Docket No. 14-17283

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL LEVIN, ET AL.,
Plaintiffs and Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Appellant,

DAVID GREENE AND ALL OTHERS SIMILARLY SITUATED,
Intervenors.

Appeal from the United States District Court for the Northern District of California,
Charles R. Breyer, District Judge, Case No. 3:14-CV-03352-CRB.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF CITY AND COUNTY'S REQUEST TO VACATE DISTRICT COURT JUDGMENT

Andrew W. Schwartz (State Bar No. 87699)
Tori Ballif Gibbons (State Bar No. 286112)
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816

Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES

The League of California Cities ("League") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the City and County of San Francisco's ("City's") request to vacate the District Court judgment. This motion is made under Federal Rule of Appellate Procedure 29(b) and Ninth Circuit Rule 29-2(b). The League sought the consent of all parties in filing its amicus brief. Appellee Levin and Appellant City consented to the filing of the amicus brief, but Intervenors did not respond; accordingly, the League submits this motion for leave to file.

I. THE MOVANT'S INTEREST.

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as

having such significance and files this brief to address issues not addressed by any of the parties.

II. ARGUMENT.

In this appeal, the City seeks a vacatur of a District Court decision invalidating a San Francisco ordinance ("Ordinance") requiring Appellees, landlords of residential rental property ("Landlords"), to pay relocation costs to their tenants evicted under the Ellis Act, Cal. Gov't Code § 7060(a). The District Court found that the Ordinance effected a "taking" of the landlord's relocation payments.

Though the League takes no position with respect to the merits of the Ordinance at issue, the League has an interest in the interaction of local rent ordinances with the Ellis Act, Cal. Gov't Code § 7060(a), as well as in ensuring that the takings doctrine does not unnecessarily burden cities' well-established authority to experiment with land use regulatory programs to protect community interests. The League is particularly sensitive to decisions that may impede the ability of local governments to address California's growing demand for affordable housing in urban markets. This case implicates these concerns.

First, the District Court opinion passed over a potentially dispositive state law issue—whether the Ordinance is preempted by the Ellis Act—instead proceeding directly to the constitutional takings question, contrary to well established Supreme Court and Ninth Circuit precedent requiring courts to avoid constitutional issues unless absolutely necessary. In doing so, the District Court violated rules of federalism and sound judicial administration and created unnecessary and inappropriate takings law.

Second, Landlords prayed for injunctive and declaratory relief for both their state statutory and constitutional claims; they did not request damages for either cause of action. Accordingly, a decision to invalidate the Ordinance based on the preemptive effect of the Ellis Act could have provided Landlords with all the relief they sought in their complaint.

The only difference between a decision on the regulatory takings claim and the state law preemption issue is the basis upon which Landlords could claim attorneys' fees. Although an adjudication of the validity of the Ordinance under state law might have prevented

Landlords from seeking fees under 42 U.S.C. § 1988, they still could have pursued fee recovery under California Code of Civil Procedure section 1021.5, as another petitioner did on a similar Ellis Act claim. Moreover, even if Landlords could not successfully recover attorneys' fees for a judgment in their favor based on state law, that hardly outweighs the public interest in avoiding unnecessary decisions construing the constitution, which has been referred to as the most "deeply rooted" doctrine in the process of constitutional adjudication. *See Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

For all these reasons, the District Court's decision should be vacated.

III. CONCLUSION.

The League's member cities have a direct interest in the outcome of this case and, therefore, respectfully move this Court to grant this motion for leave to file the accompanying amicus curiae brief addressing the above issues.

DATED: March 22, 2016 SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Andrew W. Schwartz
ANDREW W. SCHWARTZ

Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES,

CERTIFICATE OF SERVICE

I certify that on March 22, 2016, I filed the foregoing Reply Brief using the Court's CM/ECF system. All participants in this case are registered to receive service with that system and will receive a copy of this MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF CITY AND COUNTY'S REQUEST TO VACATE DISTRICT COURT JUDGMENT upon its filing.

/s/ David Weibel
David Weibel

767014.4

Docket No. 14-17283

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL LEVIN, ET AL.,
Plaintiffs and Appellees,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Appellant,

DAVID GREENE AND ALL OTHERS SIMILARLY SITUATED,
Intervenors.

Appeal from the United States District Court for the Northern District of California, Charles R. Breyer, District Judge, Case No. 3:14-CV-03352-CRB.

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF CITY AND COUNTY'S REQUEST TO VACATE DISTRICT COURT JUDGMENT

Andrew W. Schwartz (State Bar No. 87699)
Tori Ballif Gibbons (State Bar No. 286112)
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816

Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* League of California Cities aver that they are a nonprofit corporation which does not issue stock and which is not a subsidiary or affiliate of any publicly owned corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

California Cases

Federal Statutes

California Statutes

Other Authorities

INTRODUCTION

Appellant City and County of San Francisco ("City") has presented compelling arguments to this Court of Appeals to vacate the District Court judgment and dismiss the appeal. If the Ninth Circuit assumes jurisdiction, however, *Amicus Curiae* League of California Cities ("League") submits that the Court of Appeals should vacate the District Court opinion and remand the case with instructions that the District Court consider a potentially dispositive issue of state law before reaching issues of constitutional law.

In deciding that the City's ordinance requiring Appellees ("Landlords") to pay relocation costs to tenants evicted from their rental apartments under the Ellis Act, Cal. Gov't Code § 7060 *et seq*. ("Ordinance"), effected an unconstitutional taking, the District Court violated a well-established principle of judicial review: it decided the case on a constitutional issue, rather than first adjudicating a potentially dispositive state law claim. The judicial practice of avoiding constitutional issues when non-constitutional grounds are potentially dispositive is well established. *See, e.g., Alma Motor Co. v. Timken-Detroit Axle Co*., 329 U.S. 129, 136-37 (1946). Courts avoid deciding

constitutional issues whenever possible to promote sound judicial administration and to avoid convoluting constitutional jurisprudence. *See Tung Chi Jen v. Immigration & Naturalization Serv.*, 566 F.2d 1095, 1096 (9th Cir. 1977). Here, the District Court had ample state law grounds on which to decide the case, yet inappropriately skipped directly to analysis of Landlords' constitutional claims.

Since the mid-1980s, the Ellis Act has forbidden California public entities from compelling the "owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease, except for [certain] guestrooms or efficiency units within a residential hotel . . . ." Cal. Gov't Code § 7060(a). The Ellis Act does, however, allow public entities to mitigate adverse impacts on displaced persons; accordingly, the City's Rent Code placed certain notice and disability accommodation requirements on a landlord's withdrawal of units from rental. *See* San Francisco Admin. Code § 37.9(a)(13).

In 2014, the City passed the Ordinance establishing new tenant relocation payment obligations for property owners invoking their Ellis Act rights to withdraw a property from the rental market. Excerpts of

Record ("ER") 3:538.[1] The Ordinance required property owners to pay "an amount equal to the difference between the unit's monthly rental rate at the time the landlord files the notice of intent to withdraw rental units with the Board, and the market rental rate for a comparable unit in San Francisco," for a two year period, divided equally by the number of tenants in the unit. San Francisco Admin. Code § 37.9A(e)(3)(E)(ii) and (iii).

Faced with paying their tenants more than $1,000,000 dollars under the 2014 Ordinance, Landlords sought injunctive and declaratory relief from the District Court under the state law theory that the Ordinance violated the Ellis Act, as well as the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. On October 21, 2014, the District Court entered judgment for Landlords on their constitutional claims, striking down the 2014 Ordinance as a regulatory taking on its face, without addressing Landlords' state law challenge to the regulation. ER 1:4-5.

[1] Citations to the ER are to volume:page.

The City appealed the District Court's ruling. ER 2:116. Landlords argue that the City's appeal is now moot because the City has since enacted new legislation to replace the 2014 Ordinance. The City opposes this argument, explaining that the proper course would be for this Court to vacate the underlying judgment and dismiss the appeal, or to reverse the District Court's judgment on the merits. The League agrees with the City's position regarding vacatur and dismissal of the appeal. The League, however, asserts that if this Court rejects the City's argument for dismissal and assumes jurisdiction of the appeal, the District Court decision on the constitutional claim should be vacated and the case remanded to the District Court for a decision on Landlords' state law claims, prior to reaching any constitutional issue.

Had the District Court first considered whether the Ordinance was preempted by the Ellis Act, a favorable decision on that claim would have obviated the need to reach the federal takings question. As detailed, *infra*, a determination on the state law issue would have allowed the District Court to enjoin enforcement of the Ordinance and provided Landlords with the entirety of the relief they sought. For these

reasons, the District Court's inappropriate ruling on the constitutional takings issue should be vacated.

STATEMENT OF INTEREST

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The League is concurrently filing a motion for leave to file an amicus brief in support of City's request for vacatur of the District Court's decision, pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Rule 29-2(b) of the Ninth Circuit Rules.

Counsel for the League prepared the entire brief. No outside person or entity contributed funding for this brief.

ARGUMENT

I. The District Court Decision Must Be Vacated Because That Court Inappropriately Decided the Case on the Constitutional Takings Issue, Rather Than First Deciding Landlords' Potentially Dispositive State Law Claim.

The District Court's failure to consider the potentially dispositive non-constitutional issues in this case before reaching constitutional questions conflicts with Supreme Court and Ninth Circuit precedent requiring sound judicial administration and constitutional avoidance. Landlords' complaint provided the District Court with a distinct state law preemption question upon which it could have decided the case. The District Court's decision should be vacated to remedy this error.

A. Under a Well Established Principle of Judicial Administration, Courts Must Avoid Deciding Constitutional Claims Where There Are Potentially Dispositive Non-Constitutional Issues.

The Supreme Court has repeatedly held that "[i]f two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided." *Alma Motor Co.*, 329 U.S. at 136-37; *see, e.g.*, *Neese v. S. Ry. Co.*, 350 U.S. 77, 78 (1955); *Peters v. Hobby*, 349 U.S. 331, 338 (1955).

This principle of judicial administration applies to lower courts. *Alma Motor Co.*, 329 U.S. at 136-37; *Tung Chi Jen*, 566 F.2d at 1096 ("Federal courts will not resolve [constitutional] claims if an alternative, nonconstitutional basis for decision is available.").

So foundational is this practice of avoiding constitutional questions whenever possible that courts may raise dispositive non-constitutional grounds *sua sponte*, even where the parties and the lower court have not identified those non-constitutional issues. *See, e.g.*, *Tung Chi Jen*, 566 F.2d at 1096. In *Alma Motor Company*, the Supreme Court went so far as to vacate and remand the case for further proceedings on non-constitutional grounds *after* the Court had already heard oral argument on the constitutional issue. *Alma Motor Co.*, 329 U.S. at 142. The Court acknowledged that "much time ha[d] been wasted" by the failure to notice the non-constitutional issue sooner, but insisted that to decide the case on the constitutional question would be to continue on the "wrong course." *Id.*; *see also Mackey v. Mendoza-Martinez*, 362 U.S. 384, 385-87 (1960) (after oral argument, the Court *sua sponte* asked the parties to brief a potentially dispositive non-constitutional question).

This rule is one of restraint and sound judicial administration, intended to bind all adjudicatory bodies ranging from administrative agencies to the United States Supreme Court. *Tung Chi Jen*, 566 F.2d at 1096. So important is the avoidance of unnecessarily deciding constitutional questions that courts have "emphasized [it] as one of the bases for vacatur." *Clarke v. United States*, 915 F.2d 699, 708 (D.C. Cir. 1990) (*citing In re Applications of El Paso*, 887 F.2d 1103, 1006 (D.C. Cir. 1989) (remanding to district court for vacation of its decision "insofar as it determine[d] the constitutional question"); *see also Kremens v. Bartley*, 431 U.S. 119, 128, 133-34 & n.15 (1977) (policy of avoiding unnecessary constitutional decisions animated holding that passage of new legislation mooted case and lower decisions should be vacated); *Nat'l Black Police Ass'n v. Dist. of Columbia,* 108 F.3d 346, 353-54 (D.C. Cir. 1997) (finding that vacatur of unnecessary constitutional analysis "serves the public interest"). Here, the District Court's decision passed over the dispositive state law issue to rule on the constitutional takings claim in violation of this principle and, therefore, must be vacated. *See* ER 1:4-27.

B. Landlords Raised Potentially Dispositive State Law Claims Before the District Court.

Landlords raised a distinct, state law issue on which the District Court could have decided this case. The League takes no position as to the merits of Landlords' Ellis Act preemption claim, but the necessity of considering this state law claim first, before deciding any constitutional claim, is clear. The Fourth Cause of Action in Landlords' complaint alleged that "[t]he Ordinance's tenant payments provisions [on their face] constitute an unreasonable, excessive, and impermissible burden on a property owner's Ellis Act right to withdraw units from the rental market . . . in violation of the Ellis Act." ER 3:605. Landlords echoed these allegations that the Ordinance violated the Ellis Act in their "as-applied" challenge in the Tenth Cause of Action. ER 3:611-12; *see also* ER 3:600-601, ¶¶ 72, 78. Even with the District Court's decision to consider only Landlords' facial claims, the state law preemption issue raised in the Fourth Cause of Action presented possibly dispositive grounds upon which to decide the case.

Moreover, existing state court decisions regarding Ellis Act preemption suggest that the challenge to the Ordinance under state law could have been in favor of Landlords, thus obviating the need to reach

the constitutional takings question. In reviewing a challenge to the 2014 Ordinance under this same state law theory, the San Francisco Superior Court held that the payments required under the Ordinance were not "reasonable" under *Pieri v. City and County of San Francisco*, 40 Cal. Rptr. 3d 629 (Cal. Ct. App. 2006) and, thus, the Ordinance was preempted by the Ellis Act. *See* Dkt. 10-2 at 71-73 (*Jacoby et al. v. City and Cnty. of S. F.*, S.F. Superior Court No. CGC-14-540709 (Mar. 19, 2015 Order)). After the City enacted amendments to the Ordinance in 2015, another group of landlords challenged the amended law as preempted by the Ellis Act and as a regulatory taking. ER 2:109-12 (*Coyne v. City & Cnty. of S. F.,* S.F. Superior Court No. CPF-15-514382 (Oct. 2, 2015 Order)). Avoiding a ruling on the constitutional issue, the court held that the amended ordinance was preempted, *id.*; the City has since appealed.

Given these court decisions directly addressing the Ellis Act preemption question with respect to the 2014 Ordinance and the amended 2015 version, there is a reasonable possibility that the District Court also could have found that the 2014 Ordinance was preempted. This state law dispute is precisely the threshold question the District

Court should have addressed in its decision. Accordingly, the District Court decision addressing Landlords' constitutional claims must be vacated and the case should be remanded to the District Court for a decision on the state law claim.

II. A Favorable Decision on Landlords' State Law Claims Would Have Offered Landlords the Same Relief That They Sought and Received from the District Court Based on the Constitutional Claim.

In scrupulously avoiding constitutional questions where there are non-constitutional grounds for decision, courts have found that the basis for granting the plaintiff relief does not matter if the effect of the judgment is the same. As the Third Circuit explained in *Allen v. Aytch*, "an injunction based upon a breach of a contract or of local prison rules might well be every bit as effective as one predicated upon a constitutional infraction." 535 F.2d 817, 822 (3d Cir. 1976). Here, a decision on Landlords' state law preemption claims would have offered them all the relief that they received from the District Court's constitutional takings decision.

A. Landlords Sought Only Equitable Relief and Not Damages.

In their prayer for relief, Landlords sought only a declaratory judgment and preliminary and permanent injunctions against the City to prevent further action to enforce the Ordinance. ER 3:612-13. Landlords also made clear in their briefing of pre-trial motions that they seek equitable relief only, not damages. *See Levin et al. v. City and Cnty. of S. F.*, No. 3:14-CV-03352-CRB, U.S. District Court Dkt. No. 19 at 5 (arguing that "claimants that raise taking claims that seek relief other than money damages need not resort to state court for such damages before litigating their claims in state court.")

Although neither party questioned Landlords' entitlement to equitable relief for a regulatory takings claim, the District Court granted the requested declaratory and injunctive relief in its October 21, 2014 Order. *See* ER 1:4, 27.[2] Landlords sought the same equitable

[2] We note authority indicating that equitable relief as a remedy for a taking conflicts with the theoretical basis for takings, which requires compensation for a valid regulation that imposes a severe economic burden on the claimant. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005) ("The [Just Compensation] Clause expressly requires compensation where government takes private property '*for public use*.' It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper*

relief for their Ellis Act preemption claim. Thus, because Landlords did not seek damages, a decision on non-constitutional grounds would have provided them with all the relief they sought in their constitutional claims.

B. Landlords Could Still Have Sought Attorneys' Fees Under Their State Law Claims.

In their complaint, Landlords asked for attorneys' fees under 42 U.S.C. § 1988, which would not apply to Landlords' state law claims. ER 3:613. Yet, Landlords could still have sought an attorneys' fee award under California Code of Civil Procedure section 1021.5, the private attorney general doctrine. Code of Civ. Proc. § 1021.5. Indeed, the

---

interference amounting to a taking.") *quoting First English Evangelical Lutheran Church of Glendale v. Cnty. of L. A.*, 482 U.S. 304, 315 (1987)); *see also Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 (2003) (noting that legitimate government action is precondition of takings claim). Equitable relief barring enforcement of a regulation, on the other hand, is an appropriate remedy for violations of due process and equal protection. *See* John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 Vt. L. Rev. 695, 706-07 (1993) (discussing the Court's "melding" of remedies in the due process and takings contexts, and noting that "[t]he traditional remedy in a due process case is an injunction"). *Cf.* Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 Harv. L. Rev. 1630, 1631-33 (2015) (arguing that equitable remedies are available for takings).

Plaintiffs' attorney in the *Jacoby* case pursued this course in seeking attorneys' fees. *See* Attachment A (*Jacoby et al. v. City and Cnty. of S. F.*, S.F. Superior Court No. CGC-14-540709, Reply in Support of Petitioners' Motion for Attorneys' Fees (May 14, 2015)).[3]

Although the state court denied the attorneys' fee award in *Jacoby*, attorneys' fees may have been available to Landlords here under the same theory. Even if attorneys' fees were not recoverable under Appellee's state law claim, the availability of attorneys' fees should not override the important policy of judicial restraint to avoid unnecessary constitutional determinations. As the Supreme Court explained, "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (remanded and reversed on other grounds).

[3] This document is available on the S.F. Superior Court website at: http://query.sftc.org/Minds_asp_pdf/Viewer/ViewerPageNew.asp?Web_Server=QUERY.SFTC.ORG&MINDS_Server=ntimagex&Category=C&DocID=04918940&Digest=6754dd684853d31e5aed75b2e54febe354e0fb86.

Where the highest court in the United States has been willing to divest itself of jurisdiction over a case it already heard to uphold this principle, *Alma Motor Co.*, 329 U.S. at 142, it cannot now be said that Landlords' potential claim to attorneys' fees renders the District Court's constitutional adjudication "unavoidable." The District Court decision inappropriately reaching Landlords' constitutional claims should be vacated to uphold this fundamental principle of constitutional jurisprudence, regardless of Landlords' ability to seek attorneys' fees.

III. The District Court Decision Should Be Vacated and Remanded for the Additional Reason that the District Court Improperly Constitutionalized Local Land Use Regulation.

One of the fundamental motivations behind the practice of avoiding unnecessary constitutional questions is to promote judicial restraint and to avoid a plethora of constitutional law interpretations. *See Tung Chi Jen*, 566 F.2d at 1096. Here, the District Court ignored this "traditional policy" and based its decision on an incorrect interpretation of regulatory takings law— exactly the result the doctrine of "sound judicial administration" is meant to avoid. *See Alma Motor Co.*, 329 U.S. at 133-34, 142 (lower court should have decided

whether federal statute requiring payment of royalties applied to goods before considering constitutionality of statute).

By unnecessarily venturing into federal constitutional territory, the District Court has compromised essential police power held by California cities. The City correctly argues that the District Court's finding—that the Ordinance, a local regulation of land use, is subject to heightened judicial scrutiny under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)—sweeps aside several decades of regulatory takings precedent. The Supreme Court has consistently limited *Nollan/Dolan* heightened scrutiny to exactions—where the government could demand the applicant's property "as a condition for granting a development permit the government was entitled to deny." *Lingle*, 544 U.S. at 546-47; *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2595 (2013) (acknowledging that *Nollan/Dolan* apply to government conditions imposed on applications for real estate development). Exactions and regulations of land use, such as the Ordinance here, are, according to the Court, "worlds apart." *Lingle*, 544 U.S. at 547-48.

The Supreme Court has never applied *Nollan/Dolan* heightened scrutiny to a legislative regulation that, like the Ordinance, applies to a broad class of property owners, rather than to an ad hoc development application. This is because the takings doctrine arises from the concern that "some people alone [would be required] to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan*, 483 U.S. at 835, n.4 (citations omitted); *see also Dolan*, 512 U.S. at 384-85 (distinguishing between "essentially legislative determinations classifying entire areas of the city," which are subject to deferential judicial review, and cases where "the city made an adjudicative decision to condition [an] application for a building permit on an individual parcel," which is subject to heightened scrutiny); *Koontz*, 133 S.Ct. at 2594-2595 (heightened scrutiny applies where "owners apply for land-use permits" and where the government could use its "discretion to deny a permit" to coerce a property owner to dedicate property).

The League has particular concerns with the District Court's expansion of heightened scrutiny under principals of federalism. In California, legislative land use regulation is entitled to deferential

judicial review, rather than the heightened standard of *Nollan* and *Dolan*. *See Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 986-87 (Cal. 2015) (legislative inclusionary housing ordinance constituted a land use limitation, not an exaction, and therefore is not subject to heightened scrutiny); *San Remo Hotel v. City and Cnty. of S. F.*, 41 P.3d 87, 105-06 (Cal. 2002) (legislative housing replacement fee not subject to *Nollan*/*Dolan* scrutiny because "generally applicable legislation is subject to the ordinary restraints of the democratic political process"). In finding that *Nollan*/*Dolan* heightened scrutiny applies to the City's legislative ordinance—an ordinance that does not exact a property interest as a condition of approval of an individual development application—the District Court adopted a new federal constitutional test for California local land use regulations that could be applied to invalidate even garden variety zoning laws.

The District Court's passing over a potentially dispositive issue of state law here to reach the constitutional issue—and applying a constitutional test in a novel way that is inconsistent with state law—improperly federalizes and constitutionalizes local land use and economic planning, a quintessential local government responsibility.

See Lingle, 544 U.S. at 544 (means ends test not applicable to commercial rent control statute where that searching level of review would require "courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited"); *Griswold v. Conn.*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."); *Dodd v. Hood River Cnty.*, 136 F.3d 1219, 1230 (9th Cir. 1998) ("[t]he Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards'") (citation omitted); *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 828-29 (4th Cir. 1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts . . . .").

The League has a responsibility to the public and to all property owners to regulate the use of land to promote the general health, safety, morals, and welfare. The District Court's encroachment into this prerogative is not only improper, it is also unnecessary because the District Court could potentially have resolved the case on a state law

ground, thus avoiding the need to adopt a controversial and overbroad constitutional test.

CONCLUSION

The League supports the City's contention that vacatur and dismissal of the Landlords' appeal is the appropriate result. Should this Court instead assume jurisdiction over the appeal, the Court should vacate the District Court decision and remand the case to the District Court for a decision on the state law issue, before the Court reaches any constitutional question.

DATED: March 22, 2016 SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Andrew W. Schwartz
ANDREW W. SCHWARTZ

Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF COMPLIANCE

(Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32)

I hereby certify that, pursuant to Rule 29(d) of the Federal Rules of Appellate Procedure and Rules 29-2(c) and 32 of the Ninth Circuit Rules, the attached amicus brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word size 14 New Century Schoolbook font. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains **3,717** words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

DATED: March 22, 2016 SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Andrew W. Schwartz
ANDREW W. SCHWARTZ

Attorneys for Amici Curiae
LEAGUE OF CALIFORNIA CITIES

765297.9

CERTIFICATE OF SERVICE

I certify that on March 22, 2016, I filed the foregoing Reply Brief using the Court's CM/ECF system. All participants in this case are registered to receive service with that system and will receive a copy of this BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF CITY AND COUNTY'S REQUEST TO VACATE DISTRICT COURT JUDGMENT upon its filing.

/s/ David Weibel
David Weibel

ATTACHMENT A

ANDREW M. ZACKS (SBN 147794)
EMILY H. LOWTHER (SBN 284943)
ZACKS & FREEDMAN, P.C.
235 Montgomery Street, Suite 400
San Francisco, CA 94104
Tel: 415.956.8100
Fax: 415.288.9755

Attorneys for Plaintiffs and Petitioners
Jerrold Jacoby, Martin J. Coyne, Small Property Owners of San Francisco Institute, Golden Properties, LLC, and Howard Weston

SUPERIOR COURT – STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO – UNLIMITED CIVIL JURISDICTION

JERROLD JACOBY, MARTIN J. COYNE, SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE, a California non-profit corporation, GOLDEN PROPERTIES, LLC, a Delaware limited liability company, and HOWARD WESTON,

Plaintiffs and Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a California municipal corporation,

Defendant and Respondent,

RENE YANEZ, RIO YANEZ, TERESA DULALAS, CHARLES GASPERI, DIEGO DELEO, NATHA SMITH, DAVID ALLEN JAMES HAGLER, DEBORAH ROJANO, and MIMI LAY,

Intervenors.

CASE NO. CGC-14-540709

REPLY IN SUPPORT OF PETITIONERS' MOTION FOR ATTORNEYS FEES PURSUANT TO CCP § 1021.5

Date: May 14, 2015
Time: 9:30 a.m.
Dept.: 501
Judge: Hon. Ronald E. Quidachay

I. INTRODUCTION/STATEMENT OF FACTS

Respondent's opposition misses the mark. In failing to properly address Petitioners' argument that the Court should award them fees under CCP § 1021.5, Respondent erroneously analyzes and cites unsupportive case law regarding CCP § 1021.5's balancing test, and twists the Court's enjoinment of the Tax – of which would have been an unconstitutional, statutorily preempted and undeserved windfall to tenants at their landlord's expense – into an "injury" to the tenants that could not benefit from it. Finally, Respondents do not address the second prong of the analysis under CCP § 1021.5 – that a significant benefit was conferred on the general public or a large class of persons by Petitioners' prevailing on the action – thus, it concedes that Petitioners have in fact conferred such a benefit. Petitioners have met their burden in showing that an award of attorneys fees under CCP § 1021.5 is appropriate. Therefore, the Court should use its discretion to award Petitioners their reasonable attorneys' fees in this action.

II. ARGUMENT

A. Petitioners Have Correctly Analyzed the Estimated Value Test of CCP 1021.5 and Met Their Burden in Proving the Burden of This Litigation Outweighed any Economic Benefit to Petitioners.

To determine the "estimated value" of the case, a court must (1) first "determine the monetary value of the 'gains actually attained' by the successful litigants"; and (2) then "discount these total benefits by some estimate of the probability of success at the time the vital litigation decisions were made" (hereinafter the "Estimated Value Test"). (*Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 9 (internal quotations omitted)) Here, Respondent erroneously argues (1) Petitioners have not plead evidence to meet the Estimated Value Test of CCP 1021.5, and (2) makes the irrational assertions that at the outset of the litigation Petitioners had a "one in third chance of victory" (Opposition p.5:8) and by the time the *Levin* Judgment has issued, Petitioners should have stopped litigating as

"victory was assured."

In support of its misleading position that Petitioners' have not met their burden in the Estimated Value Test, Respondent cites *Beach Colony II v. Cal. Coastal Comm'n* (1985) 166 Cal.App.3d 106 ("*Beach Colony II*"). In *Beach Colony II*, the petitioner failed to meet the Estimated Value Test of CCP 1021.5 as "[i]ts sole contention [was] that the general public got something for nothing at Colony II's expense," which, as the court recognized, is "not the balancing test required to justify a shift of fees." (*Beach Colony II, supra,* 166 Cal.App.3d at p.113.) In failing to submit evidence to meet the Estimated Value Test of CCP § 1021.5, Petitioner in *Beach Colony II* made "no attempt to compare its litigation costs to the immediate economic benefit it personally received . . . ."

Here – unlike the petitioners in *Beach Colony II* – Petitioners correctly analyzed Estimated Value Test and entered evidence in support of their showing that their financial burden in bringing the action outweighed any economic benefit conferred by prevailing: Petitioners have filed with their opening papers in support this motion supporting declarations as to the amounts that would have been exacted from each Petitioner under the Tax had it not been enjoined, a supporting declaration from Petitioner's counsel indicating their litigation expenses, and, as they were required to do under the Estimated Value Test, "'discount[ed] these total benefits by some estimate of the probability of success at the time the vital litigation decisions were made." (*Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 9 ("*Los Angeles Police*").

As stated in Petitioners' opening memorandum, and as recognized *numerous* times by Respondent[1], the probability of success at the outset of this action – i.e. proving up a facial

[1] See, Respondent's Demurrer to Petition for Writ of Mandate, p. 6:7-14; Respondent's Opposition to Petition for Writ of Mandate, p. 4:6-25; Respondent's Demurrer to First Amended Petition for Writ of Mandate, p. 7:8-16; Respondent's Opposition to First Amended Petition for Writ of Mandate, p. 8:1-8

challenge to an ordinance – was slim to none, thus any benefit conferred upon Petitioners by the success of this action should be heavily discounted. (See, *Assn. of Cal. Ins. Companies v. Poizner* (2009) 180 Cal.App.4th 1029, 1054 ["A facial challenge is the most difficult challenge to mount successfully . . . [t]he moving party must show that the challenged statutes or regulations inevitably pose a present total or fatal conflict with applicable prohibitions."]) Respondent also makes the bald assertion that any financial gain by Petitioners Jerrold Jacoby and Golden Properties, LLC. should be *included* but not discounted in the Estimated Value Test because they subsequently dismissed the action, however, it cites no authority in support of this contention; thus, it should be ignored. If anything, any potential gains to Petitioners who have dismissed the action should not be considered. If the Court is inclined to include any financial gain to Petitioners who have dismissed the action, then these gains would also be subject to a discount per the Estimated Value Test.

Moreover, despite its previous assertions of the grave challenges associated with bringing a facial challenge, Respondent now designates the "probability" of success of this action at the outset as *one in three*, and discounts Petitioners' total benefits by this embellished probability of success. (Opposition p.5:7-12) Respondent bases its estimate of probability on several cases that held the Ellis Act preempted local ordinances (Opposition pp.5:24 – 6:10). Respondent then downplays its victory in *Pieri v. City & County of San Francisco* (2006) 137 Cal.App.4th 886, which is the most recent decision it cites regarding local ordinance challenges for violation of the Ellis Act. In fact, there is an even more recent victory in favor of upholding a local ordinance against an Ellis Act preemption challenge in *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13. Thus, as is shown by the more recent cases involving such challenges, the chances of prevailing in the action at hand weighed heavily in Respondent's favor. The reality is this: Petitioners chance of successfully proving

the Tax was facially preempted at the outset of this litigation – "the most difficult challenge to mount successfully" – was slim to none. (See, *Assn. of Cal. Ins. Companies v. Poizner* (2009) 180 Cal.App.4th 1029, 1054) Even a *very* conservative estimate of one in twenty chance of probability of success would heavily discount any economic gain to Petitioners, thus far outweighing the financial burden of bringing this action.[2]

Respondent's next contention, that Petitioner's chances of success after the *Levin* decision, were "assured," is also unsupported and erroneous: California courts are not bound by decisions of the lower federal courts, even on federal questions (See, *Wagner v. Apex Marine Ship Management Corp.* (2000) 83 Cal. App. 4th 1444, 1451), and thus Respondent's assertion that Petitioners should have stopped litigating the action to its conclusion due to the *Levin* decision is absurd. The case it cites in support of this position, *Abouab v. City & County of San Francisco* (2006) 141 Cal.App.4th 643, does not save Respondent's irrational argument, as it is easily distinguished from the case at hand: In *Abouab*, the petitioners filed a petition against the City of San Francisco to compel the City to investigate a potential change of ownership of One Market Place, San Francisco CA. (*Abouab v. City & County of San Francisco* (2006) 141 Cal.App.4th 643.). Prior to the *Abouab* petitioners filing their petition, the City had not been made of aware of the nature of the action or the property involved, but once it was served, it immediately agreed to investigate the property at issue. (*Id.* at 651-652) After investigation had begun, the City asked petitioners to dismiss the petition, but petitioners refused, despite the City performing the exact investigation they had requested the court compel. (*Id.* at 652) Several years later, through which time petitioners continued to litigate the action, the trial court dismissed the petition as moot, but retained jurisdiction over fees. (*Id.* at

[2] If considering only the present Petitioners ($351,432 x 5% = $17,572); if also considering Petitioners who dismissed ($1,039,432 x 5% = $51,972); compared to the $89,578.50 Petitioners seek in fees, the fees incurred in bringing the action heavily outweigh any economic benefit to Petitioners.

652) After the investigation had been completed, petitioners moved for fees under CCP 1021.5. (*Id.* at 657) The trial court denied petitioners fees, and the appellate court confirmed, reasoning in part that petitioners expended unnecessary efforts in "injecting themselves" into an action that had been mooted by the City's investigation. (*Id.* at 672)

Abouab is easily distinguished from the case at hand: here, there has been no such "cooperation" by the City, as there had been in *Abouab*. Here, the City did not, and has never agreed that the Tax was unconstitutional, or facially preempted. Respondent City has continuously denied the illegality of the Tax, even despite the *Levin* decision, and continues to do so through its appeals of both the judgment in this action and the *Levin* decision. Unlike the petitioners in *Abouab*, Petitioners have not unnecessarily "injected" themselves into a situation via petition action. They *necessarily* had to continue litigating the action against the City after the *Levin* decision to ensure their rights were protected, thus Petitioners should not be denied attorneys' fees on this basis.

B. Petitioners Have Enforced an Important Statutory Rights.

As Respondent acknowledges, the Court has discretion to determine whether Petitioners have enforced an important statutory right. (*Woodland Hills Residents Assn v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 935) As detailed in Petitioners' opening papers, the California Legislature specifically enacted the Ellis Act to overrule *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97 and protect the rights of property owners to go out of business. Thus, there is no doubt the Act was passed to achieve "fundamental legislative goals." (*Woodland Hills, supra,* at p. 936.) Respondent *admits* that the amounts exacted from property owners under the Tax was a monumental increase in the amounts previously approved under *Pieri v. City & County of San Francisco* (2006) 137 Cal.App.4th 886. (Opposition p.6:6-8 – "the amount in *Pieri* that were approved were far lower than the Enhanced Relocation Benefits

petitioners would have paid under the Ordinance challenged here.") Respondent then asserts that a finding by the Court that Petitioners' have vindicated important statutory rights "would be insult to tenants injuries," apparently suggesting that the Court has injured the tenants by not providing them the windfall – an unconstitutional and preempted exaction – they would have received under the Tax. The reality is, in finding the Tax preempted and concurring with the *Levin* decision that the Tax was unconstitutional, the Court has prevented grave injuries to property owners. If anything, fees should be awarded to discourage Respondent from enacting future far-reaching, unreasonable, and unconstitutional ordinances.

Moreover, while it is true that Petitioners did not bring a claim under the Fifth and Fourteen Amendments, they ultimately vindicated these constitutional rights in Court when they successfully advanced the argument that the unconstitutional Tax, as found by the *Levin* Judgment, deemed the Tax *per se* unreasonable under *Pieri*. Though entitled to great weight, California courts are not bound by the decisions of the lower federal courts, even on federal questions. (*Wagner v. Apex Marine Ship Management Corp.* (2000) 83 Cal. App. 4th 1444, 1451; *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal. 4th 316, 320.) However, in concurring with *Levin*, and agreeing with Petitioner's First Amended Petition, this Court too found the Tax unconstitutional on the same grounds. (Judgment Granting First Amended Petition For Writ of Mandate ¶¶ 2, 3.)

C. Respondent's Contention That Petitioner Organization Must Declare the Speculative Financial Benefits to all its Individual Members is Unsupported and Thus If the Court Grants Petitioners' Motion for Fees it Should Deny Respondent's Request to Take Discovery of the Individual Members.

Respondents argue that Petitioner Small Property Owners of San Francisco Institute (SPOSFI) must offer evidence of the financial benefit of the litigation to each of its individual members for determination of whether an award of fees under section 1021.5 is appropriate. (Opposition 6:20-27, citing *California Redev. Assn v. Matosantos* (2013) 212 Cal.App.4th 1457,

1480 ("*CRA*"); *California Licensed Foresters Assn. v. State Bd. Of Forestry* (1994) 30 Cal.App.4th 562, 570. ("*CFLA*")) While it is true that an organization can have a financial interest in its "representative capacity" and thus a "financial stake in [a] matter to the same extent as its members," (*CRA,* supra, 212 Cal.App.4th at 1480) this doesn't stand for the proposition that each individual member of an organization must offer a declaration stating any gain – no matter how speculative – they derived from prevailing on the action. Here, as stated in Petitioners' verified petition, "SPOSFI includes members who *have* invoked the Ellis Act and who *plan to do so in the future*." (First Amended Petition ¶ 2) This statement indicates past and possible future invocation of the Ellis Act; it would be speculative to attempt to determine how much SPOSFI members may save at some point in the future now that the Tax has been struck down, and any past invocation is irrelevant to the analysis. As detailed in Petitioners' opening brief, a "indirect and uncertain" pecuniary benefit does not outweigh a plaintiff's financial burden in bringing the lawsuit for the purposes of evaluating entitlement to attorney fees under CCP § 1021.5. (*Monterey/Santa Cruz County etc. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500, 1523; *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 230-231 ("*CARC*") [third prong satisfied by victory of anti-rent control plaintiff; any monetary advantage of outcome speculative]); *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 112.)

In *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, the Court of Appeal upheld a fee award to four vineyards – *commercial entities whose use of the land is to make money* – who challenged a Monterey peninsula dam project for failure to comply with environmental review requirements. (*Galante Vineyards*, supra, 60 Cal.App.4th at 1113) Like Respondent does here, the government in *Galante* contended that § 1021.5 fees could not be awarded because the petitioners had a significant

monetary interest. (*Galante Vineyards*, supra, 60 Cal.App.4th at 1125) In response, the Court of Appeal stated that while there was no question that the vineyards were the greatest beneficiary of the judgment, there was no direct monetary benefit therefrom and any future monetary advantage were speculative. (*Galante Vineyards*, supra, 60 Cal.App.4th at 1127, 1128) This is exactly the situation here: there is no direct monetary benefit from the judgment and any future monetary advantage to SPOSFI is speculative. The City's failure to discuss and distinguish *Galante Vineyards* indicates that it should control.

Nevertheless, if the Court is inclined to agree with Respondent's position that discovery must be taken on SPOSFI's individual members' prior to a fee award, Petitioner is willing to allow limited discovery that will not compromise SPOSFI members' associational or financial privacy rights.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court grants Petitioners motion and award Petitioner their reasonable attorneys' fees pursuant to CCP 1021.5.

Dated: May 20, 2015

ZACKS & FREEDMAN, P.C.

By: Emily H. Lowther
Attorneys for Petitioners