No. _____

In The
Supreme Court of the United States

LYNDSEY BALLINGER; SHARON BALLINGER,
Petitioners,

v.

CITY OF OAKLAND,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

J. DAVID BREEMER*
**Counsel of Record*
BRIAN T. HODGES
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
JBreemer@pacificlegal.org
BHodges@pacificlegal.org

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the unconstitutional conditions tests in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), apply to an ordinance that requires rental owners to make a payment to a tenant before the owners may end the tenancy and reoccupy their home.

2. Whether "state action" sufficient to justify a Fourth Amendment "seizure" claim exists when a law directs the transfer of property from one private citizen to another.

LIST OF ALL PARTIES

Lyndsey and Sharon Ballinger were the plaintiffs in the district court and appellants in the Ninth Circuit Court of Appeals and are the petitioners herein.

The City of Oakland, California, is the municipal respondent.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Ballinger v. City of Oakland, No. 18-cv-07186-HSG, 398 F. Supp. 3d 560 (N.D. Cal. Aug. 2, 2019).

Ballinger v. City of Oakland, No. 19-16550, __ F.4th __, 2022 WL 289180 (9th Cir. Feb. 1, 2022).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

United States Constitution

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Lyndsey and Sharon Ballinger respectfully request that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Ninth Circuit is published and reported at *Ballinger v. City of Oakland*, __ F.4th __, 2022 WL 289180 (9th Cir. Feb. 1, 2022), and is reproduced in Petitioners' Appendix (App.) at A. The district court's opinion is published and reported at *Ballinger v. City of Oakland*, 398 F. Supp. 3d 560 (N.D. Cal. 2019), and appears at App. B.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Ninth Circuit Court of Appeals dismissed this federal constitutional case in an opinion issued on February 1, 2022.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourth Amendment states, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Oakland Municipal Code Sections 8.22.800-8.22.870, the text of which is attached as App. C.

INTRODUCTION

Lyndsey and Sharon Ballinger (Ballingers) are nurse practitioners in the United States Air Force. In 2016, while living in Oakland, California, they were assigned to temporary military duty on the East Coast. App. B-4-5. Prior to leaving California, they leased their three-bedroom home to a pair of software engineers. Knowing their East Coast duty would be short, they agreed only to a year-long lease with the tenants, one which could be terminated at the end of the year with a 60-day notice. *Id.* In 2018, they were ready to give that notice as they prepared to return to Oakland with a new baby. App. B-5.

However, the Ballingers soon learned that, while they were away, the City of Oakland (City) passed a law requiring rental property owners to pay between $6,500 and $10,000 to their tenants—sometimes called a "relocation payment"—before the owners could lawfully end a tenancy and move home. App. B-3-4. Oakland is one of approximately a dozen West Coast cities that have adopted such ordinances in the last decade. The tenant payments required by these

laws can range from a few thousand dollars to more than a hundred thousand dollars. *See Owen v. City of Portland*, 497 P.3d 1216, 1219 (Or. 2021) ("The amount of relocation assistance required varies from $2,900 for a studio to $4,500 for larger units."); *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072, 1078-79 (N.D. Cal. 2014) (noting payment amounts of "$117,958.89" and "$223,782.25"). Such requirements are typically justified as a means to mitigate for the high cost of acquiring rental housing in West Coast cities. *Levin*, 71 F. Supp. 3d at 1085 (payments meant to mitigate high, open market rental costs); *Apartment Ass'n of Greater Los Angeles v. City of Beverly Hills*, No. CV 18-6840, 2019 WL 1930136, at *1 (C.D. Cal. Apr. 17, 2019) (relocation payment scheme meant to address "the shortage of affordable housing in the City, to halt the dramatic rise in rent").

The 2018 enactment of Oakland's tenant payment provisions meant that the Ballingers had to pay $6,582.40 to their tenants before they could end their tenancy according to the lease and return to their home. Subject under the law to stiff penalties for noncompliance, the Ballingers made the payment. App. B-5; App. A-5.

The Ballingers then sued, claiming, in part, that the ordinance provision requiring the transfer of their money to their tenants was an unconstitutional condition on their right to exclusively possess and use their home. App. B-5-6. The Ballingers relied significantly on this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994),

which hold that "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 599 (2013) (restating the *Nollan*/*Dolan* inquiry). The Ballingers further claimed that the tenant payment requirement amounted to an unreasonable seizure of their property; *i.e.*, the $6,582.40 sum transferred to their tenants under the law. App. B-22-24.

In a published decision, the Ninth Circuit dismissed the Ballingers' claims, holding that the *Nollan* and *Dolan* tests do not apply to the ordinance-imposed payment condition. *See* App. A-20-23. The court dismissed the Ballingers' unreasonable seizure claim on the ground that the loss of their money was not "state action." App. A-23-25.

The Ninth Circuit's decision thus presents this Court with the opportunity to address two important and persistent questions. First, it raises an issue as to the scope of the *Nollan* and *Dolan* unconstitutional conditions tests and, particularly, whether those tests apply to generally applicable regulations that impose monetary conditions on the exercise of traditional property rights. Many lower courts have adopted an improperly narrow view of *Nollan* and *Dolan*, leaving property owners without protection from regulations that unconstitutionally extract property interests as a condition of the exercise of a protected property right. Further, courts are in conflict on the issue, a problem that "stems in part from the Supreme Court's lack of

clear guidance." *Washington Townhomes, LLC v. Washington Cty. Water Conservancy Dist.*, 388 P.3d 753, 758 n.3 (Utah 2016).

Justices of this Court have accordingly expressed a desire to address the issue. *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, J., dissenting from denial of certiorari); *California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari); *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., and O'Connor, J., dissenting from denial of certiorari). That this Court has not yet done so "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money." *Koontz*, 570 U.S. at 627-28 (Kagan, J., dissenting).

Second, the decision below raises an important issue as to whether a legally required transfer of private funds from one private party to another involves sufficient "state action" to justify a 42 U.S.C. § 1983 claim under the Fourth Amendment. "Despite the great number of cases and the seemingly well-honed lexicon of 'tests,' the concept of 'state action' remains a difficult one." *Spencer v. Lee*, 864 F.2d 1376, 1382 (7th Cir. 1989) (Ripple, J., concurring in part and dissenting in part). The Ninth Circuit's failure to find that state action arises when a law directly compels the transfer of property from one party to another highlights the continuing problem and conflicts with this Court's precedent and with the decisions of other circuits.

The Court should grant the Petition to decide that the unconstitutional conditions doctrine applies when

a regulation requires a property owner to cede property prior to engaging in a traditional use of property, such as the right to occupy one's home, thereby resolving the disagreement among lower courts. It should further grant the Petition to hold that when a law compels one private party to transfer property to another, the law itself creates "state action" subject to redress under the Fourth Amendment. Since both issues were addressed below on the merits, and without procedural impediment, this case presents a clean vehicle for resolving the questions presented.

STATEMENT OF THE CASE

This Petition arises from the Ninth Circuit's conclusion that the Ballingers have no viable claim, under the unconstitutional conditions doctrine or Fourth Amendment, against an ordinance requiring them to transfer $6,582.40 to their tenants before they could end a tenancy and reoccupy their home for personal use.

A. The Ballingers' Lease and Enactment of the Tenant Payment Requirement

In 2015, while serving in the Air Force as nurse practitioners, the Ballingers owned and lived in a single-family home in Oakland. App. B-4. When the Ballingers were notified that they were being temporarily assigned to the Washington, D.C., area, they decided to rent their home to a pair of local software engineers. App. B-4. Knowing they would have to return to the Bay Area before too long, the Ballingers entered into a one-year lease that ended in September of 2017. At that point, the lease converted

to a month-to-month tenancy which either party could terminate. *Id.*

In January 2018, the City of Oakland amended prior ordinances to include new sections requiring rental property owners to make a tenant "relocation payment" before ending a tenancy and moving back into a home. *See* App. C. As part of a "Uniform Tenant Relocation Ordinance," the new provisions directed rental owners to make payments according to a schedule that calculates the amount due based on the size of the unit. App. B-3-4. Tenants are entitled to a $6,500 payment if they leave a one-bedroom unit, $8,000 when departing a two-bedroom unit, and $9,875 for a three-bedroom unit. App. C-3. Tenant households that "include lower income, elderly or disabled Tenants, and/or minor children shall be entitled to a single additional relocation payment of two thousand five hundred dollars ($2,500.00) per unit from the Owner." *Id.* at C-4.

In enacting the ordinance, the City explained that the mandated payments are necessary to mitigate for displaced tenants' relocation costs and related "social equity" issues. Excerpts of Record on Appeal at 42-43, 67-70 (Ninth Circuit Docket No. 8). More particularly, the tenant payment is designed to mitigate for the high cost of new tenant housing in Oakland. App. B-3. However, the ordinance does not require a departing tenant to use the payment for housing needs. A tenant may use a "relocation" payment for any personal purpose. App. A-5.

Owners who fail to make the required tenant payment are subject to criminal, administrative, and

civil penalties. App. C-8-9 (Oakland Mun. Code § 8.22.860).

B. The Ballingers' Payment and Federal Suit for Reimbursement

In 2016, when the Ballingers executed a one year lease to rent their home, the tenant payment requirement did not exist. App. B-4. However, by the time the Ballingers were ready to return to the Bay Area from their East Coast assignment, the ordinance was in force. Needing to return to their home immediately, the Ballingers complied with the ordinance. They gave their tenants a 60-day notice of termination of the lease, in accordance with the lease, and paid the tenants $6,582.40, as required by the City ordinance. *Id.* at B-5.

On November 28, 2018, the Ballingers sued the City of Oakland in the U.S. District Court for the Northern District of California. Two months later, they filed a First Amended Complaint (FAC), the operative complaint. In that pleading, the Ballingers asserted six claims: (1) a facial claim for a *per se*, physical taking of private property for a private purpose, (2) an as-applied claim for an uncompensated and unconstitutional physical taking, (3) facial and as-applied claims under the *Nollan/Dolan* unconstitutional conditions doctrine, (4) facial and as-applied claims for an unreasonable seizure under the Fourth Amendment, (5) an as-applied claim for violation of due process, and (6) a claim for unconstitutional interference with the obligation of

contract. The Ballingers sought damages (just compensation) and equitable relief.[1] App. B-5-6.

The City moved to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6). In the ensuing litigation, the Ballingers argued that the tenant payment requirement violates the *Nollan*/*Dolan* unconstitutional conditions doctrine because it forces them to surrender property (money) to exercise their right to occupy their home, without any connection between the monetary demand and the impact of their property use. In response, the City argued that the *Nollan*/*Dolan* tests are inapplicable to the tenant payment mandate because "generally applicable legislation is not subject to" such tests, App. B-14. It also contended that the Ballingers' Fourth Amendment seizure claim fails due to the absence of "state action." App. B-22.

In a published opinion, the district court granted the City's motion. Explaining that the *Nollan*/*Dolan* unconstitutional conditions doctrine only "exists to prevent the government from using its coercive power to demand unconstitutional conditions in adjudicative settings, not to impede the enforcement of generally applicable laws," the district court held that the tenant payment requirement was outside the scope of *Nollan*/*Dolan*. App. B-15-16. With respect to the seizure claim, it held that "the Ballingers . . . have not met the preliminary requirement of alleging that a state actor caused the deprivation." App. B-23.

---

[1] Because the Ballingers have recently moved out of the City of Oakland, they no longer press their request for equitable relief. They continue to seek reimbursement and damages under 42 U.S.C. § 1983.

Relying on *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999), the court explained, "The City's mere authorization [of a seizure], as opposed to encouragement, is not state action." App. B-24. The district court accordingly dismissed the Ballingers' claims.

The Ballingers timely appealed to the Ninth Circuit. In so doing, they relied solely on their federal takings, unconstitutional conditions, and unreasonable seizure claims.

C. The Ninth Circuit Opinion

In an opinion issued on February 1, 2022, the Ninth Circuit affirmed the district court judgment. App. A. With respect to the unconstitutional conditions claim, the Ninth Circuit held that the tenant payment is not the type of land use condition subject to *Nollan* and *Dolan*. The court's reasoning varied. It pointed first to the "landlord/tenant" regulatory context, App. A-7, 9, and the payment mandate's character as a general "monetary obligation," rather than a demand for a "specific, identifiable pool of money," App. A-10-11, as a basis for concluding that no taking of property or actionable claim under *Nollan* and *Dolan* existed. App. A-18. The court later held that *Nollan* and *Dolan* also do not apply because the payment mandate is not tethered to a "government benefit, such as a permit." App. A-23. While the court recognized that *Nollan* and *Dolan* might theoretically apply to legislation, it concluded that the absence of an explicit "government benefit,

like a permit," defeated the Ballingers' *Nollan* and *Dolan* claims. App. A-22-23.

In affirming dismissal of the "unreasonable seizure" claim, the Ninth Circuit concluded that the tenant payment mandate did not involve "state action." It stated:

> The City did not participate in the monetary exchange between the Ballingers and their tenants. Neither did it "exercise[ ] coercive power" . . . . At most, the City was only involved in adopting an ordinance providing the terms of eviction and payment. But enacting the Ordinance of this nature is not enough—entitling tenants to demand a relocation payment is a "kind of subtle encouragement . . . no more significant than that which inheres in [a government entity]'s creation or modification of *any* legal remedy." Adopting the Ballingers' expansive notion of state action would eviscerate the "essential dichotomy between public and private acts."

App. A-24-25 (citations omitted).

REASONS FOR GRANTING THE PETITION

Although this Court has affirmed the applicability of the unconstitutional conditions doctrine to property regulation, through the *Nollan* and *Dolan* "nexus" and "rough proportionality" tests, lower courts remain confused about the scope of those standards. Many courts limit *Nollan* and *Dolan* to only certain contexts, such as when a condition arises from a formal "permit" decision. This conflicts with this Court's broader

articulation of the doctrine, and with other court decisions that give *Nollan* and *Dolan* a broader reach, including to generally applicable conditions. Timothy M. Mulvaney, *The State of Exactions*, 61 Wm. & Mary L. Rev. 169, 219 (2019) (observing that "application of *Nollan*'s and *Dolan*'s 'nexus' and 'proportionality' standards generally has been confined to a narrowly construed set of 'concrete and specific,' ad hoc demands").

This case also raises a fundamental constitutional question as to whether a legally required transfer of property from one person to another involves "state action" sufficient to justify a claim under 42 U.S.C. § 1983. Long ago, this Court recognized that state action exists where a challenged wrong occurs "by virtue of state law and [is] made possible only because the wrongdoer is clothed with the authority of state law," *United States v. Classic*, 313 U.S. 299, 326 (1941). Yet, some circuits, including the Ninth Circuit in this case, have failed to apply this core principle. This is troubling. If a law that authorizes and directs a private citizen to appropriate another's property is not constitutionally actionable as "state action," as the decision below holds, governments can escape the property rights protections found in the Constitution by the expedient of authorizing private parties to directly appropriate property for a public good. Moreover, the decision below adds to a conflict among lower courts on the effect of coercive law in the state action inquiry.

This Court should grant the Petition to confirm that *Nollan/Dolan* broadly apply to government actions, including generally applicable regulation,

that require citizens to surrender property as the price of exercising basic property rights. *See, e.g.*, *Lambert*, 529 U.S. at 1045 (Kennedy, J., dissenting from denial of certiorari). It should also grant the Petition to hold that state action exists when a law compels a transfer of property from one party to another.

I.

THE DECISION BELOW RAISES AN IMPORTANT CONSTITUTIONAL QUESTION ABOUT THE REACH OF *NOLLAN* AND *DOLAN* AND DEEPENS A PERSISTENT CONFLICT ON THE ISSUE

Under *Nollan* and *Dolan*, the government may require a person to cede a property interest as a condition of using real property when necessary to mitigate for the impact of the proposed use. There must be an "essential nexus" and "rough proportionality" between the condition and the impact of the property use. *Koontz*, 570 U.S. at 604-05; *see also Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up a constitutional right . . . to receive just compensation when property is taken for a public use [ ] in exchange for a discretionary benefit [that] has little or no relationship to the property."); *Koontz*, 570 U.S. at 604 (the doctrine prevents "the government from coercing people into giving [rights] up").

As the following shows, this Court has portrayed the *Nollan*/*Dolan* inquiry as a broadly applicable means to separate conditions that are properly tailored to mitigate negative externalities related to property use from those that improperly force

property owners to solve public problems. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). The Ninth Circuit's decision in this case is inconsistent with this view and conflicts with other lower court decisions that apply the *Nollan* and *Dolan* tests to property rights conditions that arise from generally applicable regulation. *Parking Ass'n of Georgia*, 515 U.S. at 1117 (Thomas, J., dissenting from denial of certiorari) (recognizing a nationwide split of authority); *California Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (Thomas, J., concurring in denial of certiorari).

A. The Decision Below Conflicts With the Court's Precedent

1. The *Nollan/Dolan* tests

In its most general sense, the unconstitutional conditions doctrine enforces constitutional limitations on state power by forbidding the government from doing indirectly, through conditions on private activity, what it cannot accomplish directly. *Koontz*, 570 U.S. at 606. As this Court explained nearly a century ago,

> the power of the state . . . is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. . . . It is inconceivable that guarantees embedded in the Constitution . . . may thus be manipulated out of existence.

Frost v. R.R. Comm'n of Cal., 271 U.S. 583, 593-94 (1926); *see generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413,

1421-22 (1989) (noting that unconstitutional conditions problems arise when government imposes a condition that requires one to "forego an activity that a preferred constitutional right normally protects from government interference").

This Court has described the *Nollan* and *Dolan* tests as a "special application" of the unconstitutional conditions doctrine in the property rights context. In *Koontz*, the Court explained that the "nexus" and "rough proportionality" tests supply a balanced and fair method for gauging the constitutionality of conditions on the exercise of property rights. While the tests allow government to impose conditions that mitigate the negative externalities of a proposed property use, they ferret out and reject property use conditions that are vehicles for taking property for a public good. 570 U.S. at 604-06.

To ensure that *Nollan* and *Dolan* fulfill their intended purposes, the Court has repeatedly turned back attempts to limit their tests to only certain kinds of conditions or government actions. For instance, in *Dolan*, this Court applied the standards to invalidate two development conditions required by a generally applicable regulatory scheme. 512 U.S. at 377-78. The *Dolan* Court rejected the dissent's claim that the commercial nature of the property immunized the conditions from the unconstitutional conditions doctrine. *Id.* at 392 ("[S]imply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge."). The *Dolan* Court also rejected the dissent's insistence that application of *Nollan* and *Dolan* to the ordinance-mandated conditions would interfere with the

"necessary and traditional breadth of municipalities' power to regulate property development." *Id.* at 407 n.12 (Stephens, J., dissenting), *id.* at 390 (quoting *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)).

Subsequently, in *Koontz*, this Court rejected the argument that the *Nollan/Dolan* tests are inapplicable to conditions requiring monetary payments as a predicate to the exercise of a real property interest. 570 U.S. at 612. And in *Cedar Point*, the Court made clear that *Nollan* and *Dolan* apply to common property use conditions found in generalized health and safety regulatory schemes. 141 S. Ct. at 2079. Thus, the Court has articulated the *Nollan* and *Dolan* tests as a broadly applicable means to enforce the principles of fairness and justice—a central purpose of the Takings Clause—whenever government imposes conditions on "basic and familiar uses of property." *Id.* at 2080 (quoting *Horne v. Dep't of Agric.*, 576 U.S. 350, 366 (2015)).

2. The Ninth Circuit decision is irreconcilable with this Court's cases

In contrast, in the decision below, the Ninth Circuit adopted a narrow view of the unconstitutional conditions doctrine by refusing to apply *Nollan* and *Dolan* to a law requiring rental owners to pay tenants before the owner may lawfully reoccupy their home for their exclusive use. The court concluded that the *Nollan*/*Dolan* "essential nexus" and "rough proportionality" tests are inapplicable because the condition (1) is a regulation of tenant/landlord relations, App. A-7, 9, (2) does not take a "specific pool" of funds, but only imposes a general monetary

obligation, *id.* at A-9-11, *id.* at A-18, and (3) arises from a general regulatory scheme, rather than a specific permit decision. *Id.* at A-23.

This exception-riddled conception of *Nollan* and *Dolan* is inconsistent with this Court's understanding of the unconstitutional conditions doctrine. Indeed, in its early and foundational decision in *Frost*, the Court applied the doctrine to a state law that required trucking companies to dedicate personal property as a condition of using highways. 271 U.S. at 593-94. The Court did not consider it necessary for a formal permit to be at issue to apply to invalidate the legislated requirements.

More recently, the Court has repeatedly refused to adopt the idea, accepted below, that property owners can be subject to otherwise objectionable conditions if they put property into "business" or "commercial" use. *Cedar Point*, 141 U.S. at 2080 ("basic and familiar uses of property" are not a special benefit that "the Government may hold hostage, to be ransomed by the waiver of constitutional protection" (quoting *Horne*, 576 U.S. at 366)); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982) ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation" for a physical occupation). There is no basis for the Ninth Circuit's conclusion that *Nollan* and *Dolan* do not apply if a condition can be characterized as "a regulation of the landlord-tenant relationship." *Dolan*, 512 U.S. at 392 (rejecting an exemption for conditions rooted in "business regulation").

To be sure, property owners may expect some regulation when they rent, but they do not permanently cede their right to occupy their own property because of that (temporary) business decision. *Id.*; *see also*, *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) ("A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy."); *Alabama Ass'n of Realtors v. Dep't of Health & Human Services*, 141 S. Ct. 2485, 2489 (2021) (confirming that restrictions on an owner's ability to recover possession of rental property are subject to substantial scrutiny because they burden the protected "right to exclude" others). By the same token, owners should not be deprived of the protections afford by the unconstitutional conditions doctrine when the exercise of a basic property right—such as the right to personally occupy one's home—is subject to an unrelated or disproportionate condition. But that is exactly where the decision below leaves the law.

The Ninth Circuit's other reasoning is equally out of line with this Court's jurisprudence. The Ninth Circuit's conclusion that *Nollan* and *Dolan* do not apply when a condition arises without a formal "permit" decision conflicts with *Cedar Point*'s application of the doctrine to health and safety regulations. 141 S. Ct. at 2079. To be sure, the Ninth Circuit disclaimed any intent to rely on the "legislative" nature of Oakland's tenant payment requirement as a sole basis for declining to apply the *Nollan* and *Dolan* tests. Yet, its subsequent conclusion, that the tests do not apply unless there is

a "grant of a government benefit, such as a permit," renders the former disclaimer of no effect. After all, legislatures rarely grant "permits;" that task is left to executive branch agencies acting in an administrative or adjudicative capacity. The court's conclusion that a formal "permit" is required to trigger *Nollan* and *Dolan* is just a more subtle way of holding *Nollan* and *Dolan* inapplicable to legislative demands, and that is unsupportable. *Parking Ass'n of Georgia*, 515 U.S. at 1117-18 (Thomas, J., dissenting from denial of certiorari) ("the general applicability of the ordinance should not be relevant").

Finally, the Ninth Circuit's holding that a condition must take a "specific, identifiable" pool of money to trigger *Nollan* and *Dolan* is inconsistent with *Koontz*. There, of course, this Court applied *Nollan* and *Dolan* to a condition that required the payment of an amount of money that could come from any source; the same type of monetary demand in this case. *Koontz*, 570 U.S. at 612.

This Court should grant the Petition to explicitly hold what its precedent already implies: the *Nollan* and *Dolan* tests apply to conditions that demand a concession of property as the price of exercising a traditional property right—whether they arise from an individualized permit decision or a generally applicable regulatory scheme, whether in the land development context or the rental regulatory arena. Taking this step would not render all tenant payments or other conditions constitutionally infirm. *Cedar Point*, 141 S. Ct. at 2079. It would simply allow courts to distinguish between conditions that are properly tailored to mitigate negative externalities

and those that wrongly force property owners to solve problems that are more properly remedied by the public as a whole. The Ninth Circuit's decision leaves the Ballingers and other property owners within the Ninth Circuit's jurisdiction devoid of that sensible protection.

B. The Decision Below Conflicts With the Decisions of Other Federal and State Courts

Review is additionally warranted because the Ninth Circuit's decision deepens a longstanding split among the courts on the question whether and when generally applicable permit conditions are subject to review under *Nollan* and *Dolan*. *See Parking Ass'n of Georgia*, 515 U.S. at 1117 (Thomas, J., dissenting); *California Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (Thomas, J., concurring); David L. Callies, *Public and Private Land Development Conditions: An Overview*, 52 UIC J. Marshall L. Rev. 747, 767-69 (2019) (discussing conflicts among courts); Deborah Rosenthal, Nollan, Dolan, *and the Legislative Exception*, 66 Plan. & Envtl. L. No. 3, p. 4 (2014) (discussing the difficulty that courts have in applying the doctrine to regulatory exactions and their inconsistent results). This split of authority is firmly entrenched and cannot be resolved without this Court's intervention. *Koontz*, 570 U.S. at 628 (Kagan, J., dissenting) (noting that Court's "refusal 'to say more'" about the doctrine's application to generally applicable conditions injects uncertainty into local government decisions to impose monetary conditions); *see also* Mulvaney, 61 Wm. & Mary L. Rev. at 194 (describing the issue of the scope of *Nollan/Dolan* as

"[o]ne of the most pressing questions across the entire realm of takings law").

1. The decision below conflicts with the Sixth Circuit's approach

In *F.P. Dev., LLC v. Charter Twp. of Canton, Mich.*, 16 F.4th 198, 206 (6th Cir. 2021), the Sixth Circuit held that an ordinance-mandated condition on the development of private property violated *Nollan* and *Dolan*. At issue was a municipal ordinance that requires property owners to either plant trees or pay a mitigation fee as a condition of approval of development actions that will remove trees. *Id.* at 201-02. The quantity of mitigation was preset by the ordinance. *Id.* As a result of clearing activities on the plaintiff's property, the township demanded that it either plant 187 new trees or pay $47,898 into a tree fund. *Id.* at 202.

On appeal, the Sixth Circuit applied *Nollan* and *Dolan* to the requirement, holding that the Township had failed to show that the ordinance-mandated conditions were roughly proportional to the impacts of the development. *Id.* at 206-07. The court did so despite the fact the conditions did not arise from an individualized permit decision.

In contrast, in this case, the Ninth Circuit refused to apply *Nollan* and *Dolan* to the tenant payment requirement in part because "the Ordinance does not conditionally grant or regulate the grant of a government benefit, such as a permit, and therefore does not fall under the unconstitutional-conditions umbrella." App. at A-22-23.

2. The decision below conflicts with state court decisions

The Ninth Circuit's decision is also in conflict with state court decisions that broadly apply *Nollan* and *Dolan* to generally applicable monetary conditions, including decisions from courts in Minnesota, Texas, and Ohio.

In the recent case of *Puce v. City of Burnsville*, a Minnesota appellate court held that a law requiring developers to pay a park impact fee of 5% of a project's value was subject to the *Nollan* and *Dolan* tests. *See* __ N.W.2d __, 2022 WL 351119, at *8 (Minn. Ct. App. Feb. 7, 2022). In Texas, an appellate court reached a similar result in *Mira Mar Development Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. Ct. App. 2013). There, the Texas court held that *Nollan/Dolan* apply to generally applicable monetary conditions and that a tree mitigation fee violated the doctrine, because it was based on a formula that was not related to actual development impacts. *Id.* Finally, the Ohio Supreme Court held that *Nollan* and *Dolan* applied to an ordinance establishing a system of impact fees payable by developers of real estate to aid in the cost of new roadway projects. *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349 (Ohio 2000).

The tenant payment requirement in this case is comparable to the generally applicable monetary conditions in *Puce*, *Mira Mar*, and *Beavercreek*. In each case, the condition was mandated by legislation and a payment amount preset by a generally applicable formula. App. A-4-5. But, unlike the aforementioned state court decisions, the decision

below holds that *Nollan* and *Dolan* do not apply to such conditions. As a result, the court below refused to even consider whether the $6,582.40 payment required of the Ballingers—most of which is supposed to mitigate the high cost of replacement housing—is reasonably related to the Ballingers' reoccupation of their home. App. A-19-23.

In this respect, the Ninth Circuit's decision is in line with other lower court decisions that evade *Nollan* and *Dolan*. Such decisions allow the government to impose conditions that do not address any adverse impact from property use and which consequently function as an indirect means to acquire private property interests for public use. Indeed, since *Koontz*, numerous state courts have found ways to exclude generally applicable monetary conditions from *Nollan* and *Dolan*. These decisions include: *Douglass Properties II, LLC v. City of Olympia*, 479 P.3d 1200, 1203 (Wash. Ct. App. 2021) ("the *Nollan/Dolan* test does not apply to . . . generally applicable fees"); *Anderson Creek Partners, L.P. v. Cty. of Harnett*, 854 S.E.2d 1, 13-14 (N.C. Ct. App. 2020) (a generally applicable fee does not invoke the unconstitutional conditions doctrine); *Dabbs v. Anne Arundel Cty.*, 182 A.3d 798, 811 (Md. 2018) ("fees imposed on a generally applicable basis are not subject to a rough proportionality or nexus analysis"); *California Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 998, 990 n.11 (Cal. 2015) (exempting general "conditions that require an applicant to pay a monetary fee as a condition of obtaining a permit" from heightened scrutiny); *Am. Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099, 1106 (Ariz. Ct. App. 2018) (holding that generally applicable

conditions are not subject to scrutiny under *Nollan/Dolan*).

Still other courts are so confused on the issue of whether *Nollan* and *Dolan* extend to generalized regulatory conditions on the use of property that they have largely given up trying to resolve the issue until this Court addresses the issue. *See Highlands-In-The-Woods, L.L.C. v. Polk Cty.*, 217 So. 3d 1175, 1178 n.3 (Fla. Dist. Ct. App. 2017) ("[I]t is unclear whether the *Nollan* and *Dolan* standard applies to generally applicable legislative determinations that affect property rights[.]"); *Washington Townhomes, LLC v. Washington Cty. Water Conservancy Dist.*, 388 P.3d 753, 758 & n.3 (Utah 2016) (noting confusion among the courts after *Koontz* and remanding the case to the lower court to determine the "difficult" question of whether an impact fee regime is subject to *Nollan/Dolan*).

The decision below continues the misguided attempts by some courts to limit *Nollan* and *Dolan* to the individualized permit context, in conflict with courts that properly apply *Nollan* and *Dolan* to extractive property conditions, regardless of the source or generality of the demand. The central purpose of the *Nollan* and *Dolan* tests—to ensure that the government does not "thwart the Fifth Amendment right to just compensation" by pressuring a landowner to surrender constitutionally property interests to use, or occupy, their property—can only be satisfied if the doctrine is applied in a consistent manner throughout the nation. This case provides the Court with a clear, clean, and much-needed opportunity to address the judicial split on the

applicability of *Nollan* and *Dolan* when a claim targets generally applicable property use conditions arising outside the permitting context. *California Bldg. Indus. Ass'n*, 136 S. Ct. at 929 (Thomas, J., concurring) (noting the "compelling reasons for resolving this conflict at the earliest practicable opportunity"). The Court should accordingly grant the Petition.

II.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND THE DECISIONS OF OTHER CIRCUITS IN HOLDING THAT A LAW THAT COMPELS A SEIZURE OF PROPERTY IS INSUFFICIENT TO CREATE "STATE ACTION"

The decision below also raises a significant question about the proper "state action" analysis when a law authorizes a private party to seize the property of another. The understanding that constitutional plaintiffs can contest "state actions," but not private actions, reflects the truth that "most rights secured by the Constitution are protected only against infringement by governments." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). The state action requirement helps ensure "the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974). Indeed, "adherence to the 'state action' requirement

preserves an area of individual freedom by limiting the reach of federal law and federal judicial power" to governmental action.[2] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

Thus, seizures of property effectuated by the government are subject to constitutional challenge under 42 U.S.C. § 1983, in general, while those carried out through private conduct are generally not. In the decision below, the Ninth Circuit held that the Ballingers could not raise a Fourth Amendment "seizure" claim against the ordinance-mandated transfer of money to their tenants because it was not accomplished through "state action." App. A-24-25. This conclusion is irreconcilable with this Court's "state action" precedent and highlights a conflict among the federal circuit courts on the role and weight of coercive law in the state action inquiry in cases where the law authorizes one private party to seize the property of another.

A. The Decision Below Conflicts With This Court's Emphasis on the Role of Coercive Law in the "State Action" Analysis

As a general guidepost, this Court has explained that "state action may be found if . . . there is such a 'close nexus between the State and the challenged action'" that seemingly private behavior "may be fairly treated as that of the State itself." *Brentwood Academy v. Tennessee Secondary School Athletic*

---

[2] This Court has held that, in a § 1983 action, "the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical." *Lugar*, 457 U.S. at 929.

Ass'n, 531 U.S. 288, 295 (2001) (quoting *Jackson*, 419 U.S. at 351). The Court has further noted that the criteria which inform this test "lack rigid simplicity." *Id.* No "set of circumstances [is] absolutely sufficient." *Id.*; *see id.* at 296 ("Our cases have identified a host of facts that can bear" on test.).

Nevertheless, the Court has repeatedly emphasized that the government's role in enacting a law that compels a private party's invasion of a constitutional right is a critical, and sometimes dispositive, factor. In *Lugar*, the Court stated that state action could largely be determined by whether the deprivation "resulted from the exercise of a right or privilege having its source in state authority." 457 U.S. at 939. The Court has similarly stated that a challenged action is likely to qualify as state action when it results from the exercise of "coercive power." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Thus, while a state's "mere acquiescence in a private action" is not enough for state action, *Flagg Bros.*, 436 U.S. at 164, "a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." *Id.* (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970)). A seizure of property that results from a "procedural scheme created by the statute" is often "state action." *Lugar*, 457 U.S. at 941.

The Ninth Circuit's conclusion in this case, that the Ballingers' unreasonable seizure claim against the City fails for lack of "state action," is incompatible with the Court's framework for deducing "state action." In this case, the City enacted a law that "*requires* landlords re-taking occupancy of their homes upon the expiration of a lease to pay tenants a

relocation payment" of between $6,500-10,000. App. A-2 (emphasis added). Under the ordinance, "[t]he Owner *must* pay the tenant half of the relocation payment . . . when the termination [of lease] notice is given to the household and the remaining half when the tenant vacates the unit." App. C-6 (Oakland Mun. Code § 8.22.850.D.1). Further, these payment requirements are backed by the threat of criminal penalties and substantial civil penalties outlined in the law. App. C-8-9 (Oakland Mun. Code § 8.22.860). The only reason the Ballingers paid their tenants $6,500 was the command of the ordinance and the threat of penalties. The tenants took the sum and left.

The Ninth Circuit should have quickly identified this set of circumstances as a form of state action subject to a Fourth Amendment claim. After all, the City, "by its law, has compelled" the taking of money from the Ballingers and its transfer to tenants. *Flagg Bros.*, 436 U.S. at 164. This transfer results solely from a "procedural scheme" that exists and operates by law. *Lugar*, 457 U.S. at 941. Yet, the Ninth Circuit ignored the coercive role of the City's ordinance in its state action analysis, holding that it is "not enough" that an ordinance compels a transfer of property from one party to another. App. A-25.

The Court should take this case to affirm that a seizure "by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is state action taken 'under color of' state law." *Classic*, 313 U.S. at 326; *Blum*, 457 U.S. at 1004-12 (indicating that "coercion" or "significant encouragement," would create a "nexus" between the state and the action). Without such intervention, the

government will be able to evade constitutional limits on property seizures designed to serve some public purpose simply by passing laws that cause seizures to occur directly between private parties. The Court should close this constitutional loophole. *Cf. Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614-15 (1989) (when a search of property derives from the encouragement of a statute or regulation and is thus not "primarily the result of private initiative," the Fourth Amendment applies).

B. The Decision Below Exacerbates a Conflict Among the Circuits on the Proper "State Action" Analysis When Laws Authorize a Private Seizure of Property

The Ninth Circuit's resolution of the state action requirement is also worthy of review because it highlights, and adds to, a persistent conflict among the circuit courts on the proper state action analysis when a law allows a private party to seize property. The decisions of some circuit courts, including the Third, Fourth, Fifth, Eighth, and Tenth Circuits, focus heavily on the role and force of state law in considering whether a private seizure involves state action. Under this approach, the courts typically find that state action exists.

In contrast, the First Circuit focuses less on the role of state law in authorizing a seizure and more on the nature of the private party acquiring property in deciding whether a seizure results from state action. That approach does not result in a finding of state action. The decision below sides with the First Circuit, in conflict with the majority of other circuits addressing the issue. In so doing, the decision below

deepens the split among federal courts on the proper approach to the state action requirement when state law authorizes a private party to seize the property of another. *See* John Dorsett Niles, et al., *Making Sense of State Action*, 51 Santa Clara L. Rev. 885, 886 (2011) (noting that that judicial inconsistency in the weight afforded to certain state action factors renders "state action" issues difficult for practitioners and courts to predict); Christian Turner, *State Action Problems*, 65 Fla. L. Rev. 281, 290 (2013) (The lower federal courts have reached little agreement as to "which facts truly matter, how much they matter, or why they matter.").

1. The Third, Fourth, Fifth, Eighth, and Tenth Circuits give weight to the authority of state law in gauging whether a seizure by a private party involves "state action"

As noted above, decisions from the Third, Fourth Fifth, Eighth, and Tenth Circuits give heavy weight to the role of law in directing a seizure of property by a private party when considering if state action is present.

In *Coleman v. Turpen*, 697 F.2d 1341, 1345 (10th Cir. 1982), the Tenth Circuit held that the seizure and sale of a vehicle by a private party acting under authority of state law involved "state action" sufficient to justify a Fourth Amendment claim. In so holding, the Tenth Circuit explained that "[t]he State, in enacting section 7–210 [of a statute], created the right exercised by [the private seller] when it sold the truck." *Id.* The court accordingly held that in thus "allowing [the private party] to sell the camper, the State . . . deprived [the vehicle owner] of his property

in joint participation with [the seller]," creating "state action." *Id.*

To the same effect is the Eighth Circuit's decision in *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.*, 554 F.2d 356, 360 (8th Cir. 1977). There, a bakery owner asked a manager to store $25,000 worth of business equipment after the bakery's closure. The equipment was soon stored with a private moving and storage company. When that company and the bakery could not agree on payment for the storage, the storage company sold the disputed equipment without notice at a public auction. It did so under authority of a North Dakota statute. The Eighth Circuit focused on this state law authority in finding state action, ruling that "where a creditor is given authority by the state to unilaterally act on the resolution of legal disputes, his exercise of such authority must be delimited by the restraints of due process." *Id.*

The Fourth Circuit also accords great weight to the role of legal authorization in considering whether an alleged seizure arises from state action. *See Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006). In *Presley*, a city published and distributed a map that showed a public trail crossing private property. When people began relying on the map to trespass, the owner complained to the city, but it did not rescind the map. *Id.* at 482. When the owner asserted an unreasonable seizure claim, the Fourth Circuit held that the claim was viable—even though the trespassing and seizure was by private parties—because the city

> knew that the [ ] trail map would encourage public use of the trail—this was, after all, the map's purpose . . . [and] also knew that the City's involvement would communicate to trail users that there were no legal barriers to their use of the entire trail, including the portion that cut through Presley's property.

Id. at 488.

The Fifth Circuit uses a similar analysis to the state action issue. In *Hollis v. Itawamba County Loans*, 657 F.2d 746 (5th Cir. 1981), an automobile buyer claimed his car was unconstitutionally seized when a creditor summarily took it under authority of state law for nonpayment of debts. *Id.* at 750. The court found that state action existed simply because the creditor was acting pursuant to a statute that permitted prejudgment seizures without a hearing. *Id.*

The Third Circuit's precedent is in the same vein. In *Parks v. "Mr. Ford,"* 556 F.2d 132, 141 (3d Cir. 1977), a private repairmen retained and sold vehicles when the owners refused to pay for repairs. The owners asserted that this action violated their due process rights. The Third Circuit held that state action existed because the repairmen acted under the state statutory authority. The court observed that a "statute not only extended the power of sale to the garageman but also directed him to follow the same procedures employed by a sheriff or constable." *Id.* The court concluded: "by . . . authorizing sales to take place, directing how they are to be carried out, and giving them the effect of judicial sales," "state action

exists when a garageman sells a customer's vehicle pursuant to [the statute]." *Id.*

2. The First and Ninth Circuits discount the force of state law

The decisions of the First Circuit and Ninth Circuit afford less weight to the role of state law authorization in considering the state action issue in the private party seizure context. In *Jarvis v. Village Gun Shop, Inc.*, 805 F.3d 1 (1st Cir. 2015), for instance, the First Circuit considered whether a gun owner could challenge the transfer of his legally confiscated gun from police to a gun shop as an unconstitutional seizure. The court found no actionable state action. It noted at the outset that "[i]t is '[o]nly in rare circumstances' that private parties can be viewed as state actors." *Id.* at 8 (citation omitted). The First Circuit then discounted a Massachusetts statute that authorized the police to transfer the guns to a private business. It stated that, "[t]aken alone, that statutory authorization is too fragile a link: for purposes of demonstrating the required nexus between state action and private action, we think it insufficient simply to point to a state statute authorizing the actions of the private entity." *Id.* at 9.

The Ninth Circuit's precedent is consistent with the First Circuit. In *Melara v. Kennedy*, 541 F.2d 802, 804-05 (9th Cir. 1976), the Ninth Circuit held that there must be "significant state involvement" before the due process guarantees of the Constitution will attach to a seizure of property by a private person. It further held that "[t]he authorization by statute of the challenged conduct does not by itself require a finding

of state action." *Id.* at 804. Instead, "the central inquiry is whether the state of California is significantly involved or entangled" in a loss of property. *Id.*; *see also Adams v. S. California First National Bank*, 492 F.2d 324, 330 (9th Cir. 1973).

The Ninth Circuit's decision in this case is in the same vein. Here, the Ballingers argued that "[t]he transfer of thousands of dollars of the Ballingers' funds occurs only because the City, a political subdivision of the State, enacted a law that requires it and penalizes owners who do not pay up. This act of law is 'obviously is the product of state action.'" 9th Cir. Dkt. 29 at PDF pp. 29-30 (quoting *Lugar*, 457 U.S. at 941).

The Ninth Circuit disagreed in the decision below, explaining:

> Because the tenants were not willful participants in joint activity with the State, they cannot be fairly treated as the State itself. Nor did the City actively encourage, endorse, or participate in any wrongful interference by the tenants with the Ballingers' money. At most, the City was only involved in adopting an ordinance providing the terms of eviction and payment. But enacting the Ordinance of this nature *is not enough* . . . .

App. A-24-25 (citations omitted; emphasis added).

While this analysis is consistent with First Circuit precedent, it conflicts with the approach of a majority of other circuits. District courts within the Ninth

Circuit have already begun to follow the *Ballinger* analysis, further adding to the confusion among federal courts. *See Better Housing for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 936 (C.D. Cal. 2020). There, a federal court held that "[t]he only state action here is the Governor's signature on AB 1482. But *passing or signing a bill that may lead to the transfer of private property between private parties does not gives rise to a Fourth Amendment Claim*." *Id.* (emphasis added).

The Court should grant the Petition to hold that the demands of state law are a primary factor in the state action analysis and that state action exists when a law mandates the transfer of property from one private party to another.

CONCLUSION

The Court should grant the Petition.

DATED: February 2022.

Respectfully submitted,

J. DAVID BREEMER*
**Counsel of Record*
BRIAN T. HODGES
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
JBreemer@pacificlegal.org
BHodges@pacificlegal.org

Counsel for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYNDSEY BALLINGER; SHARON BALLINGER, *Plaintiffs-Appellants*, v. CITY OF OAKLAND, *Defendant-Appellee*.	No. 19-16550 D.C. No. 4:18-cv-07186-HSG OPINION

Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding

Argued and Submitted October 22, 2020
Submission Withdrawn July 16, 2021
Resubmitted January 25, 2022
San Francisco, California

Filed February 1, 2022

Before: Richard R. Clifton, N. Randy Smith, and
Ryan D. Nelson, Circuit Judges.

Opinion by Judge R. Nelson

SUMMARY*

Civil Rights

The panel affirmed the district court's dismissal of an action brought pursuant to 42 U.S.C. § 1983 challenging the City of Oakland's Uniform Residential Tenant Relocation Ordinance, which requires landlords re-taking occupancy of their homes upon the expiration of a lease to pay tenants a relocation payment.

Plaintiffs alleged that the relocation fee is an unconstitutional physical taking of their money for a private rather than public purpose and without just compensation. Alternatively, they claimed that the fee constitutes an unconstitutional exaction of their Oakland home, and an unconstitutional seizure of their money under the Fourth and Fourteenth Amendments.

The panel held that although in certain circumstances money can be the subject of a physical, also called a per se taking, the relocation fee required by the Ordinance was a regulation of the landlord-tenant relationship, not an unconstitutional taking of a specific and identifiable property interest. The panel further stated that because there was no taking, it did not need to address whether the relocation fee was required for a public purpose or what just compensation would be.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel rejected plaintiffs' assertion that the City placed an unconstitutional condition, called an exaction, on their preferred use of their Oakland home. The panel held that because the relocation fee here was not a compensable taking, it did not constitute an exaction.

The panel affirmed the dismissal of plaintiffs' seizure claim. The panel held that plaintiffs had not established a cognizable theory of state action; the City did not participate in the monetary exchange between plaintiffs and their tenants.

COUNSEL

J. David Breemer (argued), Meriem Lee Hubbard, and Daniel M. Ortner, Pacific Legal Foundation, Sacramento, California, for Plaintiffs-Appellants.

Kevin P. McLaughlin (argued), Deputy City Attorney; David A. Pereda, Special Counsel; Maria Bee, Chief Assistant City Attorney; Barbara J. Parker, City Attorney; Office of the City Attorney, Oakland, California; for Defendant-Appellee.

Brendan Darrow and Matthew Siegel, Berkeley, California, for Amici Curiae League of California Cities and California State Association of Counties.

Nathaniel P. Bualat, Pilar Stillwater, and Rebecca Suarez, Crowell & Moring LLP, San Francisco, California, for Amicus Curiae Western Center on Law and Poverty.

OPINION

R. NELSON, Circuit Judge:

The City of Oakland required the Ballingers to pay their tenants over $6,000 before the Ballingers could move back into their own home upon the expiration of the lease. The Ballingers challenge the payment as an unconstitutional physical taking under the Takings Clause. Instead, the requirement to pay tenants a relocation fee before an owner may move back into their home is more properly classified as a wealth-transfer provision but not an unconstitutional taking. We therefore affirm the dismissal of the Ballingers' physical takings, exaction, and seizure claims.

I

In September 2016, Lyndsey and Sharon Ballinger leased their Oakland home for one year while fulfilling military assignments on the east coast. After one year, the lease converted to a month-to-month tenancy.

Under the City of Oakland ("the City") Municipal Code, even after a lease has ended and converted to a month-to-month tenancy, the tenancy may only end if the landlord has good cause. Oakland, Cal. Mun. Code § 8.22.360(A). Ending the tenancy, or "evicting," for good cause, includes when a landlord chooses to move back into her home at the end of the month. *Id.* § 8.22.360(A)(8)–(9). In January 2018, the City adopted the Uniform Residential Tenant Relocation Ordinance ("the Ordinance"), which requires landlords re-taking occupancy of their homes upon the

expiration of a lease to pay tenants a relocation payment based on rental size, average moving costs, the duration of the tenants' occupancy, and whether the tenants earn a low income, are elderly or disabled, or have minor children. *See id.* § 8.22.820. Half the payment is due upon the tenant's receipt of the notice to vacate and the other half upon actual vacation. *Id.* § 8.22.850(D)(1). And the payment need not be spent on relocation costs. Failing in bad faith to make the payments allows a tenant to bring an action against the landlord for injunctive relief, the relocation payment, attorneys' fees, and treble damages. *Id.* § 8.22.870(A).

When the Ballingers were reassigned to the Bay area, they decided to move back into their Oakland home. The Ballingers gave their tenants sixty days' notice to vacate the property, paying half the relocation payment up front and the remainder after the tenants vacated. In total, the Ballingers paid their tenants $6,582.40 in relocation fees.

The Ballingers sued the City, bringing facial and as-applied constitutional challenges under the Declaratory Judgment Act and 42 U.S.C. § 1983. Characterizing the relocation payment as a "ransom" of their home, they claimed that the relocation fee is an unconstitutional physical taking of their money for a private purpose and without just compensation. Alternatively, they claimed that the fee constitutes an unconstitutional exaction of their Oakland home, and an unconstitutional seizure of their money under the Fourth and Fourteenth Amendments.

The district court dismissed each claim under Federal Rule of Civil Procedure 12(b)(6). It held that

"no precedent supports the Ballingers' argument that legislation requiring the payment of money constitutes a physical taking." Because "[t]he Ordinance . . . was generally applicable legislation," the district court concluded that it did not give rise to an actionable exaction claim, and the Ballingers had not shown the requisite state action for their seizure claim. The Ballingers appealed.[1]

II

We review a dismissal under Federal Rule of Civil Procedure 12(b)(6) de novo, accepting as true all allegations of material facts. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1100 n.1, 1102 (9th Cir. 2008). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Id.* at 1104.

III

We affirm the district court's dismissal of the Ballingers' taking claim. The Ballingers assert that the Ordinance effected an unconstitutional physical taking of their money for a private rather than public purpose and without just compensation. But we disagree—even though money can be the subject of a

---

[1] The City argues that because the Ballingers neglected to include a statement of the issues presented in their opening brief on appeal, we should dismiss their appeal for failure to comply with Federal Rule of Appellate Procedure 28(a)(5). *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010). The Ballingers should have done so, but we see no reason to dismiss this appeal when the Ballingers' opening brief otherwise makes the issues presented very clear.

physical, also called a per se, taking, the relocation fee required by the Ordinance was a regulation of the landlord-tenant relationship, not an unconstitutional taking of a specific and identifiable property interest. Because there was no taking, we need not address whether the relocation fee is required for a public purpose or what just compensation would be. *See Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1093 (9th Cir. 2015) (private takings claim is not an independent cognizable claim).

A

The Takings Clause of the Fifth Amendment provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const., amend. V; *see also Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 238–39 (1897) (incorporating the Takings Clause through the Fourteenth Amendment). "Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). "[A]ppropriation means *taking* as one's own." *Id.* at 2077 (citation and quotation marks omitted). "Government action that physically appropriates property is no less a physical taking because it arises from . . . a regulation (or statute, or ordinance, or miscellaneous decree)." *Id.* at 2072. The "essential question . . . is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.* We assess physical appropriations "using a simple, *per se* rule: The government must pay for what it takes." *Id.* at 2071.

The Supreme Court "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).[2] For example, "the government may place ceilings on the rents the landowner can charge, or require the landowner to accept tenants he does not like, without automatically having to pay compensation." *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992) (citations omitted). "Ordinary rent control often transfers wealth from landlords to tenants by reducing the landlords' income and the tenants' monthly payments," and "[t]raditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors." *Id.* The "transfer [of wealth] in itself does not convert regulation into physical invasion." *Id.* at 530 (challenge to mobile home rent control should be analyzed as regulatory taking); *see also Com. Builders of N. Cal. v. City of*

---

[2] In the past, this court has analyzed regulations of the landlord-tenant relationship as a regulatory taking rather than a physical taking. *See, e.g.*, *Rancho de Calistoga*, 800 F.3d at 1089 n.1 ("The Supreme Court laid to rest any argument that a mobile home rent control ordinance constitutes a physical taking . . . ."); *MHC Fin. LP v. City of San Rafael*, 714 F.3d 1118, 1126–27 (9th Cir. 2013); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc). Those challenges failed. But here, the Ballingers "rely solely on physical takings law," and expressly forego a regulatory takings claim. We therefore do not address the principles of regulatory takings. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 323–24 (2002) (courts may not apply principles of physical takings claims to regulatory takings claims).

Sacramento, 941 F.2d 872, 875 (9th Cir. 1991) (every fee provision cannot be a compensable taking). So legislative enactments "regulating the economic relations of landlord and tenants are not *per se* takings." *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987).

Here, the Ordinance imposes a transaction cost to terminate a lease agreement. We see little difference between lawful regulations, like rent control, and the Ordinance's regulation of the landlord-tenant relationship here. Thus, the relocation fee is not an unconstitutional physical taking—it "merely regulate[s] [the Ballingers'] *use* of their land by regulating the relationship between landlord and tenant." *Yee*, 503 U.S. at 528.[3]

The Ballingers argue that a taking "does not become a lesser intrusion simply because it is related to a commercial transaction" and the "decision to leave the rental market." *See Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015) (raisin growers' decision to be raisin farmers made federal government's confiscation of raisins no less a taking); *Loretto*, 458 U.S. at 439 n.17 ("[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."). But

[3] Further, "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation" of his property. *Yee*, 503 U.S. at 527; *see also Fla. Power*, 480 U.S. at 252 ("This element of required acquiescence is at the heart of the concept of occupation."). The Ballingers never asserted that there was a physical occupation of their property. To the contrary, they invited their tenants to lease their property and paid the relocation fee. *See Yee*, 503 U.S. at 532 (citing *Fla. Power*, 480 U.S. at 252–53).

"[w]hen a person voluntarily surrenders liberty or property," like when the Ballingers chose to rent their property causing them to pay the relocation fee when they caused the tenants to relocate, "the State has not *deprived* the person of a constitutionally protected interest." *L.L. Nelson Enters., Inc. v. County of St. Louis*, 673 F.3d 799, 806 (8th Cir. 2012) (citing *Zinermon v. Burch*, 494 U.S. 113, 117 n.3 (1990)); *see Yee*, 503 U.S. at 527; *Fla. Power*, 480 U.S. at 252.

Here, the Ballingers voluntarily chose to lease their property and to "evict" under the Ordinance—conduct that required them to pay the relocation fee, which they would not be compelled to pay if they continued to rent their property. *See Yee*, 503 U.S. at 527. "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* at 528. Here, the Ordinance "is a regulation of [the Ballingers'] *use* of their property, and thus does not amount to a *per se* taking." *Id.* at 532.

B

Based on the U.S. Supreme Court's "long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain," *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 616 (2013), the relocation fee's obligation to pay money rather than real or personal property does not mean that it cannot be an unconstitutional taking. Even though money is generally considered fungible, *see United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989), money may still be subject to a per se taking if it is a specific,

identifiable pool of money, *see Phillips v. Wash. Legal Found.*, 524 U.S. 156, 169–70 (1998). Indeed, the Supreme Court has held multiple times that money can be subject to a taking, and these cases show why the relocation fee here is not one: The Ordinance "merely impose[s] an obligation on a party to pay money on the happening of a contingency," which happens to be related to a real property interest, but does not "seize a sum of money from a specific fund." *McCarthy v. City of Cleveland*, 626 F.3d 280, 284 (6th Cir. 2010) (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 223–24 (2003)).

1

To begin with, the district court concluded that *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) "is the law," so "the obligation to pay money is not a taking." Because a majority of justices in *Eastern Enterprises* failed to agree to the same rationale, we reject that anything more than the *Eastern Enterprises* holding is binding in this court.

In *Eastern Enterprises*, the plaintiff challenged a statute that retroactively imposed obligations to pay for retired miners' medical expenses, claiming that this payment obligation was an unconstitutional taking of its money and a violation of substantive due process. 524 U.S. at 514–15, 517. In sum, a four-Justice plurality held that the payment obligation was a regulatory taking. *Id.* at 529 (O'Connor, J., joined by Rehnquist, C.J., Scalia, and Thomas, JJ.). But five Justices, split between Justice Kennedy's concurrence and a four-Justice dissent, conveyed that the Takings Clause is implicated only by laws that appropriate specified and identified property interests. *See id.* at

540 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 555 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting).

In his concurrence, Justice Kennedy rejected the regulatory takings claim because there was no "specific property right or interest . . . at stake" and the statute did "not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest." *Id.* at 540–41 (Kennedy, J., concurring). Instead, the payment obligation "simply impose[d] an obligation to perform an act, the payment of benefits," and was "indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Id.* at 540. But he concluded the statute violated substantive due process and thus concurred only in the plurality's holding. Justice Breyer, writing for the four Justices in dissent, agreed that the Takings Clause is limited to claims based on "the operation of a specific, separately identifiable fund of money," or "a specific interest in physical or intellectual property . . . [but not] an ordinary liability to pay money." *Id.* at 554–55 (Breyer, J., dissenting).

So five Justices agreed that mere obligations to pay money could not constitute a regulatory taking unless connected to a "specific property right," but four of them dissented from the Court's holding. Dissenting opinions cannot be considered when determining the holding of a fractured Supreme Court decision—only the opinions of those who concurred in the judgments can be considered. *Marks v. United States*, 430 U.S. 188, 193 (1977).

Even then, only an opinion that "can reasonably be described as a logical subset of the other" is binding. *United States v. Davis*, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc). But neither the plurality nor Justice Kennedy's concurrence are a logical subset of the other since they differed on why the statute was unconstitutional. *Compare E. Enters.*, 524 U.S. at 522–38 (O'Connor, J., plurality) (unconstitutional regulatory taking), *with id.* at 539–47 (Kennedy, J., concurring) (substantive due process violation). Thus, "only the specific result" of *Eastern Enterprises*, that the statute at issue was unconstitutional, is binding in this court. *Davis*, 825 F.3d at 1022.[4]

2

That said, as the district court noted, "all circuits that have addressed the issue" of the precedential value of *Eastern Enterprises* "have uniformly found that a taking does not occur when the statute in question imposes a monetary assessment that does not affect a specific interest in property." *McCarthy*,

[4] Our prior applications of *Eastern Enterprises* either accord with this conclusion, were reversed by the Supreme Court, or did not reach the issue. *See Chevron U.S.A., Inc. v. Bronster*, 363 F.3d 846, 852 (9th Cir. 2004) (suggesting *Eastern Enterprises* is "of no precedential value outside the specific facts of that case" (citing *Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1254–55 (D.C. Cir. 1998))), *rev'd on other grounds sub nom.*, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc) (relying on *Eastern Enterprises* plurality to hold that money may only constitute a regulatory taking), *aff'd*, *Brown*, 538 U.S. at 235 (but agreeing with dissenters in part); *Quarty v. United States*, 170 F.3d 961, 969 (9th Cir. 1999) (assuming without deciding *Eastern Enterprises* plurality was binding and finding no taking had occurred).

626 F.3d at 285 (collecting cases). Indeed, *Koontz* appeared to endorse that "the relinquishment of funds linked to a specific, identifiable property interest" invoked a per se takings analysis. 570 U.S. at 614. We hold, as other circuits have, that in certain circumstances not argued here, money can be the subject of a taking. But here, the City's Ordinance imposes a general obligation to pay money and does not identify any specific fund of money; therefore, it does not effectuate an unconstitutional physical taking.[5]

By way of example, money can be subject to a taking when the government procures the interest

---

[5] "[P]hysical takings jurisprudence is 'as old as the Republic.'" *Cedar Point Nursery*, 141 S. Ct. at 2071 (citation omitted). Because the lack of records of discussion on the meaning of the Takings Clause, the statements of its author, James Madison, "thus provide unusually significant evidence about what the clause was originally understood to mean." William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 791 (1995); Akhil Reed Amar, *The Bill of Rights* 78 (1998). Generally, Madison thought a federal constitution would best protect property interests and other rights. *See* The Federalist No. 10 (James Madison). One year after the ratification of the Bill of Rights, Madison wrote that the same sense of property includes "land, or merchandi[s]e, or money." James Madison, *Property*, Papers 14:266–68 (Mar. 29, 1792), *reprinted in The Founders' Constitution*, ch. 16, *available at* https://presspubs.uchicago.edu/founders/documents/v1ch16s23.html. "Government," he wrote, "is instituted to protect property of every sort." *Id.* "If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet . . . violates their actual possessions, in the labor that acquires their daily subsistence, . . . such a government is not a pattern for the United States." *Id.*

earned on lawyers' trust accounts, *see Brown*, 538 U.S. at 235; *Phillips*, 524 U.S. at 160; procures the interest accrued in interpleader funds, *see Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 162 (1980); seizes ownership of liens, which are the right to receive money secured by a particular piece of property, *see Armstrong v. United States*, 364 U.S. 40, 48 (1960); demands that one pay a debt owed to a third party to the state itself, *see Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245 (1796) (opinion of Chase, J.); *Cities Serv. Co v. McGrath*, 342 U.S. 330, 335 (1952); or seizes money without a court order, *see Cedar Point*, 141 S. Ct. at 2076 ("We have recognized that the government can commit a physical taking . . . by simply 'enter[ing] into physical possession of property without authority of a court order.'"); *see also* Richard A. Epstein & Eduardo M. Peñalver, *The Fifth Amendment Takings Clause*, Nat'l Const. Ctr., https://constitutioncenter.org/interactiveconstitution/interpretation/amendment-v/clauses/634 ("bag full of cash" is subject to physical taking).

The money in all those cases was taken from known persons in the form of a specific, identified property interest to which those persons were already entitled. *See Swisher Int'l v. Schafer*, 550 F.3d 1046, 1055 n.6 (11th Cir. 2008).

In contrast, the obligation to pay money in the tax and government services user fee context is not generally compensable under the Fifth Amendment because taxes and user fees are collected in exchange for government benefits to the payor. *See Sperry Corp.*, 493 U.S. at 62 n.9 ("artificial" to treat an award deduction from Iran-United States Claims Tribunal

as a physical taking because "[u]nlike real or personal property, money is fungible"); *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24–25 (taxes could constitute a taking if "the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property"); *see also Koontz*, 570 U.S. at 615 (collecting cases distinguishing taxes and user fees from money that can be taken). Thus, when it comes to takings, "[t]he Constitution . . . is concerned with means as well as ends." *Horne*, 576 U.S. at 362; *see also Dickman v. Comm'r of Internal Rev.*, 465 U.S. 330, 336 (1984) ("We have little difficulty accepting the theory that the use of valuable property—in this case money—is itself a legally protectible property interest.").

Here, the Ballingers' rely on *Koontz* to argue that the relocation fee is an unconstitutional taking. But *Koontz* cuts against them. The exaction in *Koontz* operated on "the direct link between the government's demand and a specific parcel of real property," 570 U.S. at 614. The Ballingers claim that a direct link exists between the government's demand for their money and their real property. We cannot deny that the relocation fee here is linked to real property, but no more so than property and estate taxes. Rather than a mere obligation to pay in relation to the use of one's property, the government in *Koontz* demanded and specifically identified that it wanted Koontz's payment of money in exchange for granting a benefit to either Koontz's parcel of land or another identified parcel of land. *Id.* at 613 ("[U]nlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land."). So the demand for payment in *Koontz* was "functionally

equivalent to other types of land use exactions" and amounted to a taking of an interest in the real property itself. *Id.* at 612–13 ("In that sense, this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property.").

Instead, the relocation fee required by the Ordinance is a monetary obligation triggered by a property owner's actions with respect to the use of their property, not a burden on the property owner's interest in the property. It is more akin to the obligations to pay money that other circuits have held were not takings, such as

- costs to clean up hazardous waste under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 190 (2d Cir. 2003);

- survivor's benefits required from previous employers of coal miners who died from Black Lung Disease, *W.V. CWP Fund v. Stacy*, 671 F.3d 378, 387 (4th Cir. 2011);

- fines for traffic offenses caught on municipal traffic cameras, *McCarthy*, 626 F.3d at 286;

- quarterly monetary assessments based on tobacco manufacturers' market share under the Fair and Equitable Tobacco Reform Act, *Swisher Int'l*, 550 F.3d at 1057; and

- special monetary assessments on domestic utilities that benefit from facilities that process environmentally contaminated uranium, *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (en banc) ("Requiring money to be spent is not a taking of property." (citation omitted)).

Unlike the cases that have found a taking of funds a violation of the Takings Clause, this Ordinance neither identifies the Ballingers' $6,582.40 as a parcel of money it intends to take, nor seeks to seize any escrow accounts or funds that meet certain criteria. Thus, the Ballingers' physical-taking claim was not "an appropriate vehicle to challenge the power of [a legislature] to impose a mere monetary obligation without regard to an identifiable property interest." *McCarthy*, 626 F.3d at 286 (quoting *Swisher Int'l*, 550 F.3d at 1057) (alteration in original).[6]

IV

For the same reasons, we disagree with the Ballingers that the City placed an unconstitutional condition, called an exaction, on their preferred use of their Oakland home. Though the Takings Clause prohibits the government from "deny[ing] a benefit to a person because he exercises a constitutional right" or "coercing people into giving [those rights] up" by imposing unconstitutional conditions on the use of

[6] Because we hold that the relocation fee is not a taking, we need not address the Ballingers' arguments that the relocation fee is taking for a private, rather than public, purpose and without just compensation.

private land, the "predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz*, 570 U.S. at 604, 612 (citation omitted). Because the relocation fee here was not a taking, it cannot have been an unconstitutional exaction.

A

The unconstitutional conditions doctrine of the Takings Clause allows the government to condition the use of one's property on agreeing to an exaction, or the dedication of one's other property to the public use, "so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Id.* at 605–06 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987)). In evaluating the constitutionality of an exaction, we must balance (1) the vulnerability of "land-use permit applicants" who can be strongarmed by government entities with "broad discretion" with (2) legitimate government interests in "landowners internaliz[ing] the negative externalities of their conduct." *Id.* at 604–05.

The Supreme Court has limited the scope of exaction claims to the administrative-conditions context. *E.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—*land-use decisions conditioning approval of development on the*

dedication of property to public use." (emphasis added)); *Lingle*, 544 U.S. at 546 (describing *Nollan* and *Dolan* as "Fifth Amendment takings challenges to adjudicative land-use exactions"); *Koontz*, 570 U.S. at 604, 614 (describing *Nollan* and *Dolan* as "involv[ing] a special application" of the unconstitutional conditions doctrine "when owners apply for land-use permits," where "central concern" is "the risk that the government may use its substantial power and discretion in land-use permitting" (citation omitted)). Following the Supreme Court's lead, we have applied an exactions analysis only to generally applicable administrative, not legislative, action. *See, e.g.*, *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008) ("In comparison to legislative land determinations, the *Nollan/Dolan* framework applies to adjudicative land-use exactions where the 'government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.'" (citation omitted)); *San Remo Hotel, LP v. San Francisco City & County*, 364 F.3d 1088, 1097 (9th Cir. 2004).[7]

[7] At least one Justice highlighted his disagreement. *See, e.g.*, *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas J., concurring in denial of certiorari) ("I continue to doubt that the existence of a taking should turn on the type of governmental entity responsible for the taking." (quotation marks and citation omitted)); *Parking Ass'n of Ga. v. City of Atlanta*, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., joined by O'Connor, J., dissenting in denial of certiorari) ("It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can.").

But the doctrine barring unconstitutional conditions is broader than the exactions context. *See Koontz*, 570 U.S. at 604 (collecting cases relating to different contexts); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 713–14 (2010) ("The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor . . . .").

Last year, in a now-vacated opinion, we relied on *McClung* to reject as an exaction "a general requirement imposed through legislation, rather than an individualized requirement to grant property rights to the public imposed as a condition for approving a specific property development." *Pakdel v. City & County of San Francisco*, 952 F.3d 1157, 1162 n.4 (9th Cir. 2020) (cleaned up), *vacated* 5 F.4th 1099 (9th Cir. 2021). However, the Supreme Court invited us to "give further consideration to [this] claim in light of [its] recent decision" in *Cedar Point Nursery*. *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226, 2229 n.1 (2021).

In *Cedar Point Nursery*, the Court highlighted that "[t]he essential question is not . . . whether the government action at issue comes garbed as regulation (or statute, or ordinance, or miscellaneous decree)." 141 S. Ct. at 2072. Yet the Court still limited the exactions context to "[w]hen the government conditions the grant of a benefit such as a permit, license, or registration" on giving up a property right. *Id.* at 2079. Thus, the Supreme Court has suggested that any government action, including administrative and legislative, that conditionally grants a benefit,

such as a permit, can supply the basis for an exaction claim rather than a basic takings claim. *See id.* at 2072; *see, e.g.*, *Com. Builders of N. Cal.*, 941 F.2d at 873 (applying exactions analysis to legislative ordinance imposing a fee to finance low-income housing in connection with the issuance of permits for nonresidential development).

B

Here, the Ballingers claim that the City's Ordinance (a legislatively imposed condition) is an unconstitutional exaction. The district court rejected their exaction claim as based on a generally applicable legislative condition when a properly pled exaction claim can only arise from administrative, not legislative, conditions.

In light of *Pakdel*, 141 S. Ct. at 2229 n.1, and *Cedar Point Nursery*, 141 S. Ct. at 2072, 2079, we agree with the Ballingers that "[w]hat matters for purposes of *Nollan* and *Dolan* is not *who* imposes an exaction, but *what* the exaction does," and the fact "[t]hat the payment requirement comes from a [c]ity ordinance is irrelevant." But the Ballingers miss, under the *Nollan/Dolan* framework, that whatever the government action is, it must condition the grant of a benefit on an unconstitutional taking. *See Dolan*, 512 U.S. at 391–92 (exactions where government bodies "make some sort of *individualized determination* that the required dedication [or condition] is related both in nature and extent to the impact of the proposed development."); *McClung*, 548 F.3d at 1227 (exactions analysis applies to "determinations conditioning permit approval on the grant of property rights to the public"). Here, the

Ordinance does not conditionally grant or regulate the grant of a government benefit, such as a permit, and therefore does not fall under the unconstitutional-conditions umbrella.

Lastly, even so, the "starting point to our analysis" of exactions claims is still whether the substance of the condition, such as granting an easement as in *Nollan* and *Dolan*, would be a taking independent of the conditioned benefit. *Cedar Point*, 141 S. Ct. at 2073; *Koontz*, 570 U.S. at 612; *see Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 384. Here, the relocation fee is not a compensable taking, so the relocation fee did not constitute an exaction. We therefore affirm the dismissal of the Ballingers' exaction claim.

V

Finally, we also affirm the dismissal of the Ballingers' seizure claim. The Fourth Amendment applies to searches and seizures in the civil context. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 51 (1993); *see also Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment through the Fourteenth Amendment). To adequately plead a seizure claim, a plaintiff must allege a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. And to establish a deprivation of Fourth Amendment rights, the Ballingers must allege the seizure was caused by state action. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The Ballingers claim their tenants were "willful participant[s] in joint activity with the State or its agents" and that the Ordinance authorizes a "meaningful interference with

[the Ballingers'] possessory interest in [their] property." The district court correctly rejected these arguments.

A private individual's actions can only be considered state action if a "sufficiently close nexus" makes private action "treat[able] as that of the [government entity] itself." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (citation omitted). Merely "authoriz[ing]," "approv[ing,] or acquiesc[ing]" to private action—such as the "creation or modification of any legal remedy"—is not enough to show state action. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52–53 (1999) (citations omitted). And an "[a]ction by a private party pursuant to [a] statute, without something more, [is] not sufficient to justify a characterization of that party as a 'state actor.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

The Ballingers have not established a cognizable theory of state action. The City did not participate in the monetary exchange between the Ballingers and their tenants. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164–65 (1978). Neither did it "exercise[ ] coercive power" over the Ballingers' tenants or "provide[ ] such significant encouragement, either overt or covert, that the [tenants'] choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004. Because the tenants were not willful participants in joint activity with the State, they cannot be fairly treated as the State itself. *Cf. Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1341–42 (9th Cir. 1977). Nor did the City actively encourage, endorse, or participate in any wrongful interference by the tenants with the Ballingers' money. *Cf. Presley v. City*

of Charlottesville, 464 F.3d 480, 488 (4th Cir. 2006). At most, the City was only involved in adopting an ordinance providing the terms of eviction and payment. *See Sullivan*, 526 U.S. at 53. But enacting the Ordinance of this nature is not enough—entitling tenants to demand a relocation payment is a "kind of subtle encouragement . . . no more significant than that which inheres in [a government entity]'s creation or modification of *any* legal remedy." *See id.* (emphasis added). Adopting the Ballingers' expansive notion of state action would eviscerate the "essential dichotomy between public and private acts." *Id.* (citation and quotation marks omitted). Thus, we affirm the district court's dismissal of the Ballingers' seizure claim.[8]

AFFIRMED.

---

[8] We affirm dismissal of the Ballingers' facial Fourth Amendment challenge as well. Outside the First Amendment context, a facial challenge must prove that a law is "unconstitutional in all of its applications," considering only those applications "in which [the law] actually authorizes or prohibits conduct." *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (citation omitted). But the Ballingers' as-applied seizure claim proves the Ordinance is not "unconstitutional in all applications," dooming a facial challenge. *See Bell v. City of Chicago*, 835 F.3d 736, 739 (7th Cir. 2016) (rejecting a facial Fourth Amendment seizure claim as "the Ordinances' actual application in [the plaintiffs'] case does not violate the Fourth Amendment" (cleaned up)); *see also Patel*, 576 U.S. at 444–45 (Alito, J., dissenting) (questioning whether facial Fourth Amendment claims are ever viable given that "reasonableness . . . is pre-eminently the sort of question which can only be decided in the concrete factual context of an individual case" (citation omitted)).

Filed Aug. 2, 2019

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LYNDSEY BALLINGER, et al., Plaintiffs, v. CITY OF OAKLAND, Defendant.	Case No. 18-cv-07186-HSG **ORDER GRANTING MOTION TO DISMISS** Re: Dkt. No. 32

Plaintiffs Lyndsey and Sharon Ballinger brought this challenge to Defendant City of Oakland's Uniform Residential Tenant Relocation Ordinance, under which they were required to pay their tenants nearly $7,000 to move back into their Oakland home. The City of Oakland moved to dismiss. *See* Dkt. No. 32. The Court finds that the Ballingers have not pled a cognizable legal theory and therefore **GRANTS** the City's motion without leave to amend.

I. BACKGROUND

The Court begins by summarizing the relevant City of Oakland ordinances before turning to the Ballingers' allegations.

A. City of Oakland Ordinances

In 2003, the City of Oakland passed the Just Cause for Eviction Ordinance, which prohibits landlords from evicting their tenants without cause. *See* Oakland, Cal., Mun. Code ("OMC" or "Code") § 8.22.300–390.[1] The City Council found that Oakland had a "prolonged affordable housing crisis" and that similar good cause protections in neighboring cities (such as San Francisco, Berkeley, and Hayward) "have aided community stability and reduced urban problems associated with arbitrary disruption of stable households." OMC § 8.22.300. That ordinance specifies what constitutes good cause for eviction, such as when a tenant fails to pay rent or violates a material term of the lease. *See* OMC § 8.22.360.A.1–2. In addition, two categories of permissible no-fault evictions (as defined in the ordinance) are relevant to this lawsuit.[2] First, a tenant may be evicted if the "owner of record seeks in good faith, without ulterior reasons and with honest intent, to recover possession of the rental unit for his or her occupancy as a

---

[1] All OMC provisions cited in this order are included in Exhibit A to the City's Request for Judicial Notice, *see* Dkt. No. 33 ("RJN"), and are also available online at https://library.municode.com/ca/oakland/codes/code_of_ordinances. Because "[m]unicipal ordinances are proper subjects for judicial notice," *Tollis, Inc. v. Cty. of San Diego*, 505 F.3d 935, 938 n.1 (9th Cir. 2007), and the Ballingers do not oppose the request, *see* Opp. at 1 n.1, the Court takes judicial notice of the OMC.

[2] Another category allows an owner to withdraw a property from the rental market in accordance with California's Ellis Act. *See* OMC § 8.22.360.A.11. The Ballingers' original complaint contended that Oakland had violated the Ellis Act, *see* Compl., Dkt. No. 1 ¶¶ 99–103, but the amended complaint dropped that legal theory.

principal residence where he or she has previously occupied the rental unit as his or her principal residence and has the right to recover possession for his or her occupancy as a principal residence under a written rental agreement with the current tenants." OMC § 8.22.360.A.8. Second, a tenant may be evicted if the "owner of record seeks in good faith, without ulterior reasons and with honest intent, to recover possession for his or her own use and occupancy as his or her principal residence." OMC § 8.22.360.A.9.

On March 1, 2016, the Oakland City Council adopted Ordinance Number 13358, which requires landlords that evict tenants when withdrawing a unit from the rental market under the Ellis Act to make a relocation payment to the evicted tenants. *See* RJN Ex. B; *see also* OMC § 8.22.450(A).

On January 16, 2018, the Oakland City Council adopted the ordinance at issue in this lawsuit—the Uniform Residential Tenant Relocation Ordinance ("the Ordinance"). *See* First Amended Complaint ("FAC"), Dkt. No. 29-1 Ex. A; *see also* OMC § 8.22.800–870. The City Council found that "all major California rent-controlled jurisdictions surveyed . . . require relocation payments for no-fault evictions" and that evicted tenants "face displacement and great hardship" and "are forced to incur substantial costs related to new housing." *See* FAC Ex. A at 2. Therefore, the Ordinance extended the relocation payment program established by Ordinance Number 13358 to other no-fault evictions, including owner move-in evictions and condominium conversions. *See id.* The Ordinance set the uniform relocation payment for qualifying no-fault evictions at $6,500 per unit for

studios and one-bedroom apartments, $8,000 per unit for two bedroom apartments, and $9,875 per unit for apartments with three or more bedrooms. *See* OMC § 8.22.820.A. These amounts were set to increase annually based on the Consumer Price Index adjustment. OMC § 8.22.820.D. Under the Ordinance, a tenant who was ultimately evicted would be eligible for one-third of the uniform relocation payment upon move-in, two-thirds of the uniform relocation payment after having lived in the unit for one year, and the entire amount after two years of occupancy. OMC § 8.22.850.C.

B. The Ballingers' Allegations

Lyndsey and Sharon Ballinger live with their two children in a three-bedroom home on MacArthur Boulevard in Oakland. *See* FAC ¶¶ 6, 22–23. Both Ballingers are members of the military: Sharon is a nurse practitioner currently stationed at Travis Air Force Base and Lyndsey is transitioning from the D.C. Air National Guard to a part-time role in the California Air National Guard. *Id.* ¶ 22. In 2015, the Ballingers were both active duty personnel in the United States Air Force and received orders to transfer to the Washington, D.C. area. *Id.* ¶ 24. Because they intended to return to Oakland following their assignment in Washington, they "decided to temporarily rent their house while on duty." *Id.* ¶ 25.

The Ballingers leased their MacArthur Boulevard home for one year, beginning on September 13, 2016. *Id.* ¶ 26; *see also id.* Ex. C (lease agreement). After the one-year lease expired, it would convert to a month-to-month tenancy. *Id.* ¶ 26. Because Oakland had not yet passed the Ordinance, the lease "did not anticipate

. . . a payment requirement, nor did it specifically acknowledge that the Ballingers intended to return to the home and use it as their primary residence." *Id.* ¶ 27.

In late 2017, the Ballingers learned that they would be reassigned to the Bay Area. *Id.* ¶ 28. The following March, the Ballingers gave their tenants sixty days' notice to vacate the MacArthur Boulevard house. *Id.* ¶ 29. Pursuant to the Ordinance, the Ballingers informed their tenants of their right to a $6,582.40 relocation payment and paid them half that amount. *Id.* ¶¶ 29–30. When their tenants vacated the house in late April 2018, the Ballingers paid them the remaining $3,291.20 required under the Ordinance. *Id.* ¶¶ 31–32. However, the Ordinance forced the Ballingers to make the relocation payment "before the tenants claimed or incurred any relocation costs and without any means to verify how or where they would spend the money." *Id.* ¶ 33.

C. The Ballingers Bring Suit

The Ballingers brought suit against the City of Oakland on November 28, 2018. *See* Dkt. No. 1. They filed the FAC on February 26, 2019, asserting six causes of action: (1) a facial Takings Clause claim for physical taking of private property for a private purpose, FAC ¶¶ 43–53; (2) facial and as-applied claims for unconstitutional exaction of private property, *id.* ¶¶ 54–64; (3) an as-applied claim for an uncompensated and unconstitutional physical taking, *id.* ¶¶ 65–73; (4) facial and as-applied claims for an unreasonable seizure in violation of the Fourth Amendment, *id.* ¶¶ 74–84; (5) an as-applied claim for violation of due process, *id.* ¶¶ 85–95; and (6) a claim

for unconstitutional interference with the obligation of contract, *id.* ¶¶ 96–104. The Ballingers seek a declaratory judgment, permanent injunction, damages, fees, and costs. *See id.* (Relief Sought).

D. Oakland Moves to Dismiss

Oakland moved to dismiss the amended complaint on March 12, 2019. *See* Dkt. No. 32 ("Mot."). The Ballingers opposed on March 25, *see* Dkt. No. 34 ("Opp."), and Oakland replied on April 2, *see* Dkt. No. 35 ("Reply"). The Court held a hearing on the motion on April 11, 2019. *See* Dkt. No. 36 (minute entry).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless, Courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). And even where facts are accepted as true, "a plaintiff may plead [him]self out of court" if he "plead[s] facts which establish that he cannot prevail on his . . . claim." *Weisbuch v. Cty. of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (quotation marks and citation omitted).

If dismissal is appropriate under Rule 12(b)(6), a court "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quotation marks and citation omitted).

III. DISCUSSION

Oakland moves to dismiss all six of the Ballingers' causes of action, as well as their requests for injunctive and declaratory relief. The Court begins with the Ballingers' three Takings Clause causes of action before turning to their other constitutional causes of action.

A. Takings Clause Claims

The Takings Clause of the Fifth Amendment provides that "[n]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. A person who has suffered a taking at the hands of a local government may bring a claim in federal court under 42 U.S.C. § 1983 to obtain just compensation. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2172 (2019).

The Supreme Court has drawn a distinction between two types of takings: physical takings and regulatory takings. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002). With respect to physical takings, the Fifth Amendment's "plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation." *Id.* The same holds true for "total regulatory takings," where the government "seeks to sustain regulation that deprives land of all economically beneficial use." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026–27 (1992). By contrast, the Fifth Amendment "contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property." *Tahoe-Sierra*, 535 U.S. at 321–22. Thus, a challenge to a regulatory taking requires "essentially ad hoc, factual inquiries." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The government need compensate for a regulatory taking "only if considerations such as the purpose of the regulation or the extent to which it deprives the owner

of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992); *see also Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). Given the "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other," the Supreme Court has warned that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Tahoe-Sierra*, 535 U.S. at 323.

At first glance, this case would seem to fit within the regulatory taking category. After all, the Ballingers challenge a city ordinance that regulates how they make use of their property. But that is not the theory the Ballingers have chosen to pursue.[3] Rather, according to the Ballingers, the Ordinance is an unconstitutional physical taking because it forces them to "turn over private funds to other private persons." FAC ¶ 45; *see also* Opp. at 4. Because the "plaintiff is the master of the complaint," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987), the Court will analyze their claim as pled.

---

[3] In fact, the Ballingers dropped their regulatory taking claim when they filed the FAC. *See* Compl., Dkt. No. 1 ¶¶ 65–72.

i. Physical Taking for Private Purpose

The Ballingers' first cause of action asserts that the Ordinance, on its face, commands a physical taking of private property for a private purpose, in violation of the Fifth Amendment. *See* FAC ¶¶ 43–53. The City contends that this cause of action must be dismissed "because it does not state an independent claim, but rather is a redundant attempt to challenge the issue of whether the Ordinance serves a public purpose." Mot. at 6. Oakland relies on *Rancho de Calistoga v. City of Calistoga*, in which the Ninth Circuit held that a "'private takings claim' cannot serve as an independent means to challenge an alleged regulatory taking" but instead "must function as part of the larger regulatory takings claim." *See* 800 F.3d 1083, 1092 (9th Cir. 2015); *see also MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1129 n.5 (9th Cir. 2013) (assuming without deciding that regulatory private taking claim was cognizable, despite being aware of no court that has ever recognized such a claim). The Ballingers assert that *Rancho* does not apply, because it was a regulatory takings case, and they are asserting a physical taking of their property. Opp. at 4.

The Court agrees that *Rancho*'s limitation does not apply to the Ballingers' physical taking claims. The Supreme Court has cautioned that courts should "not apply . . . precedent from the physical takings context to regulatory takings claims." *Tahoe-Sierra*, 535 U.S. at 323–24. And in a challenge to a physical taking, a plaintiff may assert that property was taken for a private purpose in violation of the Fifth Amendment. *See Kelo v. City of New London*, 545 U.S.

469, 477 (2005) (noting that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation"); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."). The Court notes that the term "public use" is construed broadly, to "afford[ ] legislatures broad latitude in determining what public needs justify the use of the takings power." *Kelo*, 545 U.S. at 483. But ultimately the Court need not—and, practically speaking, cannot—decide whether there was a valid public use, because it concludes that there was no taking. Accordingly, the Court **GRANTS** the motion to dismiss the first cause of action.

ii. Unconstitutional Exaction of Private Property

In their second cause of action, the Ballingers assert that the Ordinance is an unconstitutional exaction of private property because it conditions the exercise of their right to regain possession of their property on paying their tenants a relocation stipend. *See* FAC ¶¶ 55–57. Oakland argues that this claim must be dismissed because the exaction analysis does not apply, and even if it did, the Ordinance satisfies the constitutional requirements.[4] The Court begins

[4] Oakland also argued that the Ballingers' claim "is not ripe for adjudication because [they] do not allege that they have exhausted state law procedures for obtaining compensation," Mot. at 8, as was required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473

with an overview of the unconstitutional exactions doctrine before turning to its applicability here.

a. Unconstitutional Exactions

The "unconstitutional conditions doctrine" exists to "vindicate[ ] the Constitution's enumerated rights" by ensuring that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (internal quotation omitted). One "special application" of this general principle is the exactions doctrine, which exists to "protect[ ] the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Id.*

The modern exactions doctrine was first articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). There, the California Coastal Commission told the Nollans that it would grant them a development permit to rebuild their oceanfront home only if they created a public easement so that beachgoers would have continued access to the shore. *Id.* at 828–29. The Supreme Court reaffirmed that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* at 834 (alterations in original) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260

U.S. 172, 195 (1985). Since this motion was submitted, the Supreme Court overturned *Williamson County*. *See Knick*, 139 S. Ct. at 2179. Thus, failure to exhaust no longer creates a prudential barrier to federal court adjudication and the Court will proceed to the merits.

(1980)). However, the Court found that conditioning the permit on the creation of a public easement lacked a nexus with the original purpose of the building restriction, which had been to protect visual access to the beach. *See Nollan*, 483 U.S. at 837. Therefore, the condition was not a valid land-use regulation but rather an attempt to advance state interests without compensation, which amounted to an unconstitutional exaction. *See id.* at 841–42.

Seven years later, in *Dolan v. City of Tigard*, the Supreme Court considered a challenge to the city's attempt to condition approval of a redevelopment permit on the property owner dedicating roughly 10% of her property to an improved floodplain and a pedestrian and bicycle path. *See* 512 U.S. 374, 379–80 (1994). The Court held this permit condition to be an unconstitutional exaction, because the city had failed to show a "rough proportionality," meaning an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391.

Most recently, in *Koontz*, the Supreme Court identified "the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property." 570 U.S. at 614. There, the Court held that the exactions doctrine prohibited the government from making "[e]xtortionate demands for property," meaning that a property owner could sue when the

government denied a permit for refusing to accept its conditions. *See id.* at 606–07. In addition, the Court held that monetary exactions—a requirement that a property owner spend money, rather than give up a property interest—were subject to the nexus and rough proportionality requirements. *Id.* at 612.

b. Applicability of Exaction Framework

Oakland contends that the Ordinance cannot be analyzed under the exaction framework because no property was transferred to the City and because generally applicable legislation is not subject to the exaction analysis. *See* Mot. at 8–9. The Court considers each argument in turn.

1. Transfer of Property Interest

According to Oakland, the exaction framework does not apply, because the "Ordinance works no transfer of a property interest from Plaintiffs to the City." Mot. at 9. The Court does not find the analysis nearly so simple and declines to rule on this ground.

The Supreme Court has made clear that when the government takes physical possession of private property, there is a taking. *See Koontz*, 570 U.S. at 615 (noting that policy that demanded a "transfer [of] an interest in property from the landowner to the government . . . would amount to a *per se* taking similar to the taking of an easement or a lien"); *see also Tahoe-Sierra*, 535 U.S. at 322 ("When the government physically takes possession of an interest in property for some public purpose, it has a

categorical duty to compensate the former owner . . . ."). But "statutes regulating the economic relations of landlords and tenants are not *per se* takings." *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987). And the California Supreme Court has determined that *Nollan* and *Dolan* apply only when the government requires a "property owner [to] convey some identifiable property interest." *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 990 (Cal. 2015).

Despite the City's characterizations, none of the cases it cites stand for the principle that the property must necessarily be transferred to the *government* to constitute a taking. After all, in *Nollan*, it was the general public, not the government, that benefitted from the creation of a public easement to increase beach access. *See* 483 U.S. at 837. Similarly, the Ballingers have at least a plausible argument that although no money is transferred to the government, it is still put to public use because it helps to reduce rental costs and prevent displacement. Moreover, *Kelo* makes clear that the Takings Clause prohibits physical takings of real property for purely private purposes. *See* 545 U.S. at 477. But the Court ultimately need not resolve this dispute because it finds that the Ordinance cannot constitute a physical taking for the simpler reason that it is generally applicable legislation.

2. Generally Applicable Legislation

Alternatively, Oakland contends that "generally-applicable legislation is not subject to an exaction analysis." Mot. at 9. The Court agrees, because the exaction doctrine exists to prevent the government

from using its coercive power to demand unconstitutional conditions in adjudicative settings, not to impede the enforcement of generally applicable laws. *See Koontz*, 570 U.S. at 614 (noting that "direct link between the government's demand and a specific parcel of real property" led to "the risk that the government may use its substantial power and discretion in land-use permitting" to exact unconstitutional conditions).

In *McClung v. City of Sumner*, the Ninth Circuit considered a challenge to a city ordinance requiring that all new developments include storm drain pipes at least 12 inches in diameter. *See* 548 F.3d 1219, 1227 (9th Cir. 2008). The court applied a *Penn Central* regulatory takings analysis, after concluding that the *Nollan/Dolan* framework applied only to "adjudicative, individual determinations conditioning permit approval on the grant of property rights to the public" and not "general land use regulations." *Id.* It noted that extending *Nollan/Dolan* would mean "subject[ing] *any* regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police powers." *Id.* at 1228.

The Ballingers argue that *McClung* does not apply because "it was not clear that the restriction at issue was actually an exaction, rather than a standard land use regulation." Opp. at 12. Perhaps—but the same is true here. To be sure, one court in this district has held that the *Nollan/Dolan* exaction framework applies to a city ordinance requiring a monetary payment before an owner may withdraw a housing unit from the rental market. *See Levin v. City & Cty.*

of San Francisco, 71 F. Supp. 3d 1072, 1082–83 (N.D. Cal. 2014). In so holding, Judge Breyer found that "*Koontz* abrogated *McClung's* holding that *Nollan/Dolan* does not apply to monetary exactions, which is intertwined with and underlies *McClung's* assumptions about legislative conditions." *Id.* at 1083 n.4.

But this Court finds more persuasive Judge Chhabria's conclusion that *Koontz* did not overrule *McClung*. *See Bldg. Indus. Ass'n–Bay Area v. City of Oakland*, 289 F. Supp. 3d 1056, 1058 (N.D. Cal. 2018). Judge Chhabria noted that "the Ninth Circuit and the California Supreme Court have expressly stated that a development condition need only meet the requirements of *Nollan* and *Dolan* if that condition is imposed as an 'individual, adjudicative decision.'" *Id.* (quoting *McClung*, 548 F.3d at 1227; citing *Ehrlich v. City of Culver City*, 911 P.2d 429, 447 (Cal. 1996)). As noted in *Building Industry Association*, the "exactions doctrine . . . has historically been understood as a means to protect against abuse of discretion by land-use officials with respect to an individual parcel[ ] of land, and *Koontz* itself spoke of it in those terms." *Id.* at 1058–59. Limiting the exactions doctrine to adjudicative decisions makes sense, because it is in this context that the government can most easily use its considerable power and discretion over permitting to extract concessions from landowners when it would otherwise be required to pay just compensation.

By contrast, property owners may exercise their political power to oppose generally applicable legislation that regulates their property in a manner that they view as burdensome or unfair. *See San Remo*

Hotel L.P. v. City & Cty. of San Francisco, 41 P.3d 87, 105 (Cal. 2002) ("While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process."); *see also Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (Holmes, J.) ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."). Local governments frequently pass laws that alter the value of property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (noting that the Supreme Court "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails" and collecting cases). A system in which every city ordinance was subject to an unconstitutional exaction challenge would be unworkable.

In sum, although it may be true that "lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one," *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928 (2016) (Thomas, J., concurring in denial of certiorari), the Ninth Circuit has provided the answer for this Court. The Ordinance did not constitute an unconstitutional

exaction because it was generally applicable legislation, meaning that the Ballingers' exaction claim fails as a matter of law. Accordingly, the Court need not engage in the comparatively fact-intensive analysis of determining whether there was a nexus and rough proportionality.

* * *

The Court finds that the Ballingers have not, and cannot, plead an unconstitutional exaction claim based on the Ordinance and thus **GRANTS** the motion to dismiss this cause of action.

iii. Physical Taking

In their third cause of action, the Ballingers contend that the Ordinance is "an unconstitutional physical taking of property as applied to Plaintiffs," because it forces them to transfer money to their tenants or otherwise "face severe financial penalties." *See* FAC ¶ 67–70. The City argues that this cause of action must be dismissed because the Ordinance's "requirement that money transfer between two private parties does not create a physical taking of that money." Mot. at 14–16.[5]

The "classic taking" is one "in which the government directly appropriates private property for its own use," *Tahoe-Sierra*, 535 U.S. at 324 (internal alteration and quotation omitted), such as when the government requires landlords to allow the

[5] Oakland also argued that the Ballingers failed to exhaust state-law procedures for obtaining compensation, Mot. at 12, but the ripeness doctrine was overruled by *Knick*, 139 S. Ct. at 2179.

installation of television cables on buildings, *Loretto*, 458 U.S. at 421. The constitutional protection against *per se* takings without just compensation applies equally to the physical appropriation of personal property as it does to real property. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426–27 (2015) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

But no precedent supports the Ballingers' argument that legislation requiring the payment of money constitutes a physical taking, triggering the just compensation requirement. To the contrary, a plurality of Justices in *Eastern Enterprises v. Apfel* agreed that the Coal Act's creation of an obligation to pay money to fund the health care costs of retired miners did not constitute a physical taking. *See* 524 U.S. 498, 540 (1998) (Kennedy, J., concurring) ("[The Coal Act] does not operate upon or alter an identified property interest . . . . The law simply imposes an obligation to perform an act, the payment of benefits. . . . To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise."); *id.* at 554 (Breyer, J., dissenting) ("The 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. . . . This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties."). The courts of appeal that have considered this question have held that *Eastern Enterprises* established that "the mere imposition of an obligation to pay money does not give rise to a

claim under the Takings Clause." *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 387 (4th Cir. 2011); *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (finding that "five justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings"). This Court agrees that *Eastern Enterprises* is the law: the obligation to pay money is not a taking. *See Banks v. Cty. of San Mateo*, No. 16-CV-04455-YGR, 2017 WL 3434113, at *13 (N.D. Cal. Aug. 10, 2017) (noting lack of precedent in the Ninth Circuit and following *Eastern Enterprises* to find that "the charging of fees does not constitute a violation of the Takings Clause").

Nor has the holding of *Eastern Enterprise* been altered by subsequent authority. *Koontz* held only that monetary exactions in the permitting process were subject to *Nollan/Dolan* scrutiny because they burdened the ownership of an identifiable parcel of land. *See* 570 U.S. at 613–14. But it did not bring all general legislation requiring the transfer of money within the realm of the Takings Clause. The Ballingers also point to *Horne*, in which the Supreme Court held that "a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking." *See* 135 S. Ct. at 2430. But money is not specific, identifiable property. Rather, "[u]nlike real or personal property, money is fungible." *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989). And just because an ordinance mandates the transfer of wealth, that "does not convert regulation into physical invasion." *Yee*, 503 U.S. at 530. To hold otherwise would make it impossible for state and local

governments to exercise their "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto*, 458 U.S. at 440. Finally, it is difficult to envision how exactly the City of Oakland would pay just compensation for an ordinance requiring the payment of money between two private parties.

The Court finds that the Ballingers' physical taking claim is not cognizable and therefore **GRANTS** the motion to dismiss the third cause of action.

B. Fourth Amendment Seizure

The Ballingers' fourth cause of action asserts that the Ordinance constitutes an unreasonable seizure of their money and real property. *See* FAC ¶¶ 74–84. The City contends that this cause of action must be dismissed because "[r]egulation of private activity is not state action," and even if the Fourth Amendment were applicable, the seizure would not be unreasonable. *See* Mot. at 17.

Under the Fourth Amendment, a seizure "occurs when there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook Cty.*, 506 U.S. 56, 61 (1992) (internal quotation omitted). Though most familiar in the criminal context, the Fourth Amendment's protections also apply "in the civil context." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 51 (1993). But the Constitution constrains only state action. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). And "state action requires *both* an alleged

constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, *and* that the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotations omitted).

In the Ballingers' view, "the Ordinance forces the Ballingers and others to choose between one of two City-authorized seizures for tenant benefit—your home or your money—or face substantial penalties." Opp. at 16. And because the City has created a "catch-22 seizure situation," the logic goes, it is subject to the constraints of the Fourth Amendment. *See id.*

Even assuming for the sake of argument that the Ballingers have alleged a seizure of either their house or money, they have not met the preliminary requirement of alleging that a state actor caused the deprivation. The Ballingers cite a Fourth Circuit case, *Presley v. City of Charlottesville*, for the proposition that the state action requirement is met because the "City authorized and compelled a seizure of money by third parties." Opp. at 15. In *Presley*, trespasses to land committed by private citizens were attributed to the city because it knowingly published an erroneous map that encouraged the public to use a hiking trail that trespassed through the plaintiff's property. *See* 464 F.3d 480, 487–88 (4th Cir. 2006). Here, by contrast, the only state action is the passage of the Ordinance requiring the payment of money to tenants who are evicted for no fault of their own. But the "subtle encouragement" of passing a law "is no more

significant than that which inheres in the State's creation or modification of any legal remedy," and finding it to be state action would destroy the "essential dichotomy between public and private acts." *Am. Mfrs.*, 526 U.S. at 53 (internal quotation omitted). The City's mere authorization, as opposed to encouragement, is not state action. *See Am. Mfrs.*, 526 U.S. at 52; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164–66 (1978) (holding that actions by private actors taken pursuant to state statute are not state action).

Accordingly, because the Ballingers have not alleged a constitutional deprivation at the hands of a state actor, the Ballingers' Fourth Amendment claim fails as a matter of law and the Court **GRANTS** the motion to dismiss this cause of action.

C. Due Process Violation

In their fifth cause of action, the Ballingers assert that the Ordinance does not rationally advance any legitimate governmental interest and is arbitrary, particularly because of its retroactive nature, which violates the Fourteenth Amendment's guarantee of due process. *See* FAC ¶¶ 85–95. The City moves to dismiss, asserting that the Ordinance is not retrospective and that it even if it was, it survives rational basis review. *See* Mot. at 17–20.[6]

A "regulation that fails to serve any legitimate governmental objective may be so arbitrary or

[6] In its opening brief, the City also argued that "the due process claim is subsumed by the Takings Clause." Mot. at 17. In response, the Ballingers clarify that they are bringing a substantive due process claim, Opp. at 17, which the City agrees is not subsumed by the Takings Clause, Reply at 12.

irrational that it runs afoul of the Due Process Clause." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005). "To constitute a violation of substantive due process, the alleged deprivation must 'shock the conscience and offend the community's sense of fair play and decency.'" *Sylvia Landfield Tr. v. City of Los Angeles*, 729 F.3d 1189, 1195 (9th Cir. 2013) (quoting *Marsh v. Cty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012)). A law is not retroactive just because it "upsets expectations based in prior law," but only if it "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994). But even "[r]etrospective economic legislation need only survive rational basis review in order to pass constitutional muster." *Gadda v. State Bar of Cal.*, 511 F.3d 933, 938 (9th Cir. 2007); *see also Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

The Ballingers' substantive due process claim fails as a matter of law because they do not meet the "extremely high" burden, *Richardson v. City & Cty. of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1997), of showing that the Ordinance is arbitrary and irrational. First, the Ordinance is not retrospective, because although it upset the Ballingers' expectations about the costs of evicting their tenants, it does not attach any new legal consequences to events completed before its passage. *See Franceschi v. Yee*, 887 F.3d 927, 940 (9th Cir. 2018) (holding that statute revoking driver's licenses for failure to pay past-due taxes did not operate retroactively because it was "dependent on a taxpayer's current conduct . . . and not on past conduct"). Second, the Ordinance passes rational basis review, regardless of whether it acts

retroactively. The City Council's legislative purpose, to promote community stability and help tenants avoid displacement and high moving costs, was a legitimate one. *See Pennell v. City of San Jose*, 485 U.S. 1, 12–13 (1988) (holding that protection of tenants is legitimate governmental purpose); *Apartment Ass'n of Greater L.A. v. City of Beverly Hills*, No. CV 18-6840 PSG (EX), 2019 WL 1930136, at *7 (C.D. Cal. Apr. 17, 2019) (upholding challenge to relocation payment ordinance against substantive due process challenge). And the Ordinance is rationally related to that legitimate end because it shifts some of the costs of relocation from tenants evicted for no fault of their own onto their landlords based on the size of the rental property and the duration of the tenant's occupancy. *Cf. Guggenheim v. City of Goleta*, 638 F.3d 1111, 1122 (9th Cir. 2010) (en banc) (upholding rent control ordinance against substantive due process challenge). Thus, the Ballingers have not satisfied the extremely high bar of showing that the duly-passed Ordinance shocks the conscience so as to violate their substantive due process rights.

The Court **GRANTS** the motion to dismiss the due process claim because it concludes that the Ballingers have not pled any facts to reasonably support the conclusion that the Ordinance is impermissibly retroactive, arbitrary, or irrational.

D. Contract Clause

The Ballingers' sixth and final cause of action asserts that the Ordinance violates the Constitution's Contract Clause. FAC ¶¶ 96–104.

The Contract Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. The "Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties" but "does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects." *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17 (1977). The Clause is "narrowly construe[d]" in order "to ensure that local governments can effectively exercise their police powers." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003).

To assess whether "laws affecting pre-existing contracts violate the Clause," courts engage in a two-step inquiry. *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). First, courts determine whether the state law has "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). This step includes considering "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S. Ct. at 1822. And "when considering substantial impairment, [courts] focus on the importance of the term which is impaired, not the dollar amount." *S. Cal. Gas Co.*, 336 F.3d at 892. Second, if there is substantial impairment, courts look to the "means and ends of the legislation," *Sveen*, 138 S. Ct. at 1822, including whether there is a "significant and legitimate public purpose behind the regulation," *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983). When the

government is not a party to the contract, courts must "defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 413 (internal quotation omitted).

The Court finds that the Ordinance does not substantially impair the agreement between the Ballingers and their tenants. Tellingly, the Ballingers are not able to muster any precedent to support their arguments. And given the "existence of extensive regulation" of the landlord-tenant relationship, the Ballingers could not reasonably have expected the regulatory landscape to remain unchanged indefinitely. *See id.* at 416 (finding no impairment of reasonable expectations where parties recognized "existence of extensive regulation" in field); *see also Rancho de Calistoga*, 800 F.3d at 1091 (noting that "those who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end") (internal quotation and alterations omitted); *Chi. Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 737 (7th Cir. 1987) (considering extent of prior landlord-tenant regulation and denying motion for preliminary injunction on Contract Clause claim). After all, when they leased their house, the Ballingers would have been required to make a relocation payment to a tenant they evicted under the Ellis Act. The Ordinance simply extended this obligation to include no-fault evictions for owner move-ins. And the Ordinance does not prohibit owner move-ins, it just redistributes the costs so that tenants are not forced to bear the full financial brunt of being evicted. Thus, the relocation payment is not a "ransom requirement," Opp. at 21, but merely one more regulation added to

the stack of those governing the relationship between Oakland landlords and their tenants.

The Court finds that the Ballingers have not alleged a substantial impairment of their contractual relationship and thus **GRANTS** the motion to dismiss the Contract Clause cause of action.

E. Standing to Pursue Injunctive or Declaratory Relief

Oakland contends that the Ballingers lack standing to pursue either injunctive or declaratory relief and that these claims for relief must be dismissed. Mot. at 22–23. The Ballingers do not respond to this argument.

A plaintiff "must show standing with respect to each form of relief sought." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir. 2011). To establish standing, a plaintiff "must have suffered an injury-in-fact that is fairly traceable to the challenged conduct and that is likely to be redressed by a favorable judicial decision." *California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018). And when a plaintiff seeks prospective injunctive relief, he must establish "a real and immediate threat of repeated injury" so as to show "a sufficient likelihood that he will again be wronged in a similar way." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (quotations omitted).

Given that the Ballingers did not oppose this ground for dismissal, and the Court has dismissed the substantive claims, the Court declines to rule on whether the Ballingers have adequately pled standing to pursue injunctive or declaratory relief.

IV. CONCLUSION

The Court finds that the Ballingers have failed to plead a cognizable legal theory on any of their constitutional challenges to the Ordinance and thus **GRANTS** the motion to dismiss. Further, the Court grants the motion without leave to amend because it finds that leave would be futile, as counsel for the Ballingers acknowledged at the hearing that the factual underpinnings are not disputed. Of course, in granting this motion, the Court does not opine on the wisdom or the effectiveness of the Ordinance in alleviating what is undoubtedly a housing crisis in the Bay Area. *Cf. Miralle v. City of Oakland*, No. 18-CV-06823-HSG, 2018 WL 6199929, at *4 (N.D. Cal. Nov.28, 2018) (noting that "the question before the Court is not whether the City's policy approach" to addressing the "homelessness crisis" is "the ideal policy approach"). But the Ballingers lack a cognizable legal claim for the reasons discussed above, and that finding ends the Court's inquiry here.

The Clerk is directed to close the case and enter judgment in favor of Defendants.

IT IS SO ORDERED.

Dated: 8/2/19

/s/ Haywood S. Gilliam, Jr.
HAYWOOD S. GILLIAM, JR.
United States District Judge

ARTICLE VII. UNIFORM RESIDENTIAL TENANT RELOCATION ORDINANCE

8.22.800 - Purpose.

The purpose of this Section is to establish an uniform amount for relocation payments for tenants displaced by no-fault evictions.

(Ord. No. 13468, § 1, 1-16-2018)

8.22.810 - Definitions.

"Disabled" means a person with a disability, as defined in Section 12955.3 of the Government Code.

"Elderly" means a person sixty-two (62) years old or older.

"Lower-Income Tenant Household" means Tenant Households whose income is not more than that permitted for lower income households, as defined by California Health and Safety Code Section 50079.5.

"Minor Child(ren)" means a person(s) who is eighteen (18) years or younger at the time the notice is served.

"Owner" or "Property Owner" means a person, persons, corporation, partnership, limited liability company, or any other entity holding fee title to the subject real property. In the case of multiple ownership of the subject real property, "Owner" or "Property Owner" refers to each entity holding any portion of the fee interest in the property, and the property owner's obligations in this Chapter shall be joint and several as to each property owner.

"Qualifying Relocation Event" means any event or vacancy that triggers a Tenant's right to relocation payments under the Oakland Municipal Code.

"Rental Unit" means a dwelling space in the City containing a separate bathroom, kitchen, and living area, including a single-family dwelling or unit in a multifamily or multipurpose dwelling, or a unit in a condominium or cooperative housing project, or a unit in a structure that is being used for residential uses whether or not the residential use is a conforming use permitted under the Oakland Municipal Code or Oakland Planning Code, which is hired, rented, or leased to a household within the meaning of California Civil Code Section 1940. This definition applies to any dwelling space that is actually used for residential purposes, including live-work spaces, whether or not the residential use is legally permitted.

"Room" means an unsubdivided portion of the interior of a residential building in the City which is used for the purpose of sleeping, and is occupied by a Tenant Household for at least thirty (30) consecutive days. This includes, but is not limited to, a rooming unit or efficiency unit located in a residential hotel, as that term is defined in accordance with California Health and Safety Code Section 50519. This definition applies to any space that is actually used for residential purposes whether or not the residential use is legally permitted. For purposes of determining the amount of relocation payments, a room is the equivalent of a studio apartment.

"Tenant" means a Tenant as that term is defined in O.M.C. 8.22.340.

"Tenant Household" means one (1) or more individual Tenants who rent or lease a Rental Unit or Room as their primary residence and who share living accommodations. In the case where an individual Room is rented to multiple Tenants under separate agreements, each individual Tenant of such Room shall constitute a "Tenant Household" for purposes of this article.

(Ord. No. 13608, § 6(Att. E), 7-21-2020; Ord. No. 13468, § 1, 1-16-2018)

8.22.820 - Amount of relocation payments.

A. Unless otherwise specified in a Section of the Oakland Municipal Code requiring relocation payments, Tenant Households who are required to move as a result of a Qualifying Relocation Event shall be entitled to a relocation payment from the Owner in the sum of six thousand five hundred dollars ($6,500.00) per unit for studios and one-bedroom apartments; eight thousand dollars ($8,000.00) per unit for two-bedroom apartments; and nine thousand eight hundred seventy-five dollars ($9,875.00) per unit for units with three or more bedrooms. The payment shall be divided equally among all Tenants occupying the Rental Unit at the time of service on the Tenants of the notice of termination of tenancy.

B. Unless otherwise specified in a Section of the Oakland Municipal Code requiring relocation payments, Tenant Households in Rental Units that include lower income, elderly or

disabled Tenants, and/or minor children shall be entitled to a single additional relocation payment of two thousand five hundred dollars ($2,500.00) per unit from the Owner. If a household qualifies for this additional payment, the payment shall be divided equally among eligible (lower-income, elderly, disabled, parents/guardians of minor children) Tenants.

C. In the case of temporary relocations under O.M.C. 15.60.110 B., the amounts in paragraphs A-B shall be a cap on relocation payments.

D. The relocation payments specified in subsection 8.22.820 A. shall increase annually on July 1 in accordance with the CPI Adjustment as calculated in OMC subsection 8.22.070 B.3, and the increase shall apply to all eviction notices served on or after July 1. The first increase shall take place on July 1, 2017.

(Ord. No. 13608, § 6(Att. E), 7-21-2020; Ord. No. 13468, § 1, 1-16-2018)

ARTICLE VIII. RELOCATION PAYMENTS FOR OWNER OR RELATIVE MOVE-INS

8.22.850 - Relocation Payments for Owner or Relative Move-Ins.

A. Applicability. An owner who evicts a tenant pursuant to O.M.C. Section 8.22.360 A.9. or where a tenant vacates following a notice or

other communication stating the owner's intent to seek recovery of possession of the unit under this O.M.C. Section must provide relocation payment under this Section. Relocation payment procedures pursuant to code compliance or Ellis Act evictions will be governed by the Code Compliance Relocation Ordinance and the Ellis Act Ordinance.

B. The property owner shall be responsible for providing relocation payments, in the amounts specified in Section 8.22.820, to an eligible tenant household in the form and manner prescribed under this article and any rules and regulations adopted under this article.

C. Tenant Eligibility for Payment. Tenants will be eligible for relocation payments according to the following schedule based on the effective date of ay notice to terminate:

1. Upon taking possession of the rental unit, the tenant will be eligible for one-third (⅓) of the total payment pursuant to subsection B., above.

2. After one (1) year of occupancy of the rental unit, the tenant will be eligible for two-thirds (⅔) of the total payment pursuant to subsection B., above.

3. After two (2) years of occupancy of the rental unit, the tenant will be eligible for the full amount of the total payment pursuant to subsection B., above.

D. Time for Payment.

1. The owner must pay the tenant half of the relocation payment provided for in Subsection 8.22.820 A. when the termination notice is given to the household and the remaining half when the tenant vacates the unit.

2. The owner must pay the tenant the additional payment provided for in Section 8.22.820 B. within fifteen (15) days of the tenant's notice of eligibility or the tenant supplying documentation of the tenant's eligibility.

3. An owner who pays relocation expenses in conjunction with a notice to quit as required by this Section need not pay the same relocation expenses with any further notices to quit based on O.M.C. Section 8.22.360 A.9. for the same unit that are served within one hundred eighty (180) days of the notice that included the required relocation payment. Nothing in this paragraph relieves the owner from portions of relocation expenses not yet paid by the owner or received by the tenant, including the remaining half due when the tenant vacates the unit.

E. If an owner fails to make the relocation payment as prescribed, the tenant may file an action against the owner and, if the tenant is found eligible for the relocation payments, the tenant will be entitled to recover the amount

of the relocation payments plus an equal amount as damages and the tenant's attorney's fees. Should the owner's failure to make the payments as prescribed be found to be in bad faith, the tenant shall be entitled to the relocation payments plus an additional amount of three (3) times the amount of the relocation payments and the tenant's attorney's fees.

F. Owners may apply for a zero-interest loan from the City of Oakland for the purpose of satisfying their relocation payment obligation under this O.M.C Section if they meet the eligibility criteria set forth below. An owner qualifies for a relocation payment assistance loan if they meet the following two (2) conditions:

1. Ownership of fewer than five (5) units in the City of Oakland. In the case of a relative move-in, the relative must also not own any other real estate property and must be of low or moderate income as defined by California Health and Safety Code Section 50093.

2. The owner must be ineligible for a cash-out refinance loan based on the underwriting criteria for investment properties set forward by Fannie Mae regulations.

The owner must also meet at least one (1) of the following two (2) conditions to qualify:

1. The owner must not have more than six (6) months of liquid financial reserves as defined by Fannie Mae regulations.

2. The owner must qualify as low or moderate income as defined by California Health and Safety Code Section 50093.

The City Administrator may issue additional regulations or guidance to implement this subsection.

(Ord. No. 13608, § 7(Att. F), 7-21-2020; Ord. No. 13468, § 2, 1-16-2018; Ord. No. 13499, § 1, 7-24-2018)

8.22.860 - Violation—Penalty.

A. Criminal Penalties.

1. Infraction. Any property Owner violating any provision or failing to comply with any requirements of this article shall be guilty of an infraction for the first offense.

2. Misdemeanor. Any property Owner violating any provision or failing to comply with any requirements of this article multiple times shall be guilty of a misdemeanor.

B. Administrative Penalties.

1. Administrative Citation. Any person violating any provision or failing to comply

with any requirements of this article may be assessed an administrative citation pursuant to O.M.C. Chapter 1.12 for the first offense.

2. Civil Penalties. Any person violating any provision or failing to comply with any requirements of this article multiple times may be assessed a civil penalty for each violation pursuant to O.M.C. Chapter 1.08.

C. Violation includes attempted violation. In addition to failing to comply with this article, it is also violation to attempt to have a Tenant accept terms that fail to comply with this article, including any of the following actions:

1. Asking the Tenant to accept an agreement that pays less than the required relocation payments;

2. Asking the Tenant to accept an agreement that waives the Tenant's rights; or

3. Upon a return to the unit, asking the Tenant to pay a higher rent than is permitted under this article or O.M.C. Chapter 8.22.

(Ord. No. 13468, § 2, 1-16-2018)

8.22.870 - Civil Remedies.

A. Any person or organization who believes that a property Owner or Tenant Household has

violated provisions of this article or the program rules and regulations adopted pursuant to this article shall have the right to file an action for injunctive relief and/or actual damages against such party. Whoever is found to have violated this article shall be subject to appropriate injunctive relief and shall be liable for damages, costs and reasonable attorneys' fees. Treble damages shall be awarded for a property Owner's willful failure to comply with the payment obligation established under this article.

B. Nothing herein shall be deemed to interfere with the right of a property Owner to file an action against a Tenant or non-Tenant third party for the damage done to said Owner's property. Nothing herein is intended to limit the damages recoverable by any party through a private action.

C. The City Attorney may bring an action against a property Owner that the City Attorney believes has violated provisions of this article or any program rules and regulations adopted pursuant to this article. Such an action may include injunctive relief and recovery of damages, penalties—including any administrative citations or civil penalties—treble damages, and costs and reasonable attorney's fees. The City Attorney has sole discretion to determine whether to bring such an action.

(Ord. No. 13468, § 2, 1-16-2018)

No. _____

In the
Supreme Court of the United States

LYNDSEY BALLINGER; SHARON BALLINGER,

Petitioners,

v.

CITY OF OAKLAND,

Respondent.

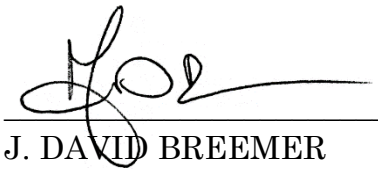
On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI contains 8,613 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 23, 2022.



J. DAVID BREEMER
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
Email: JBreemer@pacificlegal.org
Counsel for Petitioners

2311 Douglas Street
Omaha, Nebraska 68102-1214

1-800-225-6964
(402) 342-2831
Fax: (402) 342-4850

COCKLE Legal Briefs
Est. 1923

E-Mail Address:
contact@cocklelegalbriefs.com

Web Site
www.cocklelegalbriefs.com

No. _____

LYNDSEY BALLINGER; SHARON BALLINGER,
Petitioners,
v.
CITY OF OAKLAND,
Respondent.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 24th day of February, 2022, send out from Omaha, NE 1 package(s) containing 3 copies of the PETITION FOR WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

J. DAVID BREEMER*
*Counsel of Record
BRIAN T. HODGES
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
JBreemer@pacificlegal.org
BHodges@pacificlegal.org

Counsel for Petitioners

Subscribed and sworn to before me this 24th day of February, 2022.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

Renee J. Goss
Notary Public

Andrew H. Cockle
Affiant

42055

Service List
Ballinger v. City of Oakland

Counsel for Respondent:

Kevin P. McLaughlin
Office of the City Attorney
One Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612
Telephone: (510) 238-2961
Email: kmclaughlin@oaklandcityattorney.org