NO. 21-1181

In the Supreme Court of the United States

LYNDSEY BALLINGER AND SHARON BALLINGER,

Petitioners,

v.

CITY OF OAKLAND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE SAN FRANCISCO APARTMENT ASSOCIATION AND SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), the SAN FRANCISCO APARTMENT ASSOCIATION ("SFAA") and the SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE ("SPOSFI") submit this amici curiae brief in support of Petitioners Lyndsey Ballinger and Sharon Ballinger.[1]

SFAA, founded in 1917, is a full-service, non-profit trade association of persons and entities who own residential rental properties in San Francisco. SFAA currently has more than 2,800 active members. SFAA and its members have a strong interest in preserving their constitutional rights with respect to real property they own or manage in San Francisco. As part of its mission, SFAA engages in public interest litigation to insure the protection of private property rights through timely court action. SFAA was a party to one of the cases discussed herein, *Tom v. San Francisco*, 120 Cal.App.4th 674 (2004).

SPOSFI is a non-profit organization founded to represent and advocate for an under-served group of person comprising the owners of houses, condominiums, and small (2-5 unit) apartment buildings

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[1] Pursuant to this Court's Rule 37.2(a), all parties have received timely notice and consented to the filing of this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

in San Francisco, whether owner-occupied, rented, or vacant. SPOSFI comprises more than 2,000 members from a wide variety of economic, racial, and ethnic backgrounds which collectively own more than 5,000 units. SPOSFI regularly participates, as a party and amicus curiae, in legal challenges to local laws that violate the legal rights of its members and property owners generally, particularly regarding homeownership. Examples include being a party to two cases discussed herein: *Tom v. City and County of San Francisco*, 120 Cal.App.4th 674 (2004), and *Pieri v. City and County of San Francisco*, 137 Cal.App.4th 886 (2006), as well as appearing as amicus curiae in *San Remo Hotel, L. P. v. City and County of San Francisco,* 545 U.S. 323 (2005).

SUMMARY OF ARGUMENT

Several years before this Court decided *Nollan*[2], the California Court of Appeal decided a trio of cases involving local tenant relocation assistance: *Kalaydjian v. City of Los Angeles*, 149 Cal.App.3d 690, 197 Cal.Rptr. 149 (1983), *People v. H & H Properties*, 154 Cal.App.3d 894, 201 Cal.Rptr. 687 (1984), and *Briarwood Properties, Ltd. v. City of Los Angeles*, 171 Cal.App.3d 1020, 217 Cal.Rptr. 849 (1985). These cases provided the legal underpinning for later-enacted

[2] *Nollan* occurred in Ventura County, California, which is in the Central District of California. Though these three cases arose in the neighboring county of Los Angeles, that is also in the same federal district, and both counties are in the Western Division.

tenant relocation ordinances (including the ordinance at issue in this case). These cases directly undercut the Ninth Circuit's holding here that the required payments to tenants do not constitute exactions. Indeed, virtually every appellate decision in California involving the validity of tenant relocation assistance has analyzed these requirements as conditions precedent to termination of tenancies imposed by municipalities under a rent and eviction control scheme or a local subdivision law. *E.g. Pieri v. City and County of San Francisco*, 137 Cal.App.4th 886 (2006) and cases discussed therein.

This amici brief discusses the legal and historical underpinnings of tenant relocation assistance in California and the impact of relocation assistance on property owners in the context of individuals who desire to obtain possession of their property on a not-for-cause basis. As applied to property owners seeking to recover possession for owner-occupancy purposes, local relocation assistance has not been measured by federal constitutional standards but, rather, by an ad-hoc "reasonableness" test which arises from subdivision and redevelopment cases. However, contrasting with what may be reasonable to developers seeking to make a substantial profit, Amici provide the Court examples of cases where owners were required to pay extortionate sums as a condition of recovering possession of their property but which do not satisfy *Nollan/Dolan*.

ARGUMENT

I. EVICTION CONTROLS AND MUNICIPAL RELOCATION REQUIREMENTS CONDITION THE GRANT OF A GOVERNMENT BENEFIT ON THE PAYMENT OF MONEY.

In concluding that the relocation ordinance does "not conditionally grant or regulate the grant of a government benefit, such as a permit," the Ninth Circuit fails to apprehend or consider the mechanics of municipal eviction regulations. "Rent control", in this context, includes eviction controls. "Typically, rent control schemes include eviction controls that require 'good cause' in order for a landlord to bring an eviction action. Without such controls, 'the security of tenure objectives of rent control laws could be undermined and the threat of eviction could be used to nullify the operation of rent regulations.'" *Fisher v. City of Berkeley*, 37 Cal.3d 644, 693, 693 P.2d 261 (1984) [citation omitted], *aff'd sub nom. Fisher v. City of Berkeley, Cal.* (1986) 475 U.S. 260.

Typically, "good cause" also requires payment of some amount of money to the tenant that is generally denominated "relocation assistance". Thus, if the owner demonstrates "good cause"—such as an intent to recover possession for use as the family home—but does not pay the relocation assistance, the owner will not be permitted to recover possession. E.g. San Francisco Administrative Code § 37.9C, Los Angeles Municipal Code § 151.09, Berkeley Municipal Code §§ 13.76.130.A.9.h and 13.77.055.A.2, Santa Monica Municipal Code § 4.36.020. Oakland Municipal Code

Ch. 8.22, Arts. VII and VIII, et al. Each of these ordinances provides in some fashion that the owner may not recover possession without paying the tenant the amount required by the government. These are not the only cities in California that have relocation assistance. In recent years, municipalities throughout the state, small and large, have enacted rent and eviction control measures that require some amount of relocation assistance.

The Ninth Circuit misses the mark by concluding that the ordinance here does not fall under the unconstitutional conditions umbrella. California cities use relocation assistance ordinances to leverage cash payments to tenants from rental property owners as a condition of recovering possession. These conditions are imposed without consideration of the relative financial hardship on the landlord or the need of the tenant, though tenants making below a certain standard often receive additional money. This conclusion is bolstered in the case presented here: owners must pay a fee to their tenants to gain the government's approval to recover their home and restore it to its original use as an owner-occupied home even though they only intended to rent it temporarily while reassigned in service to this country. There is no principled basis for immunizing the ordinance here from judicial scrutiny under *Nollan*/*Dolan*.

II. THE EXACTIONS THAT OWNER-OCCUPIERS ARE REQUIRED TO PAY ARISE FROM EXACTIONS UPHELD UNDER STATE LAW AS A CONDITION OF GRANTING DEVELOPMENT APPROVALS.

San Francisco initially enacted its rent control scheme in 1979. That scheme included eviction control—owners may not evict tenants at the end of the

term established by the lease so long as the tenant is willing to pay the rent. Owners were authorized to evict tenants in order to move into the target unit and live in it as the owner's principal place of residence for at least one year. This is known as an "owner move-in" ("OMI") eviction. In 1991, San Francisco amended its rent ordinance to require that the owner have at least a 25% recorded interest in the property. Thereafter, San Francisco added or heightened OMI requirements to the point where this method of recovering possession was not available to many owners after 1998. *See gen. Cwynar v. City and County of San Francisco*, 90 Cal.App.4th 637, 644-646, 109 Cal.Rptr.2d 233, 238-240 (2001).

Meanwhile, due to the high cost of acquiring residential real property in these cities, many first-time home buyers acquire multi-unit buildings as tenants in common ("TIC") and then make agreements among themselves to give each owner an exclusive right of occupancy in a particular dwelling unit within the overall TIC property. *Tom v. City and County of San Francisco*, 120 Cal.App.4th 674, 676, 16 Cal.Rptr.3d 13 (2004). "[T]he entire purpose of a TIC is to allow homeownership to those who cannot afford single-family homes." *Tom*, *supra*, 120 Cal.App.4th at 681. However, the OMI restrictions frequently make it impossible for unrelated TIC owners to obtain possession of their homes via OMI evictions.

In 1986, the California Legislature enacted the Ellis Act (California Government Code § 7060 et seq.) following the California Supreme Court's opinion in *Nash v. City of Santa Monica*, 37 Cal.3d 97, 207 Cal.Rptr. 285, 688 P.2d 894 (1984), upholding an ordinance that required owners of residential rental

property to obtain a permit before they could remove property from the rental market but the permit was not practicably obtainable. "[T]he Act was intended to overrule the *Nash* decision so as to permit landlords the unfettered right to remove all residential rental units from the market . . . ." *Johnson v. City and County of San Francisco,* 137 Cal.App.4th 7, 12–13, 40 Cal.Rptr.3d 8 (2006); California Government Code § 7060.7. Until 1998, Ellis Act evictions were rare in San Francisco because the OMI process was still relatively functional. By the end of 1998, unrelated owners would have to use the Ellis Act if they wished to recover possession of their property to live in San Francisco.

In 2005, San Francisco enacted an ordinance requiring that owners invoking the Ellis Act pay their tenants a base amount of $4,500 up to $13,500 per unit plus an additional $3,000 for disability or seniority. Several individual property owners who wished to withdraw small apartment buildings from rental use found themselves having to pay tens of thousands of dollars to their tenants in order to live in their own property. These were not minor transactional costs. In one case, a very wealthy attorney used a rental unit as a *pied-a-terre.* His landlord, a woman in her eighties named Jackie Pieri, challenged the relocation requirement under a state law preemption theory.

In 2006, the California Court of Appeal held that San Francisco's relocation assistance requirement was lawful. *Pieri*, *supra*, 137 Cal.App.4th 886, 40 Cal.Rptr.3d 629. *Pieri* noted that the California Legislature had amended the Ellis Act in 2003 to prohibit its application to certain residential hotels and

eliminated original language allowing municipalities to require relocation assistance to low-income tenants in those hotels. *Pieri*, *supra*, 137 Cal.App.4th at 890-891. The Legislature amended the Act "to provide simply that the Ellis Act does not diminish or enhance any public entity's power 'to mitigate any adverse impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations.'" *Pieri*, *supra*, 137 Cal.App.4th at 890-891.

Pieri then relied on a single basis for upholding relocation assistance: "Before the enactment of the Ellis Act, several courts upheld local laws requiring landlords to make monetary payments to tenants displaced by condominium conversions." *Pieri*, *supra*, 137 Cal.App.4th at 892, citing that trio of cases from Los Angeles—*Kalaydjian*, 149 Cal.App.3d 690, 197 Cal.Rptr. 149, *H & H Properties*, 154 Cal.App.3d 894, 201 Cal.Rptr. 687, and *Briarwood Properties, Ltd. v. City of Los Angeles*, 171 Cal.App.3d 1020, 217 Cal.Rptr. 849. These cases involved a Los Angeles Municipal Code, entitled "Tenant Relocation Assistance Where Apartments Are to be Converted." *Kalaydjian*, *supra*, 149 Cal.App.3d at 692.

The first case, *Kalaydjian*, relied on a much older case, *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 42, 207 P.2d 1 (1949), which did not involve relocation assistance but, rather, dedication and use easements as a condition of subdivision approval. *Ayres*, *supra*, 34 Cal.2d at 32, 42. While California has legislation regularizing local subdivision approval, Los Angeles (as do other municipalities) had extensive authority on whether to grant subdivision approval. Property owners had no state law or federal constitutional right to create subdivisions without receiving

government approval. Because the municipality was granting a completely discretionary permission, it could condition that permission on reasonable factors. As the California Court of Appeal said in *H & H Properties* after validating tenant relocation assistance as a requirement of final subdivision map approval, "H & H is free to proceed. It simply must pay somewhat more than it expected for the privilege of engaging in a condominium conversion in Los Angeles County in the 1980s." *H & H Properties*, *supra*, 154 Cal.App.3d at 902.

The *Pieri* court also noted that *Kalaydjian* stated that "developers who benefited from the changed use could be required to alleviate the displacement and other adverse effects of the zoning conversion. The fees would assist tenants who lost their rent-controlled apartments and would have to seek housing with higher market rents . . . ." *Pieri*, *supra*, 137 Cal.App.4th at 892–893. Given the rationale of the California Court of Appeal in upholding tenant relocation schemes, there is no principled basis for the Ninth Circuit's holding that these payments are not an exaction imposed in exchange for a right to recover possession of rental units by local governments.

Briarwood Properties, the last of the three cases relied on by *Pieri*, also relied on *Kalaydjian*, stating that relocation assistance was "reasonably related to the city's goal of cushioning the displacement effect of condominium conversion." *Briarwood Properties, Ltd. v. City of Los Angeles*, 171 Cal.App.3d 1020, 1032 (1985), citing *Kalaydjian*, *supra*, 149 Cal.App.3d at 693–694, 197 Cal.Rptr. 149. *Briarwood Properties* is simply cumulative of *Kalaydjian* and adds no additional support for *Pieri's* holding.

In *Pieri*, San Francisco's 2005 relocation assistance rates were not challenged under *Nollan* and *Dolan*, and were held reasonable on a state law facial preemption challenge. However, those 2005 rates are now 65% higher with no showing that the increase approximates the expenses incurred in a typical relocation let alone passes muster under *Nollan* and *Dolan*. Other municipalities require even greater assistance. The City of Santa Monica requires up to $33,950 for a two-bedroom apartment. Of course, *Ayres* (1949), *Kalaydjian* (1983), *H & H Properties* (1984), and *Briarwood Properties* (1985) predated *Nollan* (1987) and *Dolan* (1994). Though *Pieri* was decided 12 years after *Dolan*, *Pieri* solely involved state law preemption; petitioners did not present, and the state court did not decide, any federal constitutional claims.

III. MUNICIPAL RELOCATION ASSISTANCE REQUIREMENTS DO NOT COMPLY WITH THE *NOLLAN/DOLAN* STANDARD.

At least in San Francisco, the amount of relocation assistance required has the following characteristics:

1. It is arbitrary. For Ellis Act evictions, the amount was set in 2005 at $4,500.00 per tenant up to a maximum of $13,500.00 per unit, with an additional $3,000.00 for elderly or disabled tenants, to be indexed annually. The OMI relocation assistance was set at the same base rates a year later. The rates are now approximately $7,426.54 (base) / $22,279.62 (total per unit) / $4,951.02 (additional for elderly/disabled) for Ellis Act and slightly less for OMI. The original amounts and their indexing are not tethered to the cost of relocating. San Francisco simply decided on

these amounts because they seemed reasonable by tracking a cost of living index.

2. It is not means-tested. Wealthy tenants are entitled to the same amounts as impoverished tenants. Tenants who use the premises as *pieds-a-terre* are entitled to the same amount as those whose units are their homes. Owners who manage to scrape together sufficient funds to buy a building pay the same as wealthy owners. Oftentimes, owners find that they must defer repairs they would otherwise make because those funds were given to the tenants.

3. Tenants are entitled to one-half of the assistance upon receipt of their eviction notices but there is no requirement that the tenants actually use the money to relocate; they can spend it on anything. Thus, these payments are bonus payments that are therefore arguably unrelated to their intended mitigation purpose.

4. Tenants can even accept relocation money without waiving their right to oppose the eviction. *See Danger Panda, LLC v. Launiu*, 10 Cal.App.5th 502, 216 Cal.Rptr.3d 231 (2017)—tenants who had been paid proper amount of relocation assistance refused to vacate, forcing owner to successfully appeal a determination that a minor child was entitled to assistance, causing considerable delay and expense. By local ordinance, all tenants who wish to hold over and fight their evictions, even frivolously, are provided attorneys at San Francisco's expense. This has encouraged some tenants to take relocation assistance and then extort more money through coerced settlements. This is not an anomaly. Owners must weigh the cost of an extorted settlement against the delay and cost

of their own counsel in litigating the right to recover possession.

5. As happens occasionally, there are defects in the Ellis Act or OMI process that render them void yet there is no provision to recover the money initially paid to the tenants.

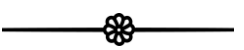
6. The requirement does not distinguish between those who "Ellis" tenant-occupied buildings in order to improve them for re-sale to an actual TIC group who is the intended owner-occupier and those owner-occupiers who do the withdrawal themselves. The former persons are actually akin to developers making a profit from the new use of the building. The latter persons are not like developers. They simply desire to live in their property as their home. Yet the law treats both groups identically without analyzing the impact on them separately.

In one instance, a doctor who was resident at San Francisco General Hospital and owned a house nearby moved his family to Wisconsin in the early 1980's and rented the house out. Later, and without the doctor's knowledge, the tenant converted the house into a daycare facility. She also made substantial plumbing and electrical changes to accommodate the daycare use, misrepresenting to San Francisco that she had the owner's authority. Because of state laws protecting daycare facilities in private homes and other factors including alleged disability, the owner determined that his best course of action was to invoke the Ellis Act and remove the property from rental use entirely, which he did in January, 2003. If San Francisco's relation assistance ordinance had been adopted at that time, he would have had to pay his tenant, who had essentially commandeered his

property, $7,500 to recover possession in order to undo, at his further expense, the substantial unauthorized changes she had made. The current schedule would require over $12,000.

Recently, the owner of 1151-1161 Alabama Street, San Francisco was required to pay a group of tenants approximately $204,000.[3] In another, on-going example, the owner of 2920-2930 25th Street, San Francisco has paid the tenants nearly $115,000 representing the first half of the required payments. Whether these and other payments are lawful should be determined under the federal constitutional *Nollan/Dolan* standard and not the state law standards that preceded this test.

[3] This ownership group paid almost $90,000 in relocation assistance during a previous withdrawal proceeding that failed due to errors in the withdrawal paperwork.



CONCLUSION

The Court should grant certiorari and use this case as an opportunity to clarify the constitutional provisions relative to municipal relocation assistance requirements and the limits of local governments' power to exact monetary transfers from homeowners to tenants in order for homeowners to lawfully occupy their own property.

Respectfully submitted,

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