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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

ERIC DEBBANE; ANDREW DEBBANE; ROBERT FRIEDLAND; NATASA ZEC; SAN FRANCISCO APARTMENT ASSOCIATION; SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE; SAN FRANCISCO ASSOCIATION OF REALTORS,

Plaintiffs,

vs.

CITY & COUNTY OF SAN FRANCISCO; BEN ROSENFELD, in his official capacity as the Auditor-Controller of the City & County of San Francisco; ALL PERSONS INTERESTED IN THE MATTER OF Proposition M on the November 8, 2022 ballot, imposing a “vacancy tax” on residential properties, and other matters related thereto; and DOES 1-100, inclusive,

Defendants.

JOSÉ CISNEROS, in his official capacity as the Tax Collector of the City & County of San Francisco,

Real Party in Interest.

Case No. CGC-23-604600

PLAINTIFFS’ NOTICE OF MOTION & MOTION FOR SUMMARY JUDGMENT or SUMMARY ADJUDICATION; POINTS & AUTHORITIES IN SUPPORT THEREOF

CALENDAR PREFERENCE REQUIRED BY STATUTE (CODE CIV. PROC. § 867)

Hearing Date: August 9, 2024
Time: 9:30 a.m.
Department: 501

Action Filed: February 9, 2023
Amended Complaint: Sept. 12, 2023
Answer Filed: Jan. 12, 2024
Trial Date: December 9, 2024

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NOTICE OF MOTION &
MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on August 9, 2024, at 9:30 a.m., in Department 501 of this Court, Plaintiffs ERIC DEBBANE; ANDREW DEBBANE; ROBERT FRIEDLAND; NATASA ZEC; SAN FRANCISCO APARTMENT ASSOCIATION; SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE; and SAN FRANCISCO ASSOCIATION OF REALTORS (collectively, "Plaintiffs") will and hereby do move the Court for an order under Code of Civil Procedure § 437c granting summary judgment or, in the alternative, summary adjudication against Defendants CITY & COUNTY OF SAN FRANCISCO, BEN ROSENFIELD,[†] and JOSÉ CISNEROS (collectively, the "City").

Plaintiffs seek summary judgment that the City's residential "vacancy tax," adopted by the City's voters as Proposition M at the November 2022 election, is invalid and unenforceable and that the Court enter a permanent injunction prohibiting the enforcement thereof. In the alternative, Plaintiffs seek summary adjudication as to each of their causes of action.

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support Thereof, the Separate Statement of Undisputed Material Facts, the Appendix of Evidence submitted herewith (including Plaintiffs' Request for Judicial Notice), and all matters and pleadings on file in this action, any related actions, and any other matter that may be presented before or at the hearing on this Motion.

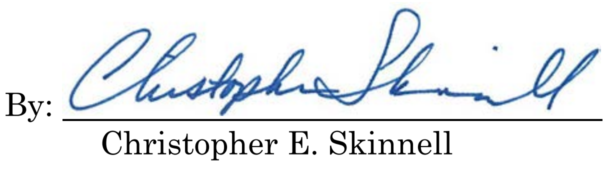
///

[†] Mr. Rosenfield has since vacated the office of Auditor-Controller, being succeeded in that post by Greg Wagner. Code of Civil Procedure § 368.5 provides that in such a circumstance, "The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." *See also* Weadon v. Shahen, 50 Cal. App. 2d 254, 260 (1942).

Citations to the Appendix herein are in the form of "Appx. [page #]." Citations to the Statement of Undisputed Material Facts are in the form of "SUMF No(s). [#]."

Dated: May 23, 2024

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: 
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I. INTRODUCTION.

This lawsuit challenges the City & County of San Francisco's planned enforcement, beginning in 2025, of Proposition M, a residential "vacancy tax" measure that was narrowly approved by the City's voters at the November 2022 election.[1] The stated purpose of Proposition M is to coerce the owners of residential real property into renting out units that, for a variety of reasons, those owners prefer to keep vacant. It does so by imposing a punitive, confiscatory annual charge—purportedly a "tax," but really a penalty—on residential units that are "vacant" for more than 182 days, whether consecutive or nonconsecutive, in a given year. This, the City may not lawfully do.

The owners' reasons for keeping their units vacant vary. Some may understandably conclude that the burdens of being a landlord—including complying with the City's elaborate and expensive rent control and just cause for eviction laws—outweigh the benefits.[2] Other owners, like the individual Plaintiffs herein, reside on the property and don't wish to share it with strangers; yet others may wish to hold a unit open for future use by themselves or family, without the hassle and often-considerable expense of evicting a tenant (if an eviction is even possible under San Francisco's strict rules[3]). And still other owners may be willing to participate in the rental market generally—indeed, may be diligently marketing their units—but are struggling to rent individual units due to circumstances beyond their control, such as the ongoing struggles of San Francisco's downtown; deteriorating conditions in the surrounding neighborhood due to crime, homelessness, public drug use, and trash; long delays in making needed repairs or renovations due to municipal bureaucracy, etc.[4]

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[1] Copies of the relevant pages of the November 2022 ballot pamphlet related to Proposition M, including the text of the measure, are attached to the First Amended Petition as Exhibit 1 (Appx. 36-51).

[2] *See* Appx. 110-16 (Decl. of Goodman) (summarizing burdens) and 97 (Decl. of Zec, ¶¶ 8-10) (same).

[3] *See* S.F. Rent Board, "Evictions Based on Owner or Relative Move-In," *online at* https://www.sf.gov/information/evictions-based-owner-or-relative-move (last visited May 15, 2024) (summarizing the stringent requirements).

[4] For example, Proposition M exempts units from the vacancy tax for time spent waiting for a building permit, but it limits that exemption to a single year. Yet getting building permits often takes far longer than a year in San Francisco. *See* Gardiner & Neilson, "627 Days, Just for a Permit—Why S.F. Building Is Sluggish," S.F. CHRON. (Dec. 15, 2022), p. A1 (on Lexis-Nexis).

But drastically slashing rents in an attempt to fill such units would often mean—given San Francisco's strict rent control laws—accepting submarket rents indefinitely.

Regardless of their reasons, what these owners have in common is a *fundamental right*—protected by various provisions of the federal and state constitutions, to keep these units vacant, rather than renting them out. Among other things, the U.S. Supreme Court has held that the "power to exclude [others from one's property] has traditionally been considered one of the most treasured strands in an owner's bundle of property rights," protected by the Takings Clause of the U.S. Constitution. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). As a corollary of that holding, the Court has also held the government cannot "compel a landowner over objection to rent his property" without violating that Clause. *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992); *see also* *Cwynar v. City & Cty. of S.F.*, 90 Cal. App. 4th 637, 658 (2001) (San Francisco law that barred owners from evicting tenants so they could use the property violated the Takings Clause). Consistent with those principles, the Legislature has enacted preemptive state law, specifically the Ellis Act, Govt. Code §§ 7060-7060.7, to further safeguard owners' rights to choose not to rent their property.

San Francisco, however, disapproves of the choice these owners have made, and the adoption of Proposition M must be understood in the broader historical context of the City's hostility toward those owners' rights. For example, the City routinely sponsors legislation to repeal or limit the Ellis Act,[5] and the case books are replete with examples of the City's efforts to penalize owners for exercising their rights.[6]

[5] *See, e.g.,* Sen. Comm. on Transp. & Hous., Bill Analysis for Sen. Bill 364 (2015-2016 Reg. Sess.) as introduced Feb. 24, 2015, p. 6, *available online at* http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0351-0400/sb_364_cfa_20150409_152831_sen_comm.html (showing former San Francisco Mayor Ed Lee as the sponsor of a bill to drastically restrict the application of the Ellis Act in San Francisco).

[6] *See, e.g.,* *Levin v. City & Cnty. of S.F.*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014) (striking down, as an unconstitutional takings, the requirement that owners removing property from the market pay evicted tenants 24 times the difference between their old rent and their new rent, amounting to hundreds of thousands of dollars), *appeal dismissed as moot*, 680 Fed. Appx. 610 (9th Cir. 2017); *Coyne v. City & Cty. of S.F.*, 9 Cal. App. 5th 1215 (2017) (reaching the same conclusion under the Ellis Act); *Bullock v. City & Cnty. of S.F.*, 221 Cal. App. 3d 1072 (1990) (striking down San Francisco ordinance as preempted by the Ellis Act because it required owners of residential hotels to obtain special permits from the City before converting them to tourist hotels, and such a permit would only be granted if the landlord promised to

Proposition M is merely the latest effort to achieve indirectly the very compulsion that the Constitution and state law prohibit the City from imposing directly. But it is well established that "if the Constitution forbids the prohibition of [particular activities, like keeping a property vacant], then that result cannot be achieved indirectly by imposing a destructive tax upon them." *Fox Bakersfield Theatre Corp. v. Bakersfield*, 36 Cal. 2d 136, 139-40 (1950). The same goes for the exercise of rights under the Ellis Act.

Simply put, Proposition M is void and unenforceable and should be enjoined.

II. APPLICABLE LEGAL STANDARD.

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Code Civ. Proc. § 437c(c). The party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 850 (2001). Where the plaintiff seeks summary judgment, the burden is to produce admissible evidence on each element of a "cause of action" entitling him or her to judgment. Code Civ. Proc. § 437c(p)(1). The party opposing the motion bears the burden of setting forth specific facts showing a triable issue of material fact as to plaintiff's claim or a defense thereto. *Law Offices of Dixon R. Howell v. Valley*, 129 Cal. App. 4th 1076, 1092 (2005).

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make a "one-for-one replacement" of the rental units lost, by constructing a similar quantity of units or paying a substantial fee); *Bullard v. S.F. Residential Rent Stabilization Bd.*, 106 Cal. App. 4th 488 (2003) (striking down ordinance that gave the Rent Board the power to set rents for tenants who are displaced by an owner-move-ins, as preempted); *Reidy v. City & Cnty. of S.F.*, 123 Cal. App. 4th 580 (2004) (again striking down requirement that residential hotel owners obtain special conversion permits as preempted by the Ellis Act); *Tom v. City & Cnty. of S.F.*, 120 Cal. App. 4th 674 (2004) (striking down ordinance that sought to discourage Ellis Act evictions by prohibiting tenants-in-common from agreeing to occupy separate units in the property under exclusive right of occupancy agreements); *Baba v. Bd. of Supervisors of the City & Cnty. of S.F.*, 124 Cal. App. 4th 504 (2004) (striking down ordinance criminalizing so-called "Ellis bluffs" where a landlord would inform a tenant of the landlord's intent to carry out an Ellis Act eviction, but did not actually file an eviction notice); *Johnson v. City & Cnty. of S.F.*, 137 Cal. App. 4th 7 (2006) (striking down, as preempted by the Ellis Act, an ordinance that required landlords who undertake Ellis Act evictions to notify tenants about the amount the landlord "believes to be due" to the tenant for relocation assistance); *S.F. Apartment Ass'n v. City & Cnty. of S.F.*, 3 Cal. App. 5th 463 (2016) ("*SFAA*") (Ellis Act preempted ordinance requiring owner to wait ten years to merge a withdrawn rental unit into other units, because it imposed an unlawful penalty on the exercise of rights under the Act).

III. UNDISPUTED FACTS.

Proposition M was submitted to the City's voters at the November 2022 general election, pursuant to the initiative process. It received 54.51% of the vote. The Board of Supervisors declared the results of the election on December 13, 2022, and Proposition M became effective ten days later. (SUMF Nos. 1 & 3.)

A. Summary of Proposition M's Main Provisions.

Beginning in 2025, Proposition M will result in property owners being charged an escalating amount for each "Residential Unit" that is "vacant" during the preceding calendar year. (SUMF Nos. 4-12.) A "Residential Unit" is broadly defined to include a "house, an apartment, a mobile home, a group of homes, or a single room that is designed as separate living quarters [*i.e.*, quarters in which the occupants live and eat separately from any other persons in the building and which have a kitchen and direct access from the outside of the building or through a common hall], other than units occupied or intended for occupancy primarily by travelers, vacationers, or other transient occupants" but excluding certain nursing homes and care facilities. (Appx. 48, Prop. M § 2952 ("Definitions").)[7] An "owner is deemed to have kept the Residential Unit" "vacant"—and therefore subject to the Prop. M penalty—if it is "unoccupied, uninhabited, or unused, for more than 182 days, whether consecutive or nonconsecutive, in a tax year," with narrow exceptions. (Appx. 49, Prop. M § 2953(j).)

The charge for a unit that is "vacant" in 2024 will be $2,500 for a Residential Unit of less than 1,000 square feet;[8] $3,500 for a Unit from 1,000 to 2,000 square feet; and $5,000 for a Unit over 2,000 square feet. (SUMF Nos. 5-7.) The amount escalates each year that the Unit remains vacant, reaching $10,000 for the smallest units in 2026 and $20,000 for units exceeding 2,000 square feet;[9] in subsequent years, the charge

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[7] A building with two or fewer Units is exempt from the tax. (Appx. 49, Prop. M § 2955(d).)

[8] According to the Census Bureau, the median rent for a one-bedroom apartment in San Francisco in 2022 was $2,338. (Appx. 135.) So, essentially, San Francisco is demanding that the owner of a such a unit pay a month's rent to the City initially, and up to four months' rent eventually, for the purported "privilege"—which is actually a right, protected by the Constitution—of keeping the unit vacant.

[9] This is equivalent to six months' worth of the median rent for a four-bedroom unit. (*Id.*)

adjusts upwards in accordance with the Consumer Price Index. (SUMF Nos. 8-12.) An owner of multiple units is charged the foregoing amounts for each unit owned that is "vacant" during the year, without any limitation whatsoever. (SUMF No. 13.)

Proposition M provides for certain exemptions from the definition of "vacancy"—specified periods during which the unit is not treated as "vacant," despite being unoccupied, such as, for example, during the period (not to exceed a year) while an application for a building permit is pending to allow repair, rehabilitation, or construction with respect to the Unit;[10] the period (not to exceed a year) where such repair, rehabilitation, or construction is underway; the first year after the Unit is built; periods during which the owner is in a medical care facility or immediately following the owner's death; or during the two years after a "catastrophic" disaster damages the Unit to the point of uninhabitability. Also excluded is any period during which the Unit is leased to a bona fide tenant, but a lease to a co-owner, spouse, domestic partner, child, parent, or sibling does not exempt the Unit from the charge. (Appx. 48-49, Prop. M §§ 2952 ("Definitions") & 2953(j).) Nor, apparently, does it exempt a Unit whose owner is actively marketing it but is unable to rent it out, despite the fact that the measure purports to tax those who "kept" the Unit vacant for half a year.

Any proceeds derived from the Proposition M charge—at least those that are left over after paying the costs of administering the tax and paying refunds and related interest—are to be spent on (1) rent subsidies for individuals 60 and older or low-income households or (2) acquiring, rehabilitating, and operating multi-unit buildings for affordable housing. (Appx. 50, Prop. M § 2958.)

B. By Its Proponents' Own Admission, the Chief Purpose of Proposition M is to Coerce Owners into Renting Their Units.

However, the proponents of the measure have made clear that any such revenues are not the main objective of the Proposition. The real goal of the measure is to coerce property-owners into renting their vacant units by imposing charges that are so

[10] *See* note 4 above.

burdensome that there is no other choice. The measure's proponents expressly told the voters, in their rebuttal argument in support of the Proposition, sent to all the City's voters in advance of the election: "*We hope no one pays this tax.* We want every vacant unit filled with people who need homes." (Appx. 41; emphasis added.) Further reinforcing this point, the proponents' main argument is headed (in all-bold type), "Prop M will help fix San Francisco's Hidden Housing Crisis: 40,000 Vacant Homes." (Appx. 40.) The rest of the proponents' main argument and rebuttal likewise stress the fact that the goal of the measure is to "reduce vacancies [so that] we will have more housing"; that "[i]n the first year alone, it is expected that 4,500 new units will return on [*sic*] the market—more than our annual goals"; and that voters should support Prop. M to "fix our hidden housing vacancy crisis." (*Id.*) The "Yes" campaign's website, printed at the end of the main argument in favor, is "fillemptyhomes.com." (*Id.*) The collection of revenue under the measure is essentially an afterthought—a single bullet point in the main argument in favor, and absent from the rebuttal entirely. (Appx. 40-41.)

Further bolstering this understanding of the measure's purpose, the official Controller's Statement on Proposition M, likewise contained in the ballot pamphlet sent to all voters, advised that the measure could raise as much as $20 million in the first year, but that "if the tax achieves *its stated purpose of reducing the number of residential vacancies*, it will result in lower revenue." (Appx. 38; emphasis added.)

Most importantly, the Proposition's own "Findings," codified in § 2951, stress the perceived evils of vacant units; note that the measure "is limited to buildings with more than two residential units because such buildings are more likely to include one or more units held vacant *by choice* and are more likely to include multiple vacancies" (emphasis added); and emphasize that it "*is intended to disincentivize prolonged vacancies*, thereby increasing the number of housing units available for occupancy…" (Appx. 48; emphasis added.) Again, the revenue-raising function of the "tax" is an afterthought.

C. The Effects of Proposition M on the Plaintiffs.

1. Eric Debbane and Andrew Debbane are brothers who co-own

several small residential buildings in various parts of the City, which they rent out. To the extent that the market and other conditions enable them to keep those units rented, they will not be subject to the tax. However, one of the buildings that the Debbanes co-own is a five-unit building in Russian Hill that they live in, along with Andrew's wife and Eric's girlfriend. They have co-owned this building since 1984, and they removed it from the market pursuant to the Ellis Act in 1998 so that they could move their aging mother into the building with them. (They could not avail themselves of an "owner move-in" eviction, *see* note 3, *supra*.) Their mother has since passed away, and the Debbanes have kept the building vacant for their own personal use. They have no desire to share the property they live on with people other than those living with them already. However, under Proposition M they will be taxed a minimum of $7,500 in 2024; $15,000 in 2025; and $30,000+ per year thereafter. (SUMF Nos. 19-24.)

2. Robert Friedland is the owner of a four-unit apartment building in the Western Addition/NOPA area. Each unit is approximately 850 square feet. He has owned the building since the early 1980s and has lived in one of the units himself during that time. Until recently, Mr. Friedland rented out the other three units, but he is 71 years old and has significant health issues. Thus, when he recently retired, he decided that he no longer wants to bear the physical and mental burdens of being a landlord for the rest of his life, so, as each unit has come vacant over the last 3-4 years, he has declined to re-rent them. He has no wish to leave his decades-old home, but he would be forced to sell his building and move if the tax were to be applied to him, because his sole remaining sources of income—Social Security and some modest savings—would not be sufficient to cover the taxes plus his other living expenses. He would effectively be evicted from his home. If Proposition M were enforced against him, he would be forced to pay $7,500 for 2024 ($2,500 x three vacant units of less than 1,000 square feet); $15,000 for 2025; and $30,000+ annually thereafter. (SUMF Nos. 27-32.)

3. Natasa Zec, prior to her retirement four years ago, worked for approximately 20 years as a "locum tenens" anesthesiologist, *i.e.*, one working on

temporary contracts at various sites across the nation, including San Francisco. In connection with the itinerant nature of her career, since 2008 Ms. Zec has owned a "micro-condominium" of exactly 300 square feet in a multi-unit building on Divisadero, where, however, she has never claimed the homeowner's exemption. She has also owned a comparably sized micro-condominium (350 square feet) in Boston since 2000, where she has claimed a homeowner's exemption. Neither of those units have ever been rented out, and Ms. Zec has never intended to rent them out. She maintains them for her personal use. Following her retirement, Ms. Zec has continued to maintain both abodes, splitting time between the two, and she wishes to continue to do so, as she has for decades. In 2022, she spent 126 days in San Francisco, and more than 183 days in Boston, an approximate number of days per year that she wishes to spend, respectively, in each place in the future. Going forward, if she continues to divide her time between the two small abodes as she historically has, she would be subject to a tax of $2,500 in 2024; $5,000 in 2025; and $10,000+ annually thereafter. The latter figure is approximately double what she pays in *ad valorem* property taxes on the Divisadero micro-condo each year. If Proposition M were enforced against her, Ms. Zec could not afford to pay the taxes and would have no choice but to sell her long-time home. In light of the burdensome restrictions San Francisco places on landlords, and based on her negative experiences as a landlord in the past (for example, in the Bronx, where tenants severely damaged a studio apartment that she owned to the point that it became essentially impossible to either rent or sell), Ms. Zec has no interest in renting out her micro-condominium on Divisadero Street and becoming a landlord in San Francisco. (SUMF Nos. 35-40, 43; Appx. 96-98 [Declaration of Natasa Zec].)

4. **SFAA, SPOSFI, and SFAR** are all nonprofit trade associations. SFAA's and SPOSFI's members all own residential rental properties in San Francisco, totaling in the tens of thousands of units, that will be potentially subject to taxation under Proposition M. They include members—including hundreds of "mom and pop" owners—who own, but choose, for a variety of reasons, not to rent out residential units

in San Francisco, and they include members who are trying to rent out residential units but are unable to do so for an extended period due to adverse market conditions or for other reasons. In both cases, their members are potentially subject to severe taxation. SFAR's 4,300+ members are dependent for their livelihood upon the sale and management of real property in San Francisco. The great majority of SFAR member brokers and agents are involved in purchases, sales and/or management of San Francisco residential properties, including ones that are subject to Proposition M, which threatens to adversely affect the ability of SFAR's members to market, sell and manage real property. (SUMF Nos. 45-50, 55-58. 61-64.)

Each of these associations has standing to bring this case because (1) their individual members will be affected by Proposition M and could have challenged the measure in their own right, (2) the ability of these associations' members to exercise their statutory and constitutional rights free from punitive consequences is germane to their organizational purposes, and (3) this challenge does not require the participation of the associations' individual members. (*Id.*) *See also* *SFAA*, 3 Cal. App. 5th at 472-74 (SFAA and SFAR had standing to bring a facial challenge on behalf of their members); *Johnson*, 137 Cal. App. 4th at 12 n.3 (SPOFSI representing property owners).

Within one year prior to the filing of this action each individual and associational Plaintiff paid (or their members paid) property, sales and/or use taxes within the City and County of San Francisco. (SUMF Nos. 25-26, 33-34, 44, 51-54, 59-60, 65-66.)

IV. ARGUMENT.

A. The Takings and Due Process Clauses Bar the City from Forcing Property Owners to Rent Out Their Property, and the City Cannot Indirectly Coerce the Same Result by Burdensome Taxation.

As discussed above, the Supreme Court has held that the government cannot "compel a landowner over objection to rent his property" without violating the Takings Clause. *Yee*, 503 U.S. at 528; *see also* *FCC v. Fla. Power Corp.*, 480 U.S. 245, 251-53 (1987) (noting constitutional problem if utility company was compelled "to enter into, renew, or refrain from terminating" agreements to lease its property). And the courts

have not hesitated to enforce this constraint, whether violated directly or indirectly.

Thus, in *Cwynar v. City & Cnty. of S.F.*, 90 Cal. App. 4th at 637, the First Appellate District held that property-owners stated a takings claim where San Francisco forced them to continue renting units that they no longer wish to rent, rather than reclaiming them for their own use or use by a close family member. *Id.* at 658. Likewise, in *Levin v. City & Cnty. of S.F.*, 71 F. Supp. 3d at 1072, the Northern District of California struck down as a taking a San Francisco ordinance requiring landlords to pay evicted tenants 24 times the difference between their old rent and their new rent as a condition of removing units from the market. The Court held that though a local government may require a landlord to make a reasonable relocation payment to displaced tenants, to help mitigate the direct impact of eviction on those tenants, the Takings Clause does not allow a city to require landlords to make expenditures to benefit society at large as a condition of no longer renting the property. *Id.* at 1086.

And perhaps most directly on point, the New York Court of Appeals (that State's highest court) squarely struck down as a physical and regulatory takings (in a case cited with approval by *Cwynar*) New York City's "anti-warehousing" law, which required landlords to "rent up" vacant apartments or pay "substantial monetary penalties for noncompliance"— "$500 per unit penalty … for each unit unrented to a bona fide tenant." *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 104 (N.Y.), *cert. denied*, 493 U.S. 976 (1989). Proposition M is substantively indistinguishable from the anti-warehousing penalties struck down in *Seawall*, except that its penalties are much greater, and it should suffer the same fate because "[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Watchtower Bible & Tract Soc'y v. City of L.A.*, 30 Cal. 2d 426, 431 (1947); *see also* *Harman v. Forssenius*, 380 U.S. 528, 540 (1965). But that is precisely what Proposition M does.

Plaintiffs anticipate, however, that the City will rely on Proposition M's characterization of its charges as a "tax," because, as a general proposition, taxes are not takings, *see* *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013).

1 But that general proposition has an important exception. The Court has recognized
2 there is a point at which a "charge denominated by the government as a 'tax' becomes
3 'so arbitrary ... that it was not the exertion of taxation but a confiscation of property.'"
4 *Id.* at 617 (quoting *Brushaber v. Union Pacific R. Co.*, 240 U.S. 1, 24-25 (1916)).

5 In other words, the fact that the government calls something a "tax" will be
6 disregarded if the measure's substance reflects a purpose to indirectly achieve an end
7 the legislature cannot lawfully achieve directly, as is the case here. "The Constitution
8 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional
9 protections." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 829 (1995) (quoting *Lane v.*
10 *Wilson*, 307 U.S. 268, 275 (1939)). "Constitutional rights would be of little value if they
11 could be…indirectly denied," *Smith v. Allwright*, 321 U.S. 649, 664 (1944), or so easily
12 "manipulated out of existence." *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960).

13 Thus, in *Child Labor Tax Case*, 259 U.S. 20 (1922), the Court struck down a "tax"
14 imposed by Congress on businesses that used child labor, holding it was not a valid
15 exercise of Congress's taxing authority but was instead a pretextual attempt to regulate
16 child labor in violation of the Tenth Amendment and that "[t]o give such magic to the
17 word 'tax' would be to break down all constitutional limitation of the powers of Congress
18 and completely wipe out the sovereignty of the States." *Id.* at 38. Likewise, in *Dep't of*
19 *Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994), the Court struck down
20 Montana's "tax" on the possession of illegal marijuana, holding that it was, in fact, an
21 improper second punishment for illegal possession that violated the Double Jeopardy
22 Clause. *Id.* at 779-80. And in *United States v. Constantine*, 296 U.S. 287 (1935), the
23 Court struck down a federal "tax" on conducting a retail liquor business, concluding
24 that it was, in fact, an unconstitutional penalty designed to punish the violation of state
25 liquor laws. *See also* *Hill v. Wallace*, 259 U.S. 44 (1922) (same re futures trading "tax").

26 California law likewise holds that the legislative label is not conclusive; in
27 determining whether a charge imposed by an ordinance is primarily for revenue-raising
28 or regulatory ones—is a tax or a penalty—"the court will look to the substantive

provisions of the ordinance and not merely its title and form," *United Bus. Comm'n v. City of San Diego*, 91 Cal. App. 3d 156, 165-66 (1979). Its legislative history is also relevant, *Cal. Taxpayers Ass'n v. Franchise Tax Bd.*, 190 Cal. App. 4th 1139, 1149-50 (2010); *United States v. Reorganized Fabricators*, 518 U.S. 213, 226 (1996), as is a history of official hostility to the exercise of constitutionally-protected rights, *Watchtower Bible & Tract Soc'y*, 30 Cal. 2d at 430-31.

These indicators all point to Proposition M being a penalty on the exercise of the constitutionally-protected right to exclude others from one's property. The text of the measure—specifically, Section 2951 (the "Findings and Purpose" section)—focuses primarily on "disincentivizing" vacancies, with revenue collection incidental thereto. "[I]f regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax." *United Bus. Comm'n*, 91 Cal. App. 3d at 165. The ballot arguments support this conclusion even more clearly, focusing almost exclusively on reducing the number of vacancies, explicitly stating (in the proponents' rebuttal), "*We hope no one pays this tax*. We want every vacant unit filled with people who need homes." And, of course, the well-documented history of San Francisco's hostility to owners exercising their right to keep units off the market is discussed above.

All of the individual Plaintiffs' circumstances illustrate the punitive, confiscatory nature of this tax, but perhaps Ms. Zec's do so most clearly. She used her micro-condominium for 126 days in 2022. If she were to do so in the future, to avoid the unit being "vacant" at least 183 days a year she would have to lease out the unit—her part-time home—to strangers for at least 57 days. But the City prohibits her from renting the unit to any one tenant for less than 30 days at a time, unless it qualifies for use as a "short-term" rental, which Ms. Zec cannot do.[11] And if she rents her micro-condo to any one tenant on a *non*-short-term basis, that tenant would be entitled to the protections of the City's just-cause for eviction laws, and Ms. Zec would be unable to

[11] Among other things, such "short-term" rentals are only permitted to property owners who spend at least 275 days a year in the unit to be rented. S.F. Admin. Code § 41A.5(g)(1).

force that tenant to vacate so that she could use the home herself as intended. S.F. Admin. Code § 37.9(a). In other words, her choice is to devote her home entirely to rental use by strangers and give up using it herself; pay punitive taxes at a rate double, and in addition to, her property taxes; or sell it and *still* give up using it herself (the likeliest result). This Hobson's choice is the very definition of "confiscatory" taxation.

Nor could Proposition M be sustained even if the Court were to conclude that Proposition M does, in fact, impose a "tax," because it is not a generally applicable tax that incidentally falls on a protected constitutional right; it is, instead, *targeted* at that right. As the California Supreme Court has held, "if the Constitution forbids the prohibition of [particular activities, like keeping a property vacant], then that result cannot be achieved indirectly by imposing a destructive tax upon them." *Fox Bakersfield Theatre Corp.*, 36 Cal. 2d at 139-40. In the same vein, the U.S. Supreme Court has said the government may not "impose a charge for the enjoyment of a right granted by the federal constitution," *Murdock v. Comm'n of Penn.*, 319 U.S. 105, 113 (1943). In other words, the government may not single out a constitutional right for special taxation or condition the exercise of that right on a payment to the government.

Minneapolis Star & Tribune v. Minn. Comm'r of Revenue, 460 U.S. 575, 591-93 (1983), is instructive on this point. In that case, the Supreme Court struck down a tax that specifically targeted newspapers (meaning those engaged in protected First Amendment activity) for differential tax treatment. The Court acknowledged that a tax that was generally applicable to businesses, like an income tax, business license tax, etc., could constitutionally be applied to businesses operating newspapers, *id.* at 581; but it held that publications could not be singled out for special treatment based on the exercise of their constitutionally protected rights. Likewise, the Court has held that the equal protection clause is violated by imposing a tax specifically on the constitutionally-protected right to vote, while again acknowledging generally-applicable taxes that do not single out a constitutional right may be imposed. *See Harper v. Va. State Bd. of Elec.*, 383 U.S. 663, 668-69 (1966). Likewise, the government "may not exact a license

tax for the privilege of carrying on interstate commerce…" *Murdock*, 319 U.S. at 113.

Here, too, Plaintiffs do not contend that the residential units in question are exempt from *generally applicable* taxes; Plaintiffs are subject to, and pay, annual *ad valorem* taxes on these properties, like all property owners in California. (SUMF Nos. 25, 33, 39, 44.) But property-owners' rights to keep their property vacant—to exclude others—is an essential element of the property rights protected by the Takings Clause, and Proposition M unlawfully singles out this right for differential—and "differentially *more burdensome*"—taxation,[12] as a transparent means of discouraging the exercise of that right. That violates the Constitution for the reasons set out in *Fox Bakersfield Theatre*, *Murdock*, *Minneapolis Star & Tribune Co.*, and *Harper*. In short, a tax that singles out this constitutional right for differential taxation is "'so arbitrary ... that it [i]s not the exertion of taxation but a confiscation of property.'" *Koontz*, 570 U.S. at 617.

B. Proposition M Is Also Preempted by the Ellis Act.

Of course, the Court need not actually reach the constitutional issues raised in the preceding section,[13] because the right to not offer one's residential units for rent is also enshrined in preemptive state law, specifically the Ellis Act, which provides, "*No public entity … shall*, *by* statute, *ordinance*, or regulation, or by administrative action implementing any statute, ordinance or regulation, *compel 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 residential hotels]." Govt. Code § 7060(a) (emphasis added).[14]

Subsequent caselaw (much of it involving San Francisco[15]) confirms that the

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[12] *Minneapolis Star & Tribune Co.*, 460 U.S. at 588 (emphasis in original). In *Minneapolis Star*, the Court was concerned by the mere possibility that newspapers could face "differentially more burdensome treatment" relative to other taxpayers. *Id.* Here, we have the fact of it.

[13] "'[C]ourts should avoid resolving constitutional issues if a case can be decided on statutory grounds[.]'" *People v. Tindall*, 24 Cal. 4th 767, 783 (2000).

[14] Under Article XI, § 7, of the California Constitution, a city or county can only "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*." (Emphasis added.) In other words, local governments—including charter cities like San Francisco—remain subject to superior state law. That includes the Ellis Act. *See* cases discussed *infra* (enjoining various San Francisco ordinances as preempted by the Ellis Act).

[15] *See* cases cited in note 6, *supra*.

1 “compulsion” prohibited by the Act is not limited merely to a direct order to make a
2 property-owner's unit available for rent. It also includes the imposition of financial or
3 other penalties for declining to do so. As the First Appellate District has held, “The Ellis
4 Act does not permit the City to condition plaintiff's departure [from the rental market]
5 upon the payment of ransom.” *Bullock v. San Francisco*, 221 Cal. App. 3d at 1101.

6 Thus, for example, in *Bullock* the appeals court struck down a San Francisco
7 ordinance conditioning a property-owner's right to take rental units off the market
8 under the Ellis Act on the landlord either constructing a similar quantity of new units
9 or paying a substantial fee to the City's Hotel Preservation Fund. 221 Cal. App. 3d at
10 1099-1100. Just as Judge Breyer did in *Levin*, the Court distinguished between a
11 limited relocation payment to displaced tenants, to offset the direct impact of eviction
12 on those tenants, and requiring landlords to make expenditures to benefit society at
13 large as a penalty for no longer renting a property. *Id.* at 1101. But that is *exactly* what
14 Proposition M seeks to do. (*See, e.g.,* Appx. 48, Prop M. § 2951(d) [findings].)

15 Likewise, in *Reidy v. City & Cty. of San Francisco*, the Court of Appeal again
16 affirmed that the requirements struck down in *Bullock* are preempted, and that
17 subsequent amendments to the Ellis Act to clarify that cities retain their general police
18 and zoning powers did not alter the analysis. 123 Cal. App. 4th at 592.

19 And recently in *Coyne v. San Francisco* the Court of Appeal held that a
20 requirement that landlords pay evicted tenants the difference between their existing
21 rent and market-rate rents for a two-year period (capped at $50,000, post-*Levin*) was
22 facially preempted by the Ellis Act because it placed a “prohibitive price” on the exercise
23 of the right not to rent the units. 9 Cal. App. 5th at 1232. In that case, the City itself
24 admitted that imposing a “prohibitive price is compulsion” and “‘the City is not allowed
25 to directly compel landlords to remain in the residential rental business. It is not
26 allowed to do the same thing indirectly by exacting a price that is so high that landlords
27 can't in practice pay it *or even that will materially deter them from evicting under the*
28 *Ellis Act*.’” *Id.* at 1226 (emphasis added, quoting oral argument). The Court agreed,

holding the charge *did* impose such a prohibitive price; crucially, the *amount*, whether the maximum $50,000 or a lesser sum, was immaterial to the holding. *Id.* at 1232.

In this case, the individual Plaintiffs likewise face a "prohibitive price" if they decline to dedicate their properties to rental uses: up to $30,000 per year for the Debbanes and for Mr. Friedland, and, for Ms. Zec, an amount that is more than double her *ad valorem* property tax rate. Other members of the associational plaintiffs face comparable—or greater—penalties for not renting their units as well. These amounts are, without question, sufficiently high as to "materially deter" many property-owners from exercising their rights under the Ellis Act not to rent their properties. (Indeed, as already noted, they are an order of magnitude greater than the $500/unit penalties struck down in *Seawall Associates*.) Proposition M is, therefore, preempted by the Act.

C. Proposition M Unconstitutionally Disadvantages a Property-Owner's Choice to Use His or Her Property to House Family Members, in Violation of Due Process and Equal Protection.

Proposition M also threatens property-owners' fundamental liberty interests in familial living arrangements, protected by the due process and equal protection clauses, insofar as it taxes (actually penalizes) units that are rented to family members of the owner while exempting units that are leased to strangers.

As discussed above, Proposition M provides that a Residential Unit is not deemed to be "vacant" at any time during which the Unit is subject to a *bona fide* lease to a tenant—*i.e.*, the so-called "Lease Period." (Appx. 48-49, Prop. M §§ 2952 ["Definitions"] & 2953(j).) But the exemption does not apply when any of the lessees is "a spouse, domestic partner, child, parent, or sibling" of the "owner or any current or former co-owner." (*Id.*)[16] As the opponents of Proposition M noted in their main argument against

[16] Specifically, the "'Lease Period' means the period during which any owner of a Residential Unit or any person in the Owner's Group of that owner leases that Residential Unit to one or more tenants under a bona fide lease intended for occupancy, *but not including any lease or rental of that Residential Unit to anyone in the Owner's Group* or to travelers, vacationers, or other transient occupants." (Appx. 48, Prop. M § 2952 ["Definitions"]; emphasis added.) "'Owner's Group' means for each owner of a Residential Unit, with respect to each Residential Unit, the owner, any current or former co-owner, and any *Related Person* or Affiliate of the owner or any current or former co-owner." (*Id.*; emphasis added.) A "'Related Person' means a spouse, domestic partner, child, parent, or sibling." (*Id.*)

1 the measure, the consequence of fact is that "[t]he measure is even written so that
2 intergenerational households and relatives living under one roof would be fined in a
3 building that isn't vacant at all." (Appx. 41.) Tellingly, in their rebuttal, the
4 Proposition's proponents did not deny that was the case. (*Id.*)[17]

5 The Supreme Court has held that the protection of familial living arrangements
6 is a fundamental liberty interest protected by substantive due process. *See, e.g., Moore*
7 *v. E. Cleveland*, 431 U.S. 494, 495 (1977) (striking down ordinance limiting occupancy
8 of a dwelling unit to members of a single "family," narrowly defined); *see also Cwynar*,
9 90 Cal. App. 4th at 643-44 (ordinance barring landlords from evicting tenants to use
10 the unit for a family member violated the Constitution). Legislation infringing on those
11 familial living arrangements is thus subject to strict scrutiny, meaning "it must be set
12 aside or limited unless it serves a compelling purpose and is necessary to the
13 accomplishment of that purpose." *In re Santos Y.*, 92 Cal. App. 4th 1274, 1315 (2001);
14 *see also Moore*, 431 U.S. at 499. That is especially so where, as here, such family
15 arrangements are singled out for uniquely disfavored treatment relative to leases to
16 strangers. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 585 (singling out protected
17 interest for taxation subject to strict scrutiny); *Clark v. Jeter*, 486 U.S. 456, 460-61
18 (1988) (disparate treatment affecting fundamental rights subject to strict scrutiny).

19 Because strict scrutiny applies, the City bears the burden of establishing that
20 the law is constitutional, *Mast v. Fillmore Cty.*, 141 S. Ct. 2430, 2432 (2021), and the
21 asserted governmental interests must have been considered *upon adoption*, rather than
22 "hypothesized or invented post hoc in response to litigation." *United States v. Va.*, 518
23 U.S. 515, 533 (1996). "[A]fter-the-fact explanations cannot help a law survive strict
24 scrutiny." *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 190 (D. Mass. 2015).[18]
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[17] While the claims of a measure's opponents that the measure will have adverse consequences are sometimes not regarded as authoritative in construing a measure, where the proponents do not dispute the claims, the courts give them greater weight. *See Legislature v. Eu*, 54 Cal. 3d 492, 505 (1991).

[18] *See also Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (for purposes of strict scrutiny, "[t]o be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose'

Nothing in Proposition M's findings or in the ballot pamphlet materials—its "legislative history," *see* *Bd. of Supervisors v. Lonergan*, 27 Cal. 3d 855, 866 (1980)—reflects a compelling interest that would remotely justify the Proposition's singling out property-owners' constitutionally-protected rights to use their property to house family members for differentially burdensome taxation. (*See* Appx. 36-51.)

D. Proposition M Also Unlawfully Burdens Constitutionally Protected Privacy Interests.

Article I, section 1, of the California Constitution provides, "All people are by nature free and independent and have inalienable rights. Among these are … pursuing and obtaining … *privacy*." (Emphasis added.) Proposition M violates this constitutional right to privacy, by seeking to compel property-owners who reside on their property—as the individual Plaintiffs do—to share the property with others against their will.

"[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *Hill v. Nat'l Coll. Athletic Ass'n*, 7 Cal. 4th 1, 39-40 (1994) ("*Hill*"). All three elements exist here.

As to the legally protected privacy interest—the first *Hill* element:

> In *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130, 134, the right to privacy was held to encompass the right to choose the people with whom one lives. (See also *Welsch v. Goswick* (1982) 130 Cal.App.3d 398, 409-415 (conc. opn. of Staniforth, J.).) The court stated that the constitutional amendment was intended "to ensure a right to privacy not only in one's family but also in one's home." (27 Cal.3d at p. 130, fn. omitted.) Moreover, the "[freedom] to associate with people of one's choice is a necessary adjunct to privacy in the family and the home." (See *People v. Katrinak* (1982) 136 Cal.App.3d 145, 153.)

Robbins v. Superior Court, 38 Cal. 3d 199, 213 (1985).

Crucially, this privacy interest encompasses the decision <u>not</u> to share a home

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for the discriminatory classification, and the legislature must have had a strong basis in evidence to support that justification.") (internal citations omitted)

with someone, just as much as it includes the right to do so.[19] And, equally important, this privacy interest is not limited solely to shared residence in a single structure; it extends to multiple housing units on the same property too. *See Coalition Advocating Legal Housing Options v. City of Santa Monica*, 88 Cal. App. 4th 451, 459 (2001) ("*CALHO*") (striking down an ordinance that sought to regulate the types and numbers of persons who could reside in a multi-unit home on the same residential property).

As to the reasonable expectation of privacy—the second *Hill* element—"it is obviously reasonable to expect privacy in one's own home," which "has traditionally been subject to the highest protection against intrusions." *Tom*, 120 Cal. App. 4th at 684. This, too, applies to multiple units on the same property. *CALHO*, 88 Cal. App. 4th at 460-41 (finding all three *Hill* elements to be met as to a multi-unit structure).

And finally, *Tom* and *CALHO* both hold that interference with the right to choose the persons with whom one chooses to live (or not) is a serious invasion—the third *Hill* element. The discussion in *Tom* is particularly relevant. In that case the Court deemed it significant that the real goal of the privacy-invading ordinance at issue there was to discourage property-owners from removing their properties from the rental market, just as Proposition M's true purpose is to discourage property-owners from exercising their rights not to use their property as rental housing. 120 Cal. App. 4th at 685.

As Plaintiffs have "carried their burden of demonstrating a serious invasion of their reasonable privacy interests, the burden shift[s] to the City to show 'that the invasion of privacy is justified because it substantively furthers one or more countervailing interests.'" *Id.* at 686 (quoting *Hill*, 7 Cal. 4th at 40). Significantly, in *Tom*, the Court of Appeal held that a desire to "preserve rental housing, by limiting the right of homeowners … to go out of the business of renting" (which is the same interest

[19] *See Robbins*, 38 Cal. 3d at 212-14 (indigent person could not be forced to reside in dormitories "without the freedom to choose his own living companions" as a condition of obtaining public benefits); *Tom*, 120 Cal. App. 4th at 674 (San Francisco ordinance prohibiting tenants-in-common from agreeing to give each other exclusive rights of occupancy in portions of a multifamily building, such that "no TIC could exclude any others from any part of the property" violated the constitutional right to privacy).

underlying Proposition M), was an insufficiently strong justification for the privacy invasion represented by prohibiting "exclusive right of occupancy agreements" for tenancies-in-common. For one thing, that purpose was held to conflict with the Ellis Act, just as Proposition M does, for the reasons discussed above; but "[s]econd, and more critically, a governmental interest in precluding homeowners from going out of the landlord business would not justify an extreme privacy violation, such as rendering homeowners unable to determine the persons with whom they should live, or forcing them to share their homes with others who are unwelcome." *Id.* at 686-87.

Again, this is an issue for all of the individual Plaintiffs in this case. All of them live on the property in question at least part time, and all would be compelled to share their homes with strangers. But again, Ms. Zec's situation most clearly illustrates the problem. To avoid the unit being "vacant" at least 183 days, she would have to lease out the unit—her part-time home—to strangers for at least 57 days. The alternative is to face thousands of dollars a year in "taxes," because San Francisco wants to commandeer her property for its own purposes. The risks of that approach are discussed above, but even if she were inclined to take the chance of not being able to regain her property when the time came, she would still be in a position of being forced to share her home. Unless she emptied the unit every year—impractical for such relatively short periods—those strangers would sleep in her bed, watch her TV, and use her dishes. Such compulsory sharing of one's home is, unquestionably, a serious invasion of her privacy.

By enacting Proposition M, San Francisco is trying to force property-owners who wish not to rent out units on the same property on which they reside—like the individual Plaintiffs here—to share their homes against their will, by making it prohibitively expensive to do otherwise. This violates those owners' privacy rights.

V. CONCLUSION.

For the foregoing reasons, Proposition M is both unconstitutional and preempted. A permanent injunction should therefore issue pursuant to Code of Civil Procedure § 526a, prohibiting Defendants from enforcing the Proposition.

Respectfully submitted,

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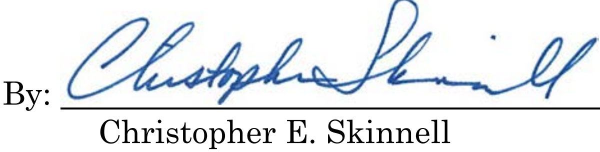
By: 

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