Hotel v. City & Cty. of S.F.*, 145 F.3d 1095 (9th Cir. 1998) (San Francisco ordinance that required owners of residential hotels to obtain special permits from the City before converting residential hotels to tourist hotels, and providing such a permit would only be granted if the landlord promised to make a "one-for-one replacement" of the rental units being lost, either by constructing a similar quantity of units or paying a substantial fee); *Tom v. City & Cty. of S.F.*, 120 Cal. App. 4th 674 (2004) (striking down ordinance that sought to discourage Ellis Act evictions by prohibiting tenants-in-common from agreeing to occupy separate units in the property under

Other California localities like Oakland, Los Angeles, Berkeley, Santa Monica, Richmond, Mountain View, East Palo Alto, West Hollywood, and others, are similarly strict, and every election cycle there are proposals for new local rent control laws, such as recent measures in Sacramento, Santa Rosa, and National City.

And, as in New York, local officials in California's rent-control jurisdictions are constantly on the lookout for ways to further constrain landlords' property rights. Every year, new legislation is proposed and passed to further restrict the ability of landlords to use their real property. San Francisco landlords are not subject only to limits on the rents they may charge. They are also subject to: strict limits on their ability to occupy their own properties for their own or immediate

---

exclusive right of occupancy agreements); *Small Prop. Owners of S.F. v. City & Cty. of S.F.*, 141 Cal. App. 4th 1388 (2006) (ordinance compelling landlords to pay tenants five percent interest on security deposits, regardless of market conditions); *Danekas v. S.F. Residential Rent Stabilization & Arbitration Bd.*, 95 Cal. App. 4th 638 (2001) (ordinance restricting the ability of a landlord to evict a tenant who replaces a departing cotenant, in violation of a lease clause prohibiting sublet and assignment)

family members' use; limits on their ability to negotiate with tenants to voluntarily leave a rent-controlled unit; limits on the sale of multi-unit buildings; stringent conditions on their ability to remove a building from the rental business; and tight restrictions on the alternative uses to which a building can be put in rare event that it is removed from the rental market. The San Francisco Rent Ordinance now runs to 133 excruciatingly detailed pages, supplemented by an additional 124 of regulations adopted by the Rent Board, as well as other ordinances regulating fees charged by the Rent Board, S.F. Admin. Code, ch. 37A; security deposits, S.F. Admin. Code, ch. 49; and landlords' communications with tenants, S.F. Admin. Code, ch. 49A.

And each new encroachment becomes part of a vast web of regulations that is used to justify the next encroachment and the next, just as happened to New York landlords in this case. A major premise of the district court's opinion is that landlords that "come to the nuisance" in a manner of speaking—who purchase property that is already subject to

rent control regulations—cannot then complain about further regulations, because their reasonable, investment-backed expectations must be evaluated against the likelihood the legislature will act again. *Cmty. Hous. Improvement Program v. City of N.Y.*, No. 19-cv-4087(EK)(RLM), 2020 U.S. Dist. LEXIS 181189, at *33 (E.D.N.Y. Sep. 30, 2020). This is a prescription for the gradual erosion of virtually all landowners' property rights over time, sanctioning death by a thousand cuts, and it is inconsistent with Supreme Court case law, notably cases cited by the district court itself, *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

It also gives judicial blessing to the ongoing effort by public officials in these cities to shift the costs of public policy goals that should rightly be borne by the public onto a small, politically unpopular minority, which is exactly what the Takings Clause is designed to prevent. These regimes compel a dedication of property rights to the public, and in all fairness

the public should have to pay for these rights, just as a private party would.

The district court's order granting the motion to dismiss should be REVERSED, and the case should be remanded for further proceedings.

ARGUMENT

A. Summary of Stringent Restrictions Imposed on San Francisco Property-Ownership Rights.

In San Francisco, most residential tenants are covered by the San Francisco Rent Ordinance which—like the New York Rent Stabilization Law—provides rent control and limits the bases for eviction. This means rents can only be raised by certain amounts per year, tied to inflation. in 2021 that increase is just 0.7%[4]—and tenants can reside in the rental unit indefinitely, unless the landlord can establish one

[4] S.F. Rent Board, "Topic No. 051: This Year's Annual Allowable Increase" (Nov. 2020), *online at* https://sfrb.org/topic-no-051-years-annual-allowable-increase (last visited Jan 15, 2021).

of 16 "just causes."[5] In other words, tenants are given a nearly absolute right to physically occupy a landlords' premises indefinitely, with very limited exceptions.

As to the annual rental increases, San Francisco law requires that each March 1 the Rent Board must publish the increase in the Consumer Price Index for the preceding 12 months, as made available by the U.S. Department of Labor, and then limits landlords' ability to increase rents to only 60% of that CPI increase. In other words, it is purposely designed to prohibit landlords from keeping rents up with the cost of inflation. S.F. Admin. Code § 37.3(a)(1).

Moreover, while there is an option for landlords to file a petition with the Rent Board seeking additional increases for

---

[5] Most of these just causes are for nonpayment of rent, nuisance, illegal use of the unit, or material violations of the lease, though San Francisco keeps incrementally restricting the ability to even evict for lease violations; for example, eviction is prohibited even where a rental agreement or lease otherwise limits the number of occupants, or limits or prohibits subletting. *See* S.F. Admin. Code § 37.9(a)(2); S.F. Rent Board, "Topic No. 151: Subletting and Replacement of Roommates" (Sept. 2018), *online at* https://sfrb.org/topic-no-151-subletting-and-replacement-roommates (last visited Jan. 21, 2021).

things like capital improvements, the process is expensive and time-consuming, and in many cases the landlord may not obtain a rent increase sufficient to cover the cost of the improvement in any event. As one example, for properties of six or more residential units, in general, only 50% of the certified capital improvement costs may be passed through to the tenants, and the amount of the passthrough may not exceed the greater of $30.00 or 10% of a tenant's petition base rent in any 12-month period. S.F. Admin. Code § 37.7(c)(5)(B)(i).

In similar vein, increased debt service costs or property taxes resulting from a change in ownership may not form the basis of an increase above the default 60% of CPI. *See* S.F. Admin. Code § 37.8(e)(4)(A)(ii). Especially for a building that has been under the same ownership for a long time—perhaps decades—this restriction may be a *significant* burden to a new purchaser. A long-time owner may have not any debt service remaining; or that owner may have very low property taxes, particularly when one considers the effect that California's

Proposition 13 has on limiting annual tax increases in the absence of a change of ownership.[6]

As to the bases of eviction, in theory the San Francisco rent ordinance permits several types of "no-fault" eviction, like owner move-in or an eviction for the purpose of leaving the rental market altogether. But these bases are so heavily regulated that they are all but impossible for most landlords to pursue. For example, a landlord may recover possession of a rental unit for the occupancy of the owner or certain close relatives of the owner for use as their principal residence for a period of at least 36 continuous months.[7] However:

---

[6] Proposition 13 generally limits property taxes to 1% of the assessed value of the property and limits annual increases in the assessed value of real property to no more than 2 percent a year, except when property changes ownership or undergoes new construction. "Essentially, Proposition 13 converted the market value-based property tax system to an acquisition value-based system." Cal. State Bd. of Equalization, "Publication 29: California Property Tax: An Overview" (Dec. 2018), p. 5. This means that a property purchased after decades of unchanged ownership may experience significant property tax increases relative to the amounts charged to the prior owner.

[7] A relative move-in eviction is only permitted for certain close relatives of the owner, including a child, parent, grandparent, grandchild, sibling or the owner's spouse or

- Owners who evict for relatives to move in must already live in the building or be moving into the building at the same time as the relative;[8]
- If a comparable unit in the building is vacant or becomes vacant during the period of the notice terminating tenancy, then the notice to vacate must be rescinded. A vacant, non-comparable unit owned in San Francisco must be offered to the tenant being evicted.[9]
- Certain tenants—disabled or catastrophically ill tenants who meet certain minimum residency requirements cannot generally be evicted, nor can any tenant who has resided in a unit for 12 months or more be evicted for an owner or relative to move in during the school year for the San Francisco Unified

---

spouses of such relations. The term "spouse" includes domestic partners. *See* S.F. Rent Board, "Topic No. 204: Evictions Based on Owner or Relative Move-In" (Oct. 2018), *online at* https://sfrb.org/topic-no-204-evictions-based-owner-or-relative-move (last visited Jan. 15, 2021).

[8] *Id.*

[9] *Id.*

School District, if a child under 18 or a person who works at a school in San Francisco resides in the rental unit, is a tenant in the unit or has a custodial or family relationship with a tenant in the unit;[10]

- Landlords are required to pay relocation expenses to tenants who are being evicted for owner or relative move-in. Each authorized occupant, regardless of age, who has resided in the unit for at least one year, is entitled to a relocation payment of $4,500.00, with a maximum payment of $13,500.00 per unit. In addition, each elderly tenant who is 60 years or older, and each disabled tenant, and each household with one or more minor children, is entitled to an additional payment of $3,000.00. Each year commencing March 1, 2007, the amount of these relocation payments, including the maximum

[10] *Id.*

relocation expenses per unit, is adjusted for inflation;[11]

- If the unit is subsequently re-rented within a specified number of years, it must be reoffered to the original tenant at the original rent;[12] and
- If it is concluded that the landlord did not seek to recover possession of a unit for an owner or relative to move in, "in good faith, without ulterior motive and with honest intent," that landlord can be subject to substantial fines and even criminal penalties.[13]

The other various types of "no-fault" evictions are subject to similarly high hurdles. For example, in 1985 the California Legislature passed the Ellis Act, Cal. Gov. Code §

---

[11] *Id*. *See also* S.F. Rent Board, "Relocation Payments for Evictions Based on Owner/Relative Move-in OR Demolition/Permanent Removal of Unit from Housing Use OR Temporary Capital Improvement Work OR Substantial Rehabilitation" (Jan. 29, 2020), *online at* https://sfrb.org/sites/default/files/Document/Form/579%20Multilingual%20Relocation%20Payments%2037.9C%2020-21.pdf (last visited Jan. 15, 2021).

[12] *Id*.

[13] *Id*.

7060 *et seq.*, purporting to overturn *Nash v. City of Santa Monica*, 37 Cal. 3d 97 (1984), and giving landlords the right to exit the rental industry. But under the guise of enacting "procedural protections" for tenants, San Francisco has repeatedly sought to so significantly burden a landlord's ability to exercise its nominal state law rights as to render it illusory.[14]

Landlords seeking to exercise their rights under the Ellis Act must comply with elaborate notice requirements; certain categories of tenants—those who are elderly or disabled—can extend the time of the eviction for up to a year; the tenants retain reoccupancy rights for up to ten years; regardless of who obtains a new lease, the unit must be rented

[14] Of course, even if this were not true, the Supreme Court made clear in several cases that the ability to exit the market entirely, to avoid regulation, does not obviate a takings claim. *See Horne*, 576 U.S. at 365 ("In [*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 n.17 (1982)], we rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord. We held instead that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.").

at the old rent-controlled rate if it is re-leased during the first five years; and here, too, the City has imposed a requirement that the landlord pay a tenant tens of thousands of dollars for the "privilege" of regaining possession of the landlord's property.[15]

Other no-fault evictions, such as condominium conversions, demolition of the unit, and substantial rehabilitation are subject to relocation payments and other restrictions as well, including a ten-year ban on merging a unit removed from the rental market with another unit for the purpose of residing in or selling the merged units. *S.F. Apartment Ass'n v. City & Cty. of S.F.*, 3 Cal. App. 5th 463, 479 n.8 (2016).

---

[15] *See* S.F. Rent Board, "Topic No. 205: Evictions Pursuant to the Ellis Act" (Feb. 2020), *online at* https://sfrb.org/TOPIC-no-205-evictions-pursuant-ellis-act (last visited Jan. 15, 2021); S.F. Rent Board, "Relocation Payments for Tenants Evicted Under the Ellis Act" (Jan 29, 2020), *online at* https://sfrb.org/sites/default/files/Document/Form/578%20Multilingual%20Relocation%20Payments%2037.9A%2020-21.pdf (last visited Jan. 15, 2021).

In the past, many landlords sought to avoid the headaches of these regulations by directly negotiating with tenants to voluntarily vacate a rent-controlled unit in exchange for agreed-upon compensation. San Francisco has sought to restrict that option as well, imposing stringent restrictions on such negotiations: tenants and the Rent Board now must be given notice before a landlord can even approach the tenant about a voluntary buyout; a buyout agreement may be executed no sooner than 30 days after buyout discussions commence, and the tenant has a 45-day recission period; a copy of the entire agreement must be lodged with the Rent Board, which is then made publicly available (the personal information of tenants—but not landlords—is redacted); and the city has deputized various tenants' rights organizations to file lawsuits against landlords alleged to have violated these requirements, seeking fees and awarding attorneys' fees.[16]

---

[16] *See* S.F. Admin. Code § 37.9E; S.F. Rent Board, "Topic No. 263: Buyout Agreements" (Dec. 2020), *online at* https://sfrb.org/topic-no-263-buyout-agreements (last visited Jan. 15, 2021); *San Francisco Apartment Ass'n v. City & Cty. of S.F.*, 881 F.3d at 1169.

As the ever-expanding regulations to which owners of rental property in San Francisco are subject grow ever more complicated and burdensome, it is small wonder that some would wish to stop being landlords. As Ellis Act evictions are tightly limited, as discussed above, another option is to sell a rental property. Here, too, San Francisco has intervened. Any building with three or more residential units—or vacant land that could be developed into three or more residential units—is now subject to the Community Opportunity to Purchase Act ("COPA"), S.F. Admin. Code, ch. 41B.

COPA provides that before marketing a covered property to prospective sellers, the owner must first give certain "qualified" non-profit organizations ("QNPs") a right of first offer and then wait up to 30 days for such an offer to be made. The owner need not accept an offer from a QNP and may instead choose to market the property to private purchasers. However, once an agreement is reached, the owner must give the QNPs a second bite at the apple—a right of first refusal. And that right must be renewed if the terms

of the agreement materially change after the QNP declined. The law is subject to enforcement by damages, stiff penalty provisions for willful or knowing violations (10% of the sale price first time, 20% the second time, and 30% each additional time), and other "consistent" remedies, and attorneys' fees.

As a practical matter, landlords in San Francisco are subject to strict limits on the amount they can rent their units for; when they can gain repossession; their ability to sell the property in many cases; and their ability to exit the rental market altogether. Of the three main rights in the "bundle of sticks" identified by *Horne*—"the rights to possess, use and dispose of" their property, *see* 576 U.S. at 361-62—only the first is not presently limited to a substantial degree, and even that right of possession is limited to possession on paper—retention of title—rather than actual, physical possession in most cases.[17]

[17] Soon, landlords may even be penalized for letting a residential unit sit vacant. It has been estimated that anywhere between 10,000 and 25,000 rental units sit vacant in San Francisco due to the burdens of its rigorous rent control regime. *See* James, "How the Rich Get Richer, Rental

B. Boiling the Frog: Past Invasions of Property Rights Cannot Perpetually Justify New Ones.

As the district court opinion amply demonstrates, takings jurisprudence in the rent control context suffers from a "boiling frog" problem. "In the parable, the frog cannot be dropped into a pot of boiling water because it will leap out and save itself. However, if it is placed in a cool pot of water and the temperature is raised one degree at a time, the frog will fail to appreciate the danger and will not jump out, resulting in it being boiled alive." *Luna v. Cty. of Kern*, 2017 U.S. Dist. LEXIS 144352, at *5 n.1 (E.D. Cal. Sep. 5, 2017). In a similar

---

Edition," N.Y. TIMES (Feb. 17, 2012), *available online at* https://www.nytimes.com/2012/02/17/us/san-francisco-rent-control-and-unintended-consequences.html (last visited Jan. 15, 2021). But in March 2020 the voters of San Francisco approved Proposition D, which imposes a substantial new tax on owners of *retail* properties who let those properties sit vacant for a given period of time. A similar tax on vacant residential properties was adopted in nearby Oakland in 2018 as Measure W and has been proposed in San Francisco by members of the Board of Supervisors. *See* Pender, "Should S.F. tax empty homes and buildings?," S.F. CHRON. (July 22, 2017), *available on Lexis-Nexis and online at* https://www.sfchronicle.com/business/networth/article/Should-SF-tax-empty-homes-and-buildings-11306541.php (last visited Jan. 15, 2021).

vein, under the mode of analysis employed by the district court, each encroachment on landlords' property rights can then be used to justify the next and the next and the next, until little remains.

For example, much of the district court's analysis focuses centrally on the fact that some of the plaintiff landlords had purchased properties when some form of rent control was already in effect in New York. 2020 U.S. Dist. LEXIS 181189, at *33 ("these Plaintiffs bought their properties under a different, and more mature, version of the RSL (as in effect in 2003 and 2008, respectively…)"). Accordingly, the district court concluded, the landlords' takings claims could not succeed, because their reasonable, investment-backed expectations must be evaluated against the likelihood the legislature will act again. And again. And again.

California's courts have similarly justified new, ever-expanding encroachments on landlords' property rights by reference to past encroachments in this manner. *See, e.g.,*

Danekas v. S.F. Residential Rent Stabilization & Arbitration Bd., 95 Cal. App. 4th 638, 651 (2001) (argument that a rent control ordinance was an unconstitutional impairment of contracts rejected, in part because the rental industry is routinely regulated); *Interstate Marina Development Co. v. County of Los Angeles*, 155 Cal. App. 3d 435, 447 (1984) ("Rent control, like the imposition of a new tax, is simply one of the usual hazards of the business enterprise.").

But there is no obvious limit to this principle; it merely counsels governments to deprive property owners of their property rights in slow motion, rather than all at once—to turn up the heat on the frog one degree at a time. The district court makes a passing nod to this problem, acknowledging that "it cannot be said that there is no such thing as a regulatory taking in the world of rent stabilization, and it remains, and it remains eminently possible that at some point, the legislature will apply the proverbial straw that breaks the camel's back," 2020 U.S. Dist. LEXIS 181189, at *19 (E.D.N.Y. Sep. 30, 2020). And the district court even

acknowledges that "[t]he Supreme Court has spoken about the need for takings jurisprudence to redress this kind of incremental deprivation of property rights." *Id.* at n.10 (citing *Lucas*, 505 U.S. at 1014).

Specifically, the Court noted in *Lucas,* "If . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared.'" 505 U.S. at 1014 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

But despite the district court's recognition of this slow-motion deprivation, its ruling continues to abet the gradual erosion of New York landlords' property rights. At some point, the courts must take *Lucas*'s admonition to heart, lest the Takings Clause slowly be rendered dead letter.[18]

[18] The district court's approach counsels property owners to vigorously resist even modest actions lest those become a justification for later, more draconian ones. For example, *amici* noted above that California recently enacted Assembly Bill 1482, California's first statewide rent control

Nor is the district court's approach consistent with *Horne* and *Loretto*, which rejected the principle that the decision to voluntarily participate in a given industry (raisin-growing in *Horne*; property rental in *Loretto*) signals the property-owners' acquiescence to having that property forcibly occupied by another party at the government's insistence, and to the exclusion of the property-owner him- or herself. *See* *Horne*, 576 U.S. at 365; *Loretto*, 458 U.S. at 439 n.17.

What started out as comparatively modest, emergency measures during World War I[19] have, over the course of decades (and especially the last few decades), metastasized into all-encompassing regulatory regimes that give property owners little choice but to continue renting their property

---

law. Though considerably less restrictive than the rent control laws in place in many localities like San Francisco, many property owners understandably view that law as the camel's nose under the tent, particularly in jurisdictions where rent control did not previously exist.

[19] *See* *Edward A. Levy Leasing Co., Inc., v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Block v. Hirsch*, 256 U.S. 135 (1921).

while imposing ever-stricter—and more expensive—obligations on the maintenance of the property[20] and tightly constraining the rent that they can charge.

---

[20] The burdens are not slight, to say the least. Under California law, landlords have an implied duty to maintain the "habitability" of a rental unit. *See* *Green v. Superior Court*, 10 Cal. 3d 616 (1974). The Legislature has elaborated upon this duty in considerable detail; it includes the responsibility to maintain the structure of the unit—roof, walls, floors, ceilings, stairways, and railings—in good repair; to ensure that the plumbing—including hot and cold water—sewage, gas, heating, electric, and lighting, are in good working order; to ensure clean and sanitary buildings, grounds, and appurtenances, free from debris, filth, rubbish, garbage, rodents, and vermin; it requires the provision of adequate trash receptacles in good repair; it requires the provision of suitable deadbolts and other locks on doors and windows; working smoke detectors; natural lighting in every room, etc. Cal. Civ. Code § 1941 *et seq.* San Francisco has imposed its own, additional requirements. *See* S.F. Housing Code, ch. 13. The characterization of real estate as a "passive" investment is far from a literal description. Moreover, significant penalties can attach to the failure to comply with these obligations, up to and including criminal misdemeanor prosecution. *See* S.F. Housing Code § 204(a). Moreover, under federal and state fair housing laws, landlords must often bear significant costs to provide reasonable accommodations and modifications to their buildings to accommodate a tenant's disability, rather than being based on general health and safety conditions. The costs of reasonable *accommodations* must be borne by the landlord. *See* 24 C.F.R. § 100.204 (HUD regulation re reasonable accommodations); 2 Cal. Code Regs. § 12179 (California regulation re reasonable accommodations); Joint Statement of the Dept. of Housing

C. New York (and San Francisco's) Strict Rent Control Regimes Impose Burdens on a Subset of Landlords That, in All Fairness, Should be Borne by the Public as a Whole.

The Supreme Court has repeatedly recognized that the purpose of the Takings Clause is to prevent the "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See also Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017).

For example, it is widely recognized that in San Francisco "there are 'deep structural problems in the housing market,' in which increasing demand has met a supply limited

---

and Urban Development and the Dept. of Justice, *Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004), pp. 8-10 (see Questions 9 and 11 re costs associated with accommodation). And while the cost to install reasonable *modifications* must initially be borne by the tenant, modifications made to common areas, or those that don't interfere with the use of the property by subsequent tenants, become the responsibility of the landlord to either remove or maintain. *See* 24 C.F.R. § 100.203 (HUD regulation re reasonable modifications); Joint Statement of the Dept. of Housing and Urban Development and the Dept. of Justice, Reasonable Modifications Under the Fair Housing Act (Mar. 5, 2008), pp. 8 and 12 (see Questions 13 and 24 regarding costs of maintaining and restoring modifications).

by a City that has 'not produc[ed] housing as [its] population has grown.' [Citation.] 'Increased employment and population' has clashed with 'minimal increases in new housing' to put 'upward pressure on rental rates' and downward pressure on the citywide rental vacancy rate…" *Levin*, 71 F. Supp. 3d at 1075. "The limited supply—and correspondingly high price—of rental units in San Francisco is, on the City's own evidence, caused by entrenched market forces and structural decisions made by the City long ago in the management of its housing stock." *Id.* at 1084. Yet rather than address these structural issues, the City prefers instead to compel a subset of landlords—those who own multi-unit buildings built prior to 1979—to bear the burden of mitigating the City's own counterproductive housing policies, by subsidizing tenants, effectively using the landlords' property as the City's own.

This approach is especially burdensome in many cases because there has never been any form of means testing in San Francisco, and, of course, in New York the 2019 amendments to the RSL eliminated the exceptions for high-

income and luxury apartments. Though, politically, the theory of rent control seeks to trade on the premise that the tenant is the "little guy" who has no financial resources, and the landlord is the "big guy" with money to burn, there is no basis for assuming that this is universally—or even generally—true. For example, stories abound of wealthy, white-collar tenants in San Francisco—hedge-fund managers, lawyers, stockbrokers, tech executives—reaping the benefits of rent control, sometimes even subletting rent-controlled units and making significant money in the process. *See, e.g.,* C.W. Nevius, "On San Francisco: In some rent-control apartment beefs, it's the tenant who games the landlord," S.F. CHRON. (Oct. 30, 2014), p. A1, *available on Lexis*; *200 Arguello Assocs., LLC v. Dyas*, 2017 Cal. App. Unpub. LEXIS 3295 (Cal. Ct. App. May 12, 2017) (executives who used rent-controlled unit to house domestic employees).

Conversely, the image of the fat-cat landlord is not borne out by the facts. According to Census Bureau data collected by the Urban Institute, more than 22 million rental units—

approximately half of the country's rental units—are found in small buildings with between one and four units.[21] The real estate market in California trends even more towards such lower density small buildings than the nation as a whole due to the nature of the region's housing stock.[22] Most of the units are owned by mom-and-pop landlords, many of whom invested in property to save for retirement. Among those owning residential investment property, roughly a third are from low- to moderate-income households; property income constitutes up to 20 percent of their total household income.[23] Even in normal circumstances, the owners of these smaller buildings spend at least half of their rental income on mortgage

---

[21] *See* Housing Finance Policy Center, "Small Multifamily Units," URBAN INSTITUTE (May 2020), p. 4 (last visited Dec. 21, 2020).

[22] Reid & Heisler, "The Ongoing Housing Crisis: California Renters Still Struggle to Pay Rent Even as Counties Re-Open," TERNER CENTER FOR HOUSING INNOVATION, U.C. BERKELEY (Oct. 2, 2020), https://ternercenter.berkeley.edu/research-and-policy/ongoing-housing-crisis/ (last visited Dec. 21, 2020).

[23] *See* Broady, Edelberg & Moss, "An eviction moratorium without rental assistance hurts smaller landlords, too," BROOKINGS INSTITUTION (Sept. 21, 2020) (last visited Dec. 21, 2020).

payments, property taxes, and insurance for their properties.[24] Studies show that rent control devalues these landlords' property by as much as 25% relative to uncontrolled units.[25]

Amici recognize that courts are not in the business of imposing sound economic principles on political bodies, and if public bodies wish to subsidize tenants—low-income or otherwise—that is their prerogative. And *amici* further understand why public officials would find it more politically palatable to impose those costs on a disfavored political minority, rather than on the broader public. But that is exactly why the Takings Clause exists. The Cities of San Francisco and New York should not, in all fairness, shift the

---

[24] Schuetz, "Halting evictions during the coronavirus crisis isn't as good as it sounds," BROOKINGS INST. (Mar. 25, 2020), https://www.brookings.edu/blog/the-avenue/2020/03/25/halting-evictions-during-the-coronavirus-crisis-isnt-as-good-as-it-sounds/ (last visited Dec. 21, 2020).

[25] *See, e.g.*, Autor, *et al.*, "Housing Market Spillovers: Evidence from the End of Rent Control in Cambridge, Massachusetts," 122 J. OF POL. ECON. 661 (June 2014), *available online at* https://economics.mit.edu/files/9760 (last visited Jan. 18, 2021).

burden of their public policy purposes to a subset of landlords, using private property to achieve their goals.

CONCLUSION

Over the past few decades, cities like New York and San Francisco have engaged in a self-perpetuating cycle to the substantial detriment of private property rights: those cities prevent the construction of sufficient housing, thereby driving up the cost of the limited stock that exists. They then seek to mitigate those costs by forcing landlords to permit the indefinite physical occupation of their properties by third parties at suppressed rental rates and place near-insuperable—and ever higher—hurdles in front of those property owners' ability to use the property for other purposes, with each new constraint building on, and justified by, those that came before. In this manner, these cities gradually but effectively assume control of the residential properties in question, while shifting the costs of doing so to a politically unpopular minority. This is exactly the situation that the Takings Clause is designed to prevent.

For the foregoing reasons, the order dismissing Appellants' claims should REVERSED.

Respectfully submitted,

January 22, 2021 NIELSEN MERKSAMER PARRINELLO GROSS & LEONI LLP

By: /s/ Christopher E. Skinnell
James R. Parrinello
Christopher E. Skinnell

Attorneys for Amici Curiae
SAN FRANCISCO APARTMENT ASSOCIATION & CALIFORNIA APARTMENT ASSOCIATION

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the under-signed counsel for *Amici Curiae* SAN FRANCISCO APARTMENT ASSOCIATION and CALIFORNIA APARTMENT ASSOCIATION certifies that this brief:

(i) complies with the type-volume limitation of Local Rule 29.1(c) because it contains 5,889 words, including footnotes and excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f); and

(ii) complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this document has been prepared using Microsoft Office Word for Microsoft 365 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: January 22, 2021 /s/ Christopher E. Skinnell