No. 16-16130

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOUFIC AND EVA JISSER, AND THE
TOUFIC AND EVA JISSER REVOCABLE TRUST,

Plaintiffs - Appellants,

v.

CITY OF PALO ALTO,

Defendant - Appellee.

On Appeal from the United States District Court for
the Northern District of California, San Jose Division
Honorable Edward J. Davila, District Judge

PLAINTIFFS - APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Jisser family has owned and operated the Buena Vista mobilehome park on their land in Palo Alto for more than 30 years. All they want to do is exit the rental business, allowing for the retirement of elder members of the family and for the next generation to someday put the land to another use. The City has leveraged its permitting power to demand that the Jissers pay an estimated $8,000,000 in extraordinary "enhanced relocation benefits" to tenants as a condition of withdrawing the property from the rental market. Rather than pay, the Jissers brought the instant case for equitable relief to invalidate the unconstitutional condition. The City's demand violates principles set out in the *Nollan*, *Dolan*, and *Koontz* line of cases because it bears no essential nexus to the public impact of the mobilehome park's closure, and is not proportionate to the withdrawal of the property from the rental market. The district court dismissed on the grounds that the Jissers did not first pursue compensation in state court pursuant to the *Williamson County* state-procedures doctrine; the Jissers challenge that judgment in this appeal.

Defendant-Appellee City responds that the Jissers' unconstitutional conditions claim is not ripe, and is time-barred, and that their related Public Use Clause claim must be dismissed for failure to state a claim. Contrary to the City's claims, an unconstitutional conditions case seeking equitable relief, such as the one here, is ripe

without a prior damages suit, and the Jissers state a viable Public Use Clause claim under *Kelo v. City of New London*, 545 U.S. 469 (2005).

ARGUMENT

The common and logical remedy for a *Nollan*/*Dolan* claim is invalidation of the unconstitutional condition, rather than compensation. That is in fact the relief granted in the seminal *Nollan*[1] and *Dolan*[2] cases themselves and in many like cases that have followed. It is particularly appropriate for a property owner to seek declaratory and injunctive relief where the government unconstitutionally conditions a change in land use on the transfer of money, but the money has not yet changed hands. Because this case does not hinge on compensation, *Williamson County*'s[3] state procedures rule does not apply, and the case is ripe now. Further, the City's demand for an estimated $8,000,000 in payments to individual tenants violates the Public Use Clause because those payments are not restricted to mitigate housing expenses, but may be used by tenants for any private purpose whatsoever. "A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is

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[1] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

[2] *Dolan v. California Coastal Commission*, 512 U.S. 374 (1994).

[3] *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*, 473 U.S. 172 (1985).

intended to favor a particular private party, with only incidental or pretextual public benefits." *Kelo*, 545 U.S. at 491.

I

DECLARATORY AND INJUNCTIVE RELIEF, NOT COMPENSATION, IS THE RIGHT REMEDY

A. Invalidation of the Offending Condition Is the Common and Logical Remedy in Unconstitutional Conditions Cases

The City argues that *Williamson County*'s state-procedures rule applies because "a plaintiff must seek compensation in state court before bringing an as-applied federal takings claim, no matter the type of taking, the relief sought, or the particular legal theory." Ans. Br. at 20. It cites *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), and other physical or regulatory takings cases from this Court in support of that hypothesis. It takes cover from language in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), and *Williamson County* to the effect that the Takings Clause "does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194. But the City goes too far.

The City ignores the fact that unconstitutional conditions cases have been treated differently than physical and regulatory takings cases founded on the Just Compensation Clause. The U.S. Supreme Court and other courts have invalidated unconstitutional conditions (or declared them unconstitutional) rather than award

compensation. It is noteworthy that the plaintiffs in both *Nollan* and *Dolan* were not forced to accept compensation.[4] Invalidation of an unconstitutional condition is not only a common remedy, but the most logical one.

(1)

In *Nollan*, the Supreme Court held that when government demands property in exchange for a land-use permit, but that demand fails to bear an "essential nexus" to the public impact of the property owner's proposed project, the condition "is not a valid regulation of land use but an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (internal quotation omitted). The condition requiring a dedication of a public easement across the Nollan's property failed to meet "even the most untailored standards" of mitigating a public impact arising from the Nollan's proposed development and was struck down. *Id*. at 838. In reversing the California Court of Appeal, the Supreme Court did not order compensation to be paid for the unlawful taking of the easement, but left the trial court's remedy of invalidation of the offending condition in place. This result makes sense if one recognizes that, contrary to a physical or regulatory takings case where the government exercises legitimate power to take property, an unconstitutional conditions case challenges the propriety of the government's demand. In such a case, a declaration that the unconstitutional

[4] *See Wilkie v. Robbins*, 551 U.S. 537, 583-84 (2007) (Ginsburg, J., concurring in part, dissenting in part) (noting that both *Nollan* and *Dolan* were cases where the conditions were invalidated).

condition amounts to a taking, or an injunction to halt an uncompensated taking before damage is done, is the most logical remedy.

Compensation was also absent from *Dolan*. When Dolan applied for a permit to expand her hardware store in Tigard, Oregon, the city conditioned approval on the dedication of a portion of her property for a bike path and floodplain buffer. 512 U.S. at 379. Dolan sought invalidation of the condition because the government's demand for property far exceeded any public impact caused by her proposed development. *Id*. at 380-81. The Supreme Court agreed, holding that the government must "make some sort of individualized determination that the required dedication is related both in nature and extend to the proposed development" and that the city had not met that burden. *Id*. at 391. Rather than award compensation—the outcome the Defendant-Appellee here argues is the necessary and only possible outcome—the Court remanded the case to the Oregon Supreme Court with the declaration that the condition constituted a taking. The Oregon Supreme Court then sent it back to the City of Tigard for reconsideration. *Dolan v. City of Tigard*, 877 P.2d 1201 (Or. 1994). The city withdrew its condition in the face the Supreme Court's declaration and no compensation was ever paid.

Lower courts also follow a pattern of invalidating unconstitutional conditions on land use permits by declaration or injunction. In *Goss v. City of Little Rock*, 151 F.3d 861, 862 (8th Cir. 1998), for instance, the court considered under *Nollan*/*Dolan*

a permit condition requiring a landowner to dedicate a portion of his property in exchange for a zoning change. It affirmed the district court's invalidation of the condition (while reversing other aspects of the lower court's order). *Id*. at 864. The First Circuit likewise affirmed a district court's invalidation of an impact fee condition imposed on development because the fee did not meet the standards of *Dolan*. *See City of Portsmouth v. Shlesinger*, 57 F.3d 12, 14 (1st Cir. 1995). Numerous state supreme courts also recognize that invalidation of an unlawful permit condition is the proper form of relief in an unconstitutional conditions case. *See, e.g.*, *Dobbs Ferry Development Ass'n v. Board of Trustees*, 81 A.D.3d 945 (N.Y. App. Div. 2011) (invalidating a development fee in lieu of parkland dedication because the fee did not bear scrutiny under standards of *Nollan* and *Dolan*); *Collings v. Planning Bd*., 947 N.E.2d 78 (Mass. App. Ct. 2011) (invalidating a demand for a dedication of land in exchange for a permit to subdivide property because the condition did not bear an "essential nexus" to the proposed project).

(2)

These cases all make sense because, when the government leverages its permitting power to impose a condition that threatens a taking, and neither contemplates nor offers compensation (unlike an eminent domain proceeding), prospective equitable relief is called for to resolve the legal uncertainty among the parties. Forcing the Jissers to choose between forgoing their mobilehome park closure

(thereby accepting the permanent, unwanted occupation of their land by tenants) versus paying an unconstitutional exaction and suing to have it returned by state court is just the kind of dilemma the Declaratory Judgment Act was designed to remedy. The Supreme Court has stated that "where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat," but instead allow the plaintiff to seek prospective relief through a declaratory judgment. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). And, as Plaintiffs-Appellants explained in their opening brief, an injunction to halt the taking before it occurs is appropriate where a suit for compensation is not available because the condition has not yet been fully executed (such as in the instant case, where the condition calls for a transfer of money that has not yet occurred). Op. Br. at 14-15.

The City itself recognizes that invalidation of a condition is the usual remedy in an unconstitutional conditions case, Ans. Br. at 40; it merely argues that unconstitutional conditions cases involving the Takings Clause must be treated differently. The Supreme Court does not agree: there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan*, 512 U.S. at 392.

B. Equitable Relief Is Particularly Appropriate in a "One-to-One" Money-Takings Case Where No Money Has Yet Been Transferred

The most compelling circumstance for equitable relief is an unconstitutional condition that takes money, where the remedy of compensation would merely require one-for-one dollar reimbursement of the confiscated funds. *See* Op. Br. at 14-16. The government objects that the Ninth Circuit has never adopted a "money takings exception" to *Williamson County*'s state-procedures rule. It asserts that Plaintiffs-Appellants overstate the precedent of Supreme Court or Ninth Circuit cases in which money-takings cases were ripe without a prior damages suit. *See* Ans. Br. at 25-31.

Plaintiffs-Appellants' argument relies on Supreme Court and Ninth Circuit cases analogous to this one, because there simply are no Ninth Circuit precedents that have dealt with the *precise* type of monetary demand imposed by the city in this case. The most exact analog from any court is the recently decided *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014), which ruled just as Plaintiffs-Appellants urge this Court to rule. There, Judge Charles Breyer granted declaratory and injunctive relief to plaintiffs on the merits in an unconstitutional conditions challenge to an extortionate monetary demand similar to the one imposed by the City. *Id*. at 1074. Like here, the municipality forced property owners to make an extraordinary lump-sum payment to tenants as a condition of granting a permit to

withdraw the property from the rental market. *Id*. And, like here, those payments were "not sufficiently related to the impact of the withdrawal, and therefore violated the principles set forth by *Nollan*, *Dolan*, and *Koontz*." *Id*.

Judge Breyer rejected the defendant's argument that compensation, not equitable relief, was the only available remedy, writing that plaintiffs may seek "equitable relief under [] circumstances, like those presented here, where the lump-sum payment from property owner to tenant . . . neither provides nor sensibly contemplates compensation." *Id*. at 1079 n.3. "This makes sense, as it would entail an utterly pointless set of activities to require a plaintiff to pay money . . . and then go seek one for one dollar reimbursement before challenging the law as a taking." *Id*. (citations omitted). This is similar the to rationale expressed by the Supreme Court when it granted declaratory and injunctive relief in *Eastern Enters. v. Apfel*, without a prior suit for compensation. 524 U.S. 498, 521 (1998) (equitable relief proper to restrain a transfer of money where "Congress could not have contemplated that the Treasury would compensate [the plaintiffs] for their liability under the Act, for every dollar paid pursuant to a statue would be presumed to generate a dollar of . . . compensation") (internal quotation and citation omitted).

The City counters with the curious argument that it might not be "utterly pointless" to force the Jissers to submit to the condition now and seek reimbursement of the same money later in state court. Ans. Br. at 30. It offers several reasons: that it

is not yet known whether *every* dollar of the payment mandate will ultimately be judged a taking and repaid by the City; that the City might have some local purpose in taking the money now, even if a state court later finds the taking unconstitutional; and that "there is a significant benefit to payment of relocation assistance by Appellants in the first instance, followed by just compensation from the City" later. *Id*. at 30-31. But the City can have no legitimate interest in imposing an unconstitutional condition and forcing the Jissers into court to undo it. Moreover, the legal uncertainty regarding the City's liability is all the more reason to insist on equitable relief for prudential reasons. *See* Op. Br. at 19-20 (arguing that prudential considerations warrant waiving *Williamson County*'s state procedures rule even if it applies).

C. The Jissers' Claims Call for Equitable Relief

At various points in its response, the City argues that the Jissers' claims do not turn on the nature of the City's permit condition but on its amount. *See* Ans. Br. at 7, 37, 44. If the case is just about an "excessive" amount of money, the City reasons, the case is really about compensation and should be subject to *Williamson County*'s state-procedures rule. It supports this point by mischaracterizing statements by Plaintiffs-Appellants' counsel during oral argument on the City's motion to dismiss in the district court. The statements are easily clarified and the City's argument is unavailing.

During that hearing, Judge Davila asked Plaintiffs-Appellants' counsel whether a hypothetical payment mandate of $100,000, rather than the actual estimated $8,000,000 demand, would constitute an unconditional condition. Counsel replied that it would not. *See* Def-Appellees' SER 124 (Transcript at 16:15-16). That is because the Jissers' claim is that "tenant payments for rent subsidies and compensation for the on-site value of their mobilehomes [are] not directly related to an impact arising from" the park closure. The exchange with Judge Davila expressed the point that while the estimated $8,000,000 demand was unconstitutional, *some* exaction that bore a direct relationship to the impact of closing the park could pass muster under the standards of *Nollan*, *Dolan*, and *Koontz*. Judge Davila's hypothetical $100,000 payment mandate struck counsel as a figure that could be justified if it constituted a calculation of tenants' actual moving expenses. But actual moving expenses are not in controversy here. Rather, what is at issue is a mandate,

> by the City [that has] nothing to do with the mitigation of public costs caused by the Jisser Family's closure of the park, but [is] an attempt by the City to make the Jisser Family bear the costs of providing tenant public assistance and mitigating the City's acute lack of affordable housing—costs that, in justice, should be borne by the whole public of Palo Alto.

ER 25. As is clear from the Jissers' Complaint and the context at oral argument, the City's demand is unconstitutional not merely because it is large, but because it lacks an essential nexus and rough proportionality to any public impact of the Jissers'

withdrawal of their land from the rental market. Declaratory and injunctive relief, not compensation, is therefore the proper remedy.

II

THE JISSERS STATE A VIABLE PUBLIC USE CLAUSE CLAIM

The City does not contest the Jissers' argument that Public Use Clause claims are not subject to *Williamson County*'s state-procedures requirement. *See* Op. Br. at 11-12. Indeed, it cannot because seeking compensation is never the appropriate remedy for a Public Use Clause violation. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 543 (2005) ("No amount of compensation can authorize such action."). Instead, it urges this Court to "affirm the district court's dismissal" on the alternative ground that the claim "fails on the merits" (by which it presumably means pursuant to Federal Rule of Civil Procedure 12(b)(6)). Ans. Br. at 42.

Review for failure to state a claim for relief is limited to the contents of the complaint, its attachments, and facts not subject to reasonable dispute of which the Court has taken judicial notice. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). A claim that is "plausible on its face," and which alleges facts sufficient "to raise a right to relief above the speculative level," shall not be dismissed. *Bell v. Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-56, 570 (2007). The Jissers' Complaint amply set out a viable Public Use Clause claim.

The City's payment mandate violates the Public Use Clause because it requires the Jissers to make extraordinary cash payments to particular tenants, with no "restrictions on how the funds are spent by tenants," allowing them to "be used for any private purpose whatsoever." ER 26. Moreover, the "private benefits accruing to tenants from the mandated payments far outweigh any conceivable public benefit." *Id*. The money demand "was intended to benefit private parties." *Id*. The City claims that the purpose of payment is to provide "relocation assistance," Ans. Br. at 44, yet with no requirement that the money be used for housing, it is a mere taking of money from the Jissers for the impermissible "purpose of conferring a private benefit on a particular private party." *Kelo*, 545 U.S. at 477. "A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, *with only incidental or pretextual public benefits*." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (emphasis added).

The City avers that "relocation assistance" is a legitimate governmental interest, and cites *Midkiff* and other cases for the idea that a Public Use Clause claim must fail because the City's money demand "bears a rational relationship to that purpose." Ans. Br. at 46. This begs the question because whether the City's payment demand is legitimate is precisely the question at issue. Here, City officials responded to pressure from political constituents who did not want the mobilehome park to close. The Jissers

allege that under the guise of "relocation assistance," the City conditioned the park's closure on cash payments to tenants with the purpose and effect of conferring direct and extraordinary benefits on them at the Jissers' expense. ER 26. First, there is no reason to think the Jissers' transfer of money to tenants, absent any strings attached to its use, will advance any public housing purpose at all. Second, a taking that bears even an assumed rational relationship to an *impermissible purpose* cannot survive scrutiny under the Public Use Clause and must be stopped.

Finally, the City cites *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992), for the proposition that a "transfer from one private party to another," like the one here, does not always violate the Public Use Clause. Ans. Br. at 45. To the extent the precedent has relevance after *Kelo*, it is inapplicable here. *National R.R.* involved the taking of railroad tracks from a private owner by Amtrak, which conveyed them to another private owner, for the continued benefit of Amtrak itself. Amtrak is a quasi-governmental common carrier with an indisputable mission to serve the general public, not a private tenant being handed cash with no strings attached from a private landlord at the command of a city. The Supreme Court's countenance of the former says nothing about the constitutionality of the City's monetary demand.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and remand the case for further proceedings on the merits.

DATED: January 12, 2017.

Respectfully submitted,

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s/ Lawrence G. Salzman
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