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 12 SMALL PROPERTY OWNERS OF
 SAN FRANCISCO INSTITUTE

13 UNITED STATES DISTRICT COURT
 14
 15 NORTHERN DISTRICT OF CALIFORNIA

16 SAN FRANCISCO

0605

17 TIM CARRICO and SMALL PROPERTY)
 18 OWNERS OF SAN FRANCISCO)
 19 INSTITUTE,)

20 Plaintiffs,)

21 vs.)

22 CITY AND COUNTY OF)
 23 SAN FRANCISCO,)

24 Defendant.)
 25)
 26)

CASE NO.

COMPLAINT FOR: **WHEN**
 1) VIOLATION OF FIRST AND
 FOURTEENTH AMENDMENTS;
 42 U.S.C. § 1983; 2) VIOLATION
 OF SUBSTANTIVE DUE
 PROCESS; 3) DECLARATORY
 RELIEF; 4) STATE LAW
 PREEMPTION; 5) VIOLATION
 OF SAN FRANCISCO
 MUNICIPAL ELECTIONS CODE
 § 500; 6) VIOLATION OF STATE
 SUBSTANTIVE DUE PROCESS;
 7) STATE DECLARATORY
 RELIEF

ORIGINAL
 FILED
 2009 FEB 10 P 3:23
 E-filing
 SUPERIOR COURT
 COUNTY OF SAN FRANCISCO

1 Plaintiffs TIM CARRICO and SMALL PROPERTY OWNERS OF
2 SAN FRANCISCO INSTITUTE allege as follows:

3 JURISDICTION AND VENUE

4 1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331,
5 1343 and 42 U.S.C. § 1983. It also has subject matter over pendent state law claims
6 pursuant to 28 U.S.C. § 1367.

7
8 2. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and
9 2202, and by Rules 57 and 65 of the Federal Rules of Civil Procedure.

10 3. Venue is proper pursuant to 28 U.S.C. § 1391(b).

11 PARTIES

12 4. Plaintiff TIM CARRICO (“Carrico”) is, and at all times herein was, a
13 citizen of the United States and an individual owner of real property located in the
14 City and County of San Francisco, State of California, consisting of several multi-unit
15 apartment buildings. Carrico is the person principally responsible for such
16 properties and has been a party plaintiff in unlawful detainer proceedings in San
17 Francisco Superior Court in connection with such properties.

18
19 5. Plaintiff SMALL PROPERTY OWNERS OF SAN FRANCISCO
20 INSTITUTE (“Small Property Owners”) is, and all times herein was, a nonprofit
21 association of approximately 1,500 members who own residential properties in the
22 City and County of San Francisco, California, including multi-unit apartment
23 buildings subject to the ordinance at issue.

24
25 6. Plaintiffs have a beneficial interest in the subject of this suit as they are
26 subject to the legal and constitutional infirmities of the municipal ordinance at issue
27 in this matter – Defendant’s Proposition M.

1 and volitionally severable from each other.

2 12. SAN FRANCISCO is responsible for administering and enforcing its
3 laws.

4 COUNT ONE

5 (Violation of First and Fourteenth Amendments; 42 U.S.C. § 1983)

6 13. Plaintiffs refer to and incorporate by reference, as though fully set forth
7 herein, paragraphs 1 through 12 of this complaint.

8 14. Sections 37.10B(a)(6) and 37.10B(a)(7), which prohibit inducements to
9 tenants to vacate units, are unconstitutional because they violate the First and
10 Fourteenth Amendments of the United States Constitution by proscribing and
11 chilling valid speech, such as offers to settle potential litigation or offering other
12 lawful inducements and discouraging landlords from exercising their right to petition
13 for redress of grievances. They are also vague and ambiguous, such that they will
14 chill a broader amount of speech than would be constitutionally permissible, and fail
15 to provide proper notice as to what conduct will subject a person to liability in
16 violation of the guarantee of due process under the Fourteenth Amendment of the
17 United States Constitution.

18 15. Section 37.10B(c)(6) creates a one-way fee shifting provision in favor of
19 tenants: tenants who win a lawsuit receive their attorney's fees while prevailing
20 landlords do not. This provision violates the right of petition by similarly burdening
21 and chilling it. It also impermissibly favors one category of litigants over another
22 with no rational basis for the classification in violation of the 14th Amendment.

23 16. Individually and collectively, the terms of Proposition M are vague and
24 ambiguous as to what conduct will subject landlords to liability and therefore have
25

1 the effect of discouraging and burdening the exercise of the rights of free speech and
2 of denying Plaintiffs their right of due process.

3 17. Thus, Proposition M violates the First and Fourteenth Amendments of
4 the U.S. Constitution because it has the purpose and effect of discouraging and
5 burdening landlords' rights of free speech and petition and deprives them of their
6 right of due process.
7

8 COUNT TWO
9 (Violation of Substantive Due Process)

10 18. Plaintiffs refer to and incorporate by reference, as though fully set forth
11 herein, paragraphs 1 through 12 of this complaint.

12 19. The text of Proposition M printed in the Voter Information Pamphlet
13 improperly included passages of the proposed new § 37.10B in strikeout text, thereby
14 incorrectly representing to voters that there was an existing ordinance on the subject
15 of tenant harassment and that Proposition M was merely amending it when, in fact,
16 there was no such existing ordinance and § 37.10B was entirely new legislation.
17 Proposition M is therefore is illegal, unconstitutional, and unenforceable because the
18 ballot materials were inaccurate and misleading and affected the ability of the voters
19 to make and informed choice, and the enactment of Proposition M therefore violates
20 Plaintiffs' federal substantive due process rights.
21

22 COUNT THREE
23 (Declaratory Relief)

24 20. Plaintiffs refer to and incorporate by reference, as though fully set forth
25 herein, paragraphs 1 through 12 of this complaint.

26 21. There is an actual controversy between the parties in that Plaintiffs
27 contend that all of Proposition is void and unenforceable whereas Defendant
28

1 contends that the entire proposition is enforceable. Plaintiffs also contend that
2 certain parts of the proposition violate their rights of freedom of speech and to
3 petition for redress of grievances, whereas Defendant contends no part of the
4 proposition violates such rights. Furthermore, Plaintiffs contend that certain parts of
5 the proposition are so vague and ambiguous as to violate due process of law, whereas
6 Defendant contends no part of the proposition is vague or ambiguous.
7

8 22. Plaintiffs are entitled to a declaration setting forth what parts, if any, of
9 Proposition M may be enforced and any limitations thereon.

10 COUNT FOUR

11 (Pendent state law claims - State Law Preemption)

12 23. Plaintiffs refer to and incorporate by reference, as though fully set forth
13 herein, paragraphs 1 through 12 of this complaint.

14 24. Sections 37.10B(a)(6) and 37.10B(a)(7), which prohibit inducements to
15 tenants to vacate units, are vague and ambiguous as to what conduct will subject a
16 person to liability) in violation of the guarantee of due process under Article I, § 7 of
17 the California Constitution. They also violate Article I, § 2 of the California
18 Constitution by proscribing and chilling valid speech, such as offers to settle
19 potential litigation or other lawful inducements and because of their vagueness and
20 ambiguity, chill a broader amount of speech than is constitutionally permissible.
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22 Finally, these sections are in direct conflict with and preempted by the common law
23 and statutory litigation privilege, California Civil Code § 47, which creates a privilege
24 for statements made in contemplation of litigation or during the course of litigation.
25

26 25. Section 37.10B(a)(9) prohibits the violation of discrimination laws and
27 the Proposition makes such violations remediable by the San Francisco Residential
28

1 Rent Stabilization and Arbitration Board. This section is an anti-discrimination law
2 that is expressly preempted by the California Fair Employment and Housing Act,
3 California Government Code §§ 12900 *et seq.*

4 26. Section 37.10B(a)(11) prohibits landlords and their agents, contractors,
5 subcontractors, and employees from refusing to accept or acknowledge receipt of a
6 tenant's lawful rent payment. Section 37.10B(a)(12) prohibits landlords and their
7 agents, contractors, subcontractors, and employees from refusing to cash a rent
8 check for over 30 days. Because the acceptance of rent may create a waiver of
9 existing causes of action for unlawful detainer under state law, these sections
10 effectively require landlords to waive existing causes of unlawful action under state
11 law and the right to raise rents under the state's Costa-Hawkins Rental Housing Act,
12 Civil Code § 1954.5 *et seq.* Sections 37.10B(a)(11) and 37.10B(a)(12) are therefore
13 illegal, unconstitutional, and unenforceable because they are in conflict with, and
14 preempted by, state law and violate Plaintiffs' state law due process rights.
15

16 27. Section 37.10B(c)(3) creates a private cause of action for a violation of
17 this "Section"; it also provides that the burden of proof in such cases shall be the
18 preponderance of the evidence. Section 37.10B(c)(3) further provides that any
19 violation of "this Chapter" of the San Francisco Administrative Code may be asserted
20 as an affirmative defense in an unlawful detainer action. Section 37.10B(c)(3) is
21 illegal, unconstitutional, and unenforceable because 1) it is an *ultra vires* act, as SAN
22 FRANCISCO is not constitutionally authorized to create a private cause of action; 2)
23 state law preempts local law with respect to the burden of pleading and proof; 3) its
24 provisions that any violation will constitute a defense to an unlawful detainer action
25 is in conflict with and preempted by state law authorizing such actions on specific
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1 grounds; 4) it is vague and ambiguous as to the meaning of the terms "this Section"
2 and "this Chapter" and therefore violates Plaintiffs' state law due process rights; and
3 5) it is in direct conflict and preempted by the common law and statutory litigation
4 privilege, California Civil Code § 47, which fully occupies the field of whether
5 penalties may be imposed upon citizens for statements made in contemplation of
6 litigation.
7

8 28. Section 37.B10(c)(5) provides for a cause of action against any person
9 who violates or aids or incites another person to violate the provisions of Section
10 37.B10, entitles a prevailing plaintiff to attorney's fees, and does so without regard to
11 whether the prohibited statements occurred in a good-faith contemplation of
12 litigation or during the course of litigation itself. Section 37.B10(c)(5) is illegal,
13 unconstitutional, and unenforceable because: 1) it violates Article I, § 2 of the
14 California Constitution by discouraging landlords from exercising their right to
15 freedom of speech; 2) it violates Article I, § 3 of the California Constitution because it
16 discourages landlords from exercising their right to petition for redress of grievances;
17 3) it is in direct conflict with and preempted by state law governing awards of
18 attorney's fees; and 4) it is in direct conflict with and preempted by the common law
19 and statutory litigation privilege, California Civil Code § 47, which creates a privilege
20 for statements made in contemplation of, or during, litigation.
21

22 29. Section 37.10B(c)(6) affords the prevailing defendant in any action to
23 recover possession of a rental unit a right to attorney's fees, even though the action
24 was brought in good faith and with probable cause. This provision is illegal,
25 unconstitutional and unenforceable because: 1) it violates the right of petition by
26 impermissibly burdening and chilling it; 2) it is in direct conflict with and preempted
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1 by state law governing awards of attorney's fees; 3) it is in direct conflict and
2 preempted by the common law and statutory litigation privilege, California Civil
3 Code § 47, which creates a privilege for statements made in contemplation of, or
4 during, litigation; and 4) by including this provision, Proposition M, which otherwise
5 concerns tenant harassment, embraces more than one subject, in violation of Article
6 2, § 8(d) of the California Constitution.

8 30. Individually and collectively, the terms of Proposition M are vague and
9 ambiguous as to what conduct will subject a person to liability, in violation of the
10 guarantee of due process under Article I, § 7 of the California Constitution.
11 Additionally, both directly and as a result of their vagueness and ambiguity, they chill
12 a broader amount of speech than is constitutionally permissible in violation of Article
13 I, § 2 of the California Constitution. Finally, because the measure's terms are
14 intended and do discourage landlords from exercising their right to petition for
15 redress of grievances, it violates Article I, Section 3 of the California Constitution by
16 discouraging.

18 31. For all of the foregoing reasons, Proposition M is preempted by state
19 law.

21 COUNT FIVE

22 (Pendent state law claims - Violation of San Francisco
Municipal Elections Code § 500)

23 32. Plaintiffs refer to and incorporate by reference, as though fully set forth
24 herein, paragraphs 1 through 12 and 18 through 19 of this complaint.

25 33. Proposition M illegal and unenforceable because (1) its enactment
26 violates San Francisco Municipal Elections Code § 500, which required that the text
27 of any proposed measure be printed in the Voter Information Pamphlet, and (2) the
28

1 ballot materials were inaccurate and misleading.

2 COUNT SIX

3 (Pendent state law claims - Violation of Substantive Due Process Rights)

4 34. Plaintiffs refer to and incorporate by reference, as though fully set forth
5 herein, paragraphs 1 through 12, 18 through 19, and 32 through 33 of this complaint.

6 35. Proposition M is illegal, unconstitutional, and unenforceable because
7 the ballot materials were inaccurate and misleading, and the enactment of
8 Proposition M therefore violates Plaintiffs' state law substantive due process rights.

9 COUNT SEVEN

10 (Pendent state law claims - Declaratory Relief)

11 36. Plaintiffs refer to and incorporate by reference, as though fully set forth
12 herein, paragraphs 1 through 12 and 23 through 35 of this complaint.

13 37. There is an actual controversy between the parties in that Plaintiffs
14 contend that all of Proposition M is void and unenforceable, whereas Defendant
15 contends that the entire proposition is enforceable. Plaintiffs also contend that
16 certain parts of the proposition are preempted by state law, whereas Defendant
17 contends no part of the proposition violates state law.

18 38. Plaintiffs are entitled to a declaration setting forth what parts, if any, of
19 Proposition M may be enforced and any limitations thereon.

20 PRAYER

21 WHEREFORE, Plaintiffs pray for judgment as follows:

- 22
- 23 1. A permanent injunction barring enforcement of Proposition M;
 - 24 2. A declaration stating what parts, if any, of Proposition M are
25 enforceable, in what manner, and to what extent;
 - 26 3. Costs of suit;
- 27
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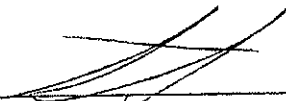
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4. Attorney's fees;

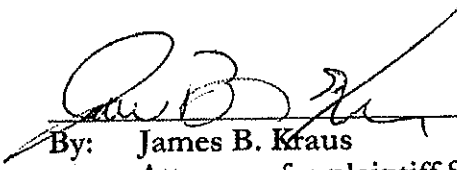
5. All further appropriate relief as warranted by the findings of the Court or jury.

Date: February 9, 2009

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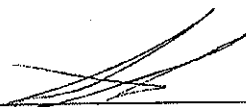
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DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand trial by jury.

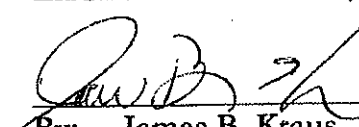
Date: February 9, 2009

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