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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DANIEL LEVIN; MARIA LEVIN; PARK LANE ASSOCIATES, L.P.; THE SAN FRANCISCO APARTMENT ASSOCIATION; and THE COALITION FOR BETTER HOUSING,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Case No. 3:14-cv-03352-CRB

BRIEF OF AMICI CURIAE TENANTS TOGETHER, ET AL. IN SUPPORT OF DEFENDANT CITY AND COUNTY OF SAN FRANCISCO

Judge: Hon. Charles R. Breyer
Courtroom.: 6

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I. INTRODUCTION

Since 1979, the San Francisco Rent Stabilization and Arbitration Ordinance (the "Ordinance") has provided two important protections to hundreds of thousands of renters throughout the City. First, while landlords are free to charge any rent they want at the beginning of a new tenancy, the Ordinance caps the annual percentage by which landlords may increase the rent charged to their existing tenant families. Second, the Ordinance restricts the grounds on which landlords validly may evict tenant families from their homes principally to various forms of tenant misconduct.

As both the United States Supreme Court and the Ninth Circuit repeatedly have recognized, these features of the Ordinance constitute permissible exercises of the City's police power to promote the general welfare:

> [A city] ha[s] a legitimate interest in protecting tenants from such unreasonable rent increases. *The eviction limits protect tenants from the high cost of dislocation in a tight housing market*, and prevent landlords from arbitrarily evicting tenants simply to obtain higher rents from new tenants.

Schnuck v. City of Santa Monica, 935 F.2d 171, 175 (9th Cir. 1991) (citation omitted) (emphasis added); *accord, e.g.*, *Pennell v. City of San Jose*, 485 U.S. 1, 13-14 & n.8 (1988) (recognizing both "protecting tenants from burdensome rent increases" and "*reducing the costs of dislocation that might otherwise result* if landlords were to charge rents to tenants that they could not afford" as legitimate interests served by rent control statute under review) (emphasis added); *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1024 (9th Cir. 2007) (confirming continuing validity of holding in *Schnuck*).

Consistent with California's Ellis Act, the Ordinance does permit landlords to withdraw their property from the rental housing market so long as they comply with certain notice and monetary relocation assistance requirements. Monetary relocation assistance helps to mitigate the "high cost of dislocation in a tight housing market," *Schnuck*, 935 F.2d at 175, that the Ordinance was designed to avoid, but that tenants suddenly must face upon their landlords' withdrawal of their homes from the rental housing market. The Ordinance leaves it up to the individual displaced tenant to determine how best to use that relocation assistance in light of his or her

individual circumstances.

In 2014, the City amended the Ordinance to provide monetary relocation assistance that much more accurately reflects the magnitude of the high cost of dislocation suffered by tenants whose landlords withdraw their rent-controlled homes from the San Francisco rental housing market. Under this amendment (the "2014 Mitigation Ordinance"), the monetary relocation payment is the greater of the lump sum payment available under the Ordinance as amended in 2005, or a sum equal to two years of the difference between the particular displaced tenant's controlled rent for his or her home and the market-rate rent for a comparable unit in San Francisco.

Remarkably, Plaintiffs contend that – notwithstanding the undeniable power of the City to require landlords to accept below market rents under the Ordinance so as to protect tenants against the high cost of displacement – the City suddenly loses all power to require landlords to mitigate those costs of displacement as soon as they announce their intention to terminate their participation in the rental housing market. The City has cogently demonstrated why Plaintiffs err, and Tenants Together and the other *amici* identified in Appendix A hereto (collectively, "Tenants") join in the City's arguments. Tenants write separately to emphasize certain points on behalf of their tenant members and clients throughout California and the nation.

II. LEGAL STANDARDS APPLICABLE TO PLAINTIFFS' FACIAL CHALLENGE

A. In Their Facial Challenge, Plaintiffs Bear The Burden Of Demonstrating That No Set Of Circumstances Exists Under Which The Ordinance Would Be Valid

Pursuant to the Parties' joint stipulation to bifurcate the facial and as-applied claims at issue in this litigation, the only issue before the Court at this time is Plaintiffs' facial challenge to the 2014 Mitigation Ordinance. Dkt. 40.

Plaintiffs bear an extraordinarily heavy burden in seeking the wholesale invalidation of the Ordinance through a facial challenge. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the Act would be valid*." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). In bringing a facial challenge, "a plaintiff can only succeed by establishing … that the law is unconstitutional in all of its applications." *Wash. State Grange v.*

Wash. State Republican Party, 552 U.S. 442, 449 (2008); *see also United States v. Kaczynski*, 551 F.3d 1120, 1125 (9th Cir. 2009) (holding that "a generally applicable statute is not facially invalid unless the statute can *never* be applied in a constitutional manner") (emphasis in original).

This key principle – often referred to as the *Salerno* standard – applies with no less force to facial takings claims than to other types of facial challenges. *See Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 579 n.3 (9th Cir. 2008) (en banc) (holding that *Salerno* standard applies to all facial challenges outside the First Amendment); *see also S. Lyme Prop. Owners Ass'n v. Town of Old Lyme*, 539 F. Supp. 2d 524, 535 (D. Conn. 2008) (applying *Salerno* to facial takings claim). Thus, the Supreme Court has recognized the "important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987); *see also, e.g., Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (recognizing that an alleged facial taking "does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated"). In adjudicating a facial takings claim, a court may look only to "the regulation's general scope and dominant features, rather than to the effect of the application of the regulation in specific circumstances" or to specific property owners. *Tahoe-Sierra Preserv. Council, Inc. v. Taho Reg'l Planning Agency*, 216 F.3d 764, 773 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002), *overruled on other grounds by Gonzales v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc).

Plaintiffs imply (though they do not expressly argue) that their facial challenge should not be subject to the demanding *Salerno* standard. *See* Pl. Trial Br. at 13-14. That is not so, for a simple reason: In their facial challenge, Plaintiffs seek the invalidation of the Ordinance not merely with respect to themselves and their own properties, but with respect to *any* properties and landlords in San Francisco. *See* Dkt. 1, Complaint, at 24. Because Plaintiffs seek to prevent the City from applying the Ordinance to anyone, Plaintiffs must demonstrate that the Ordinance cannot constitutionally be applied to anyone, no matter their individual circumstances. *See Doe v. Reed*, 561 U.S. 186, 194 (2010) ("The important point is that plaintiffs' claim and the relief that

would follow … reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach."); *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 755 F.3d 671, 683 n.12 (9th Cir. 2014) (same).

For the reasons that follow, in addition to those set forth in the City's briefs, Plaintiffs' facial challenge to the Ordinance cannot meet this high standard.

III. PLAINTIFFS' FACIAL PHYSICAL TAKINGS AND *NOLLAN* EXACTIONS CLAIMS ARE TIME-BARRED.

As an initial matter, at least two of Plaintiffs' facial claims are time-barred; namely, their *per se* physical takings claim and their exactions claim based on *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). These claims are time-barred because they could have been brought no later than 2005, the applicable statute of limitations is two years, and the 2014 amendment to the Ordinance has no relevance to these claims in any way that would re-start the limitations period. *See Committee Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 701 n.3 (9th Cir. 2009) (limitations period for § 1983 claims in California is two years).

The basis of Plaintiffs' physical takings claim is their allegation that the Ordinance either (1) physically takes their money, or (2) imposes a permanent physical occupation of their property by limiting their ability to evict their tenants. Pl. Trial Br. at 14-15. Similarly, the basis of Plaintiffs' *Nollan* claim is that there is "no 'nexus' between the Payment and the impact of withdrawal of the property from the market." Pl. Trial Br. at 19. But Plaintiffs offer no explanation of how the *2014 amendment* to the Ordinance gives rise to either of these claims. The Ordinance as it existed since 2005 (if not earlier) had all the salient features relevant to these two claims: It too required landlords to pay a relocation assistance fee to displaced tenants before removing a rental unit from the housing market. The 2014 amendment made only one material change: It increased the amount of money to be paid to displaced tenants, in order to more accurately reflect the full cost to those tenants of involuntary relocation. In short, Plaintiffs'

physical takings and *Nollan* claims are identical in all respects to claims Plaintiffs could have brought no later than 2005 (if not earlier).[1]

Under these circumstances, Plaintiffs' claims are time-barred. A facial takings claim "accrues on the date that the challenged statute or ordinance went into effect." *Action Apt. Ass'n*, 509 F.3d at 1027; *accord Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993). Later amendments to, or re-enactment of, the same ordinance re-starts the limitations period "only if those amendments alter 'the effect of the ordinance upon the plaintiffs.'" *Action Apt. Ass'n*, 509 F.3d at 1027 (quoting *De Anza Props. X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir. 1991)).

Action Apartment Association squarely forecloses Plaintiffs' physical takings and *Nollan* claims. There, the plaintiff brought both a takings and a substantive due process challenge against Santa Monica's rent-control ordinance. 509 F.3d at 1022. The rent control ordinance at issue had been enacted in 1979 and had been in amended three times, most recently in 2002. *Id.* The 2002 amendments included "some new provisions, including, most significantly, provisions that ma[d]e it harder for landlords to evict their tenants." *Id.* The Ninth Circuit rejected the plaintiff's argument that the 2002 amendments re-started the limitations period. The court reasoned that the plaintiff's claim "makes no mention whatsoever of the 2002 amendments," and that whatever the merits of the plaintiff's claim, the factual allegation underlying the claim was "as true in 1979 as it is today." *Id.* at 1027; *see also Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 957 (9th Cir. 2011) (holding facial challenge to rent-control ordinance untimely where amendment "only added a new methodology" for calculating rent increases).

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[1] By contrast, Tenants do not contend that Plaintiffs' exaction claim based on *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is time-barred. Unlike Plaintiffs' physical takings and *Nollan* claims, their *Dolan* claim may depend in part on the amount of the required relocation assistance payment. This is because a *Dolan* analysis entails consideration of the fit between the payment to the "nature and extent" of the impact of displacement. *Dolan*, 512 U.S. at 391. To be sure, Plaintiffs' facial *Dolan* claim faces other insurmountable hurdles: It is expressly barred by Ninth Circuit precedent, *see Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998), and it lacks merit on its own terms because *Dolan* does not properly apply to the 2014 Mitigation Ordinance and the amount of the relocation assistance payment in any event is *directly* proportional to the harm suffered by displaced tenants. *See infra* at 10-14.

Here, Plaintiffs' physical takings and *Nollan* claims do not depend at all on the *amount* of the relocation payment the Ordinance requires landlords to pay to displaced tenants. They depend only on the *existence* of that requirement. *See* Pl. Trial Br. at 16 (arguing that the Ordinance effects a physical taking because it "requires rental owners to acquiesce to occupation of their property by an unwanted tenant, and to forfeit their federal and state right to exclusively possess their property, unless they make the Payment"); *id.* at 18 (arguing that the Ordinance fails to meet the *Nollan* "essential nexus" requirement because "the withdrawal of rental property does not cause the rental affordability problem addressed by the Payment"). Because that requirement has been in place since at least 2005 (if not earlier), Plaintiffs have failed to bring their facial challenge within the two-year statute of limitations for § 1983 claims in California.

IV. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE ORDINANCE ON ITS FACE EFFECTS A PHYSICAL TAKING.

Plaintiffs have offered two theories as to how the Ordinance on its face effects a *per se*, physical taking of their property. First, they argue that the Ordinance physically takes their money, in the form of the relocation assistance payment. Pl. Trial Br. at 14-15. Second, they contend that the Ordinance subjects them unwillingly to a permanent physical occupation of their property by tenants, in violation of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Pl. Trial Br. at 15-16. To prevail on these facial claims and obtain their requested relief – wholesale invalidation of the Ordinance's requirement of relocation assistance payments – Plaintiffs must establish either that the Ordinance physically takes the money of *every* property owner subject to it, or that the Ordinance requires *every* property owner subject to it to suffer a permanent physical occupation of their property. *See Salerno*, 481 U.S. at 745; *supra* at 2-4. Plaintiffs cannot remotely make such a showing.

First, the Ordinance does not on its face physically take money from any property owner. Property owners who remain in the rental business, as the majority of landlords subject to the Ordinance choose to do, are not required under the Ordinance to make any payments to anyone. That fact on its own defeats Plaintiffs' facial "taking of money" claim. Plaintiffs cite a variety of cases in which the government *actually took* money from individuals, as opposed to making a

payment of money a *condition* on a discretionary land-use permit. *See* Pl. Trial Br. at 15 (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Webb's Fabulous Pharm., Inc. v. Beckwith*, 440 U.S. 155 (1980); and *Schneider v. Cal. Dep't of Corr.*, 345 F.3d 716 (9th Cir. 2003)). Here, by contrast, as in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), the government has given a property owner a choice: He or she can continue to derive income from renting the property to tenants, *or* he or she can take the property off the rental market and make the relocation assistance payment. That situation cannot give rise to a *per se* physical takings claim. The Supreme Court held in *Koontz* that that situation may in some circumstances give rise to a *Nollan*/*Dolan* exaction claim. *Koontz*, 133 S. Ct. at 2602-03. Such a claim fails here for the reasons set forth below, *see infra* at 10-14, but for purposes of Plaintiffs' physical takings claim, the answer is even more basic: Plaintiffs can cite no case in which any court has *ever* found a physical taking of money on facts such as these.

Second, the Ordinance on its face does not run afoul of *Loretto*, in which the Court concluded that "a permanent physical occupation authorized by government is a taking" categorically requiring the payment of just compensation. 458 U.S. at 426. Plaintiffs' facial permanent-physical-occupation claim fails for multiple reasons. First, and most obviously, Plaintiffs cannot carry their burden under *Salerno* of showing that the Ordinance causes a permanent physical occupation for *all* landlords subject to it. The Ordinance requires landlords to make relocation assistance payments only to tenants who are displaced involuntarily under the Ellis Act, not to those who leave for other reasons. Yet thousands of San Francisco tenants relocate voluntarily each month; others, unfortunately, pass away. That means that there are thousands of landlords each year who regain full possession of the housing units they have put out for rent without making *any* relocation assistance payment—a fact that, on its own, defeats Plaintiffs' facial *Loretto* claim. *See Yee*, 503 U.S. at 528 (rejecting permanent-physical-occupation claim against rent control statute where statute permitted property owners to regain possession of property within "6 or 12 months").

Plaintiffs' facial permanent-physical-occupation claim founders on other grounds as well. The Ordinance does not compel any landlord to lease his or her property to any tenant; it merely

provides certain protections to tenants once landlords make the voluntary choice to make a housing unit available for rent. The Supreme Court has repeatedly recognized that this distinction defeats a physical takings claim. *See Yee*, 503 U.S. at 528 ("Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government."); *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252-53 (1987) ("[I]t is the invitation … that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license."). Nor does the Ordinance even compel any property owner, once he or she voluntarily has made an apartment available for rent, to continue to rent it to the tenant. A landlord can regain full possession of his or her property by making the relocation assistance payment. That key fact distinguishes the cases Plaintiff cites (Trial Br. at 16) in which courts have suggested that a rent control ordinance that "*nullifies* an owner's right to occupy his own property can constitute a per se physical taking." *Cwynar v. City & County of S.F.*, 90 Cal. App. 4th 637, 654 (2001) (emphasis added); *see also Ross v. City of Berkeley*, 655 F. Supp. 820, 836-42 (N.D. Cal. 1987). The Ordinance has not *nullified* any landlord's right to regain possession or his or her property, but rather requires the payment of relocation assistance as a reasonable condition on that right, as the Ellis Act expressly permits, *see* Cal. Gov't Code § 7060.1(c).

V. PLAINTIFFS' FACIAL EXACTION CLAIM FAILS.

A. *Nollan* and *Dolan* Do Not Apply To The 2014 Mitigation Ordinance Because It Is An Economic Regulation Of The Existing Landlord-Tenant Relationship

Tenants agree with the City that application of *Nollan* and *Dolan* is foreclosed here by Ninth Circuit precedent properly restricting that analysis to *individually adjudicated* land-use exactions. *See McClung v. City of Sumner*, 548 F.3d 1219, 1222, 1228 (9th Cir. 2008), *abrogated in part on other grounds by Koontz*, 133 S. Ct. 2586. Tenants also agree with the City that, even if that were not so, *Nollan* and *Dolan* remain inapplicable because the 2014 Mitigation Ordinance is a permissible economic regulation of existing landlord-tenant relationships, and not itself a taking.

The necessary predicate to application of *Nollan* and *Dolan* is a determination that a *per se* taking would have occurred had the City simply ordered landlords to pay relocation assistance to

tenants. *See Koontz*, 133 S. Ct. at 2598-99; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-47 (2005). Plaintiffs blithely assert that this predicate is met because in *Koontz* the Supreme Court held that *Nollan* and *Dolan* applied to "monetary exactions" imposed on a specific piece of real property as part of the land-use permitting process. *See Koontz*, 133 S. Ct. at 2598-2600. But *Koontz* involved the situation where the monetary exaction demanded by the government did not constitute the *regulation* of an *existing use* of the real property. Rather, it constituted the type of "in lieu of" fees that are ubiquitous in the land-use permitting process and are properly intended to mitigate harms that will be imposed by *future uses* of the real property once they are permitted. The *Koontz* Court reasoned that applying *Nollan* and *Dolan* to such fees (at least when individually adjudicated) was necessary to avoid turning those cases into dead letters. *See id*.

By contrast, the 2014 Mitigation Ordinance is a mere regulation of existing landlord-tenant relationships that were created by landlords' voluntary participation in the rental housing business. Close to a century ago, the Supreme Court held that the rental housing business is subject to intense regulation pursuant to the police power, including "regulations requiring large expenditures by landlords," without such regulation constituting a taking. *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 246-47 (1922); *Block v. Hirsh*, 256 U.S. 135, 155-56 (1921). The Supreme Court specifically approved both rent and eviction controls as such proper exercises of the police powers. *See id*. And – extending these precedents – New York's highest court held that it constituted a proper regulation under the police powers to preclude landlords from removing buildings from the rental housing market until they relocated their tenants into comparable units at comparable rents. *Loab Estates, Inc. v. Druhe*, 90 N.E.2d 25, 26-27 (N.Y. 1949).

While takings jurisprudence has evolved, the Supreme Court clearly and repeatedly has stated that the broad power to regulate the landlord-tenant relationship recognized by these early precedents continue unabated. For example, in *Florida Power*, the Supreme Court explained:

> As we observed in *Loretto*, statutes regulating the economic relations of landlords and tenants are not *per se* takings. "So long as these regulations do not *require* the landlord to suffer the physical occupation of a portion of his building by a third party [i.e., a non-tenant], they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity."

480 U.S. at 252 (emphasis in original; citations omitted); *see Yee*, 503 U.S. at 528-29 (rejecting

per se takings approach to mobile home rent control ordinance despite fact it caused a one-time transfer of wealth from landlord to tenant). Similarly, in *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (1989), a case upon which Plaintiffs rely, New York's highest court held that *Loab Estates*' approval of mandatory tenant relocation obligations likewise remains unaffected by developments in takings law. *See Seawall*, 74 N.Y.2d at 105-06. Plaintiffs' suggestion that *Koontz sub silentio* turned tenant relocation assistance from a standard regulation of the landlord-tenant relationship into a "monetary exaction" subject to heightened scrutiny is simply untenable.

B. Even If *Nollan* and *Dolan* Do Apply To The 2014 Mitigation Ordinance, The Ordinance Is Not On its Face An Unconstitutional Condition

1. The 2014 Mitigation Ordinance Does Not Facially Violate The *Nollan* Requirement Of An Essential Nexus Between The Required Tenant Relocation Assistance Payment And A Legitimate Public Purpose

As an initial matter, Plaintiffs' *Nollan* claim is time-barred for the reasons set forth above. *See supra* at 4-6. It is also meritless. In order to satisfy *Nollan*, there must be an "essential nexus" between the requirement that landlords withdrawing their properties from the rental housing market make the relocation assistance payment to their displaced tenants and a "legitimate public purpose[ ]." *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (essential nexus present where proposed exactions would mitigate increased flooding and traffic caused by proposed development); *see also Nollan*, 483 U.S. at 836-37 (essential nexus absent where proposed exaction would not actually mitigate obstruction of scenic view caused by proposed development). Such an essential nexus exists here.

The purpose of the 2014 Mitigation Ordinance is stated in the Legislative Digest:

> In light of hardships faced by the increasing number of evicted tenants and the increased difficulty in finding affordable housing following eviction, *this ordinance is designed to better mitigate the adverse impacts for people displaced by Ellis Act evictions.*

S.F. Trial Ex. 10 at 17 (emphasis added). As numerous courts have recognized, mitigation of tenant hardship is a valid public purpose that is directly served by requiring landlords to provide relocation assistance to any tenants they displace by withdrawing their properties from the rental housing market. *See, e.g.*, *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 284-87, (Minn. App. 1996) (city had police power to require mobile home park owner to pay tenants' cost

to relocate, or to buy their mobile homes, prior to park closure); *Sobel v Higgins*, 188 A.D.2d 286, 286-87 (N.Y. App. Div. 1992) (city had police power to require landlord to assist tenant to relocate in comparable unit, and potentially to pay cash relocation stipend, prior to landlord withdrawing unit from rental market); *People v. H & H Props.*, 154 Cal. App. 3d 894, 898 n.1, 900-01 (1984) (city had police power to require that landlords pay tenants dislocated by condominium conversion monetary relocation assistance, including fee to defray anticipated rent increases calculated by monthly rent multiplied by length of tenancy in rent control unit); *Kalaydjian v. City of Los Angeles*, 149 Cal. App. 3d 690, 692-94 (1983) (city had police power to require that landlords pay tenants dislocated by conversion to commercial use a flat fee as relocation assistance); *Loab Estates, Inc.* 90 N.E.2d at 27 (city had police power to require that landlords assist tenants to relocate to comparable units at comparable rents prior to removing building from rental market).

Plaintiffs' proffered arguments against this straightforward conclusion lack merit. On the one hand, Plaintiffs contend without citation to any relevant authority that there is "no public benefit" from mitigating the harms suffered by individual tenants. Pl. Trial Br. at 12. However, the Supreme Court rejected this precise argument in *Pennell*:

> As appellants put it, "[t]he objective of alleviating individual tenant hardship is . . . not a 'policy the legislature is free to adopt' in a rent control ordinance." [citation omitted] We reject this contention, however, because we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare. [citation omitted] Indeed, a primary purpose of rent control is the protection of tenants. See, *e.g.*, *Bowles v. Willingham*, 321 U.S. 503, 513, n. 9, 64 S. Ct. 641, 646, n. 9, 88 L. Ed. 892 (1944) (one purpose of rent control is "to protect persons with relatively fixed and limited incomes, consumers, wage earners . . . from undue impairment of their standard of living").

485 U.S. at 12-13. Indeed, given that a recognized public purpose of rent and eviction controls is to "protect tenants from the high cost of dislocation in a tight housing market," *Schnuck*, 935 F.2d at 175, it is plain that mitigating that very same hardship with relocation assistance when it nevertheless occurs due to landlord action likewise is a permissible public purpose.[2]

[2] For these same reasons, Plaintiffs' facial public use claim is without merit.

On the other hand, Plaintiffs argue that there is no essential nexus because the landlords paying the relocation assistance did not cause the housing shortage and high rents that impose hardship on displaced tenants. Pl. Trial Br. at 18-19. That theory reflects a fundamental misunderstanding of the Supreme Court's exactions case law. The question under *Nollan*, *Dolan*, and *Koontz* is not whether a property owner is in some sense responsible for existing conditions (such as a lack of beach access, traffic congestion, or general loss of wetlands), but rather, *taking those background conditions as a given*, what would be the marginal impacts of the proposed development and whether the proposed exaction has "an essential nexus and rough proportionality to those impacts." *Koontz*, 133 S. Ct. at 2595. In *Dolan*, for instance, the Court found an essential nexus between the property owner's proposed development and the exaction required by the city for traffic reduction, without asking whether the property owner was responsible for existing traffic congestion (which she almost certainly was not). 512 U.S. at 387-88; *accord Koontz*, 133 S. Ct. at 2595. Here, the essential nexus between the relocation assistance payment and the impact of a landlord's decision to withdraw property from the rental market is obvious: but for the landlord's withdrawal of his property from the rental housing market, his tenants would have continued to enjoy and inhabit their existing rent-controlled apartments.

2. The 2014 Mitigation Ordinance Does Not Facially Violate The *Dolan* Requirement Of Rough Proportionality Between The Relocation Assistance Payments And The Hardship Caused To Tenants

In order to satisfy *Dolan*, there must be a "rough proportionality" between the hardship imposed on displaced tenants by landlords and the size of the relocation assistance payments due to those tenants. *Dolan*, 512 U.S. at 391. "No precise mathematical calculation is required," but the exaction must be "related both in nature and extent to the impact of the proposed development." *Id*. While this "rough proportionality" test is not met if the relocation assistance payment merely "*could* offset some of" the tenant hardship caused by the displacement, it is met if the relocation assistance payment "*will*, or is *likely to*, offset some of" that hardship. *See id*. at 395 (emphases in original).

Dolan is readily satisfied here. Through application of the Controller's formula, the 2014 Mitigation Ordinance carefully tailors each displaced tenant's relocation assistance payment to the

market-based cost to that specific tenant of obtaining a comparable replacement unit in San Francisco for two years. Payment of that sum to each displaced tenant necessarily "*will*, or is *likely to*, offset some of" the hardship caused by the loss of his or her rent-controlled home. *Dolan*, 512 U.S. at 395 (emphasis in original).

Plaintiffs' efforts to dispute this conclusion are in vain. Plaintiffs first assert that the relocation assistance payment is not roughly proportional in *nature* to the hardship caused by a landlord's withdrawal of property from the residential housing market because there is no requirement that the displaced tenant spend this sum on "housing or rent." Pl. Trial Br. at 19. This argument is insufficient under *Salerno* to support Plaintiffs' facial challenge – undoubtedly *some* (and likely many) displaced tenants will spend their payment on "housing or rent." Indeed, as money is fungible, *all* displaced tenants paying higher rent in replacement housing are in effect spending their payment on "housing or rent."

More fundamentally, there simply is no basis for Plaintiffs' assertion that displaced tenants are not using their payments to mitigate the hardship caused by the loss of their rent-controlled homes unless they spend it directly on housing or rent. Expenditures on transportation, education, or even social interactions in a new neighborhood all properly can mitigate the losses suffered when tenants are forced from their homes and have every aspect of their daily lives disrupted.

Plaintiffs also assert that the relocation assistance payments required by the 2014 Mitigation Ordinance are not roughly proportional in *extent* to the hardship caused by landlord withdrawals, because it is only when displaced tenants voluntarily choose to stay in San Francisco's overheated market that they have any potential need for the two-year rent subsidy calculated by the Controller's formula. Pl. Trial Br. at 19-20. However, avoiding the displacement of San Francisco residents from their neighborhoods is a legitimate public purpose, and the relocation assistance payment clearly is roughly proportional to (albeit less than) the harm caused to those tenants who do seek to stay in the City despite the loss of their rent controlled homes. This alone defeats Plaintiffs' facial challenge under *Salerno*. Moreover, for tenants who instead leave San Francisco and obtain lower market-rate rents elsewhere, the difference in market rents (subject to market imperfections) is roughly proportional to the decreased desirability of the

tenants' new homes, and therefore the relocation assistance payment again is roughly proportional to (albeit less than) the harm to those tenants of being displaced from their rent-controlled San Francisco homes.

VI. PLAINTIFFS' FACIAL SUBSTANTIVE DUE PROCESS CLAIMS FAIL.

Plaintiffs also allege that the Ordinance on its face violates the substantive component of the Due Process Clause of the Fourteenth Amendment. The basis for Plaintiffs' substantive due process challenge is somewhat unclear. Plaintiffs' Complaint offered a hodgepodge of rationales in support of its substantive due process claim. *See* Dkt. 1, Complaint, at 16-17. Perhaps sensing the weakness in these arguments, Plaintiffs' due process arguments in their Trial Brief focus exclusively on the allegedly retroactive nature of the Ordinance, in that it applies to landlords who issued Ellis Act notices prior to its June 1, 2014 effective date. *See* Pl. Trial Br. at 20-21.

As an initial matter, the 2014 Mitigation Ordinance is not properly classified as retroactive, because it applies only to landlords who oust their tenants from possession after the active date. Moreover, even if Plaintiffs were to prevail on their due process retroactivity claim, that would provide a basis not for invalidating the Ordinance in its entirety, but only for enjoining its retroactive application. *See ACLU of Nev. v. Masto*, 670 F.3d 1046, 1050 (9th Cir. 2012).

Even on its own terms, Plaintiffs' due process retroactivity claim fails. As previously discussed, the Ordinance's stated purpose is to "mitigate the adverse impacts for people displaced by Ellis Act evictions." S.F. Trial Ex. 10 at 17. That purpose plainly is a legitimate one, as courts all across the country have recognized for decades. *See supra* at 10-11. Nor does the allegedly retroactive nature of the 2014 Mitigation Ordinance change that conclusion. It is well established that governments "may enact legislation with retroactive effect so long as it … pass[es] constitutional muster under rational basis scrutiny." *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1570 (9th Cir. 1993). Thus, the Supreme Court has explained that retroactive economic legislation may be unconstitutional only "if it imposes *severe* retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is *substantially disproportionate* to the parties' experience." *Eastern Enters. v. Apfel*, 524 U.S. 498, 528-29 (1998) (plurality opinion) (emphases added); *see also id.* at 549 (Kennedy, J., concurring)

(discussing "due process protection … against retroactive laws *of great severity*" (emphasis added)). The 2014 Mitigation Ordinance does not meet that high threshold at all, and most certainly not on its face. It is neither unforeseeable (since the Ordinance had previously required a relocation assistance payment of precisely the same kind) nor disproportionate (both because it is pegged to the harm a displaced tenant will face, and because in many cases remains at the same levels as before the recent amendment). It does not violate the Due Process Clause.

VII. PLAINTIFFS' FACIAL ELLIS ACT CLAIM FAILS.

As construed by the California Courts of Appeal, the Ellis Act preempts only local ordinances that "[i]mpose a prohibitive price on a landlord's exercise of the right . . . to go out of business." *Pieri v. City & County of S.F.*, 137 Cal. App. 4th 886, 893 (2006). As the City persuasively explains, Plaintiffs cannot possibly establish on a facial basis that the 2014 Mitigation Ordinance imposes such a prohibitive price because (1) the California Court of Appeal found that the tenant relocation assistance payments under the 2005 version of the Ordinance did not impose such a prohibitive price, *see id*. at 894, and (2) in many instances landlords would pay that same level of relocation assistance under the 2014 Mitigation Ordinance.

Recognizing this, Plaintiffs instead attempt to use their Ellis Act facial challenge to assert that the 2014 Mitigation Ordinance is a taking under the California Constitution pursuant to the "reasonable relationship" test for legislatively mandated, formulaic mitigation fees as set forth in *San Remo Hotel L.P. v. City & County of S.F.*, 27 Cal. 4th 643, 671 (2002). While the Court should not even consider this unpled claim, if it does it should reject it for all the reasons that it should reject Plaintiffs' *Nollan* and *Dolan* claims, as explained in Part V, *supra*.

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