Case No. 19-16550

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYNDSEY BALLINGER AND SHARON BALLINGER,
Plaintiffs and Appellants,

v.

CITY OF OAKLAND,
Defendant and Appellee.

Appeal from the United States District Court,
Northern District of California
Case No. 4:18-cv-07186-HSG
Honorable Haywood S. Gilliam, District Judge

APPELLEE'S ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Plaintiffs/Appellants Lyndsey and Sharon Ballinger failed to include a statement of the issues presented for review, as required by Federal Rule of Appellate Procedure 28(a)(5). For this reason, the appeal should be dismissed. *See Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010).

Based upon the Ballingers' opening brief, Defendant/Appellee City of Oakland identifies the following issues for review:

1. Whether the relocation payment requirement of the City of Oakland's Uniform Residential Tenant Relocation Ordinance is a "physical" taking of the Ballingers' money without just compensation, in violation of the Fifth Amendment's Takings Clause.

2. Whether the relocation payment requirement of the City of Oakland's Uniform Residential Tenant Relocation Ordinance is an unconstitutional exaction, in violation of the Fifth Amendment's Takings Clause.

3. Whether the relocation payment requirement of the City of Oakland's Uniform Residential Tenant Relocation Ordinance is an unreasonable seizure of the Ballingers' money, in violation of the Fourth Amendment.

STATEMENT OF THE CASE

I. Statement Of Facts

A. The Ballingers Enter Into A Lease Agreement.

Lyndsey and Sharon Ballinger own a three-bedroom, single family home located at 1685 MacArthur Boulevard in Oakland, California. (Excerpts of Record ("ER") at 29, ¶ 23.) On September 13, 2016, they entered into a lease agreement to rent their property to a couple. (*Id*. at 30, ¶ 26.) The term of the lease agreement was for one year, from October 1, 2016 to September 30, 2017, at a monthly rent of $3,395. (*Id*. at 60.) Thereafter, the residents were in "hold over" status under the agreement, on a month to month tenancy that could be terminated by the residents on 30 days' notice, or by the Ballingers with 60 days' notice. (*Id*. at 61.)

The agreement also required the tenants to pay a security deposit to Ballingers in the amount of $3,395 prior to taking possession of the property. Accordingly, the total move-in cost for the tenants was $6,790, which included the first month's rent and security deposit. (*Id*. at 65.)

B. The City Enacts Its Uniform Residential Tenant Relocation Ordinance.

Under Oakland's Just Cause for Eviction Ordinance, a landlord may not evict a tenant without cause. This is subject to several exceptions that permit eviction where the tenant is without fault (known as "no-fault" evictions). These exceptions permit eviction (1) when needed to make repairs to bring a unit into code compliance, (2) to withdraw units from the rental market pursuant to the state's Ellis Act, and (3) when an owner (or specified relatives of the owner) seeks to move into the unit. (Supplemental Excerpts of Record ("SER") at 1-3.)

There are two forms of owner move-in evictions under the City's Just Cause for Eviction Ordinance. First, an owner may evict a tenant in order to move into a unit as her principal residence where she previously occupied the unit as her principal residence, and has the right to recover possession under a written agreement with the current tenants. (*Id*. at 2.) Second, an owner may evict a tenant in order to use a unit as her own principal residence, or the principal residence of the owner's spouse, domestic partner, child, parent, or grandparent. (*Id*.) Other requirements not relevant here also apply.

In 2016, the City established relocation payment amounts for Ellis Act evictions. The City found average move-in costs of $6,000 for a one-bedroom apartment, $7,500 for a two-bedroom apartment, and $9,375 for a three-bedroom apartment, and average moving costs of approximately $500. (*Id*. at 15.)[1] Based on these findings, the City established relocation payment amounts of $6,500 for studios and one-bedroom units, $8,000 for two-bedroom units, and $9,875 for units with three bedrooms or more. (*Id*. at 15, 19) These amounts adjust for inflation annually on July 1. (*Id*. at 9.) Relocation payments in these amounts have been required for Ellis Act evictions since 2016, and for code compliance evictions since 2017. (*Id*. at 6-7, 12-13.)

On January 16, 2018, the Oakland City Council adopted the Uniform Residential Tenant Relocation Ordinance, Ordinance 13468 C.M.S. (ER at 42-55.) The purpose of the Ordinance is to extend relocation payments to tenants displaced by certain owner move-in evictions and condominium conversions, and to establish a uniform

[1] These calculations were made based on average monthly rental prices in Oakland for one- and two-bedroom units according to a "Zumper Report" for November 2015, extrapolated to three-bedroom units, and then based upon the "average move in costs of first, last and security deposit as well as actual moving costs." (SER at 31-32.)

schedule of relocation payments for no-fault evictions. (*Id.* at 42-43; SER at 8.) The Ordinance was intended to help tenants manage the costs associated with displacement, prevent homelessness, and promote social equity. (ER at 69-70; SER at 28.)

In enacting the Ordinance, the City Council expressly found that 1) all major California rent-controlled jurisdictions require relocation payments for no-fault evictions, such as those due to owner move-ins and condominium conversions; 2) "tenants evicted in Oakland are forced to incur substantial costs related to new housing including, but not limited to, move-in costs to a new home, moving costs, new utility hook-ups, payments for temporary housing, and lost work time seeking housing;" and 3) "the proposed expansion in coverage of the relocation payments for no-fault evictions is justified and necessary for impacted Tenants to find new housing and avoid displacement[.]" (ER at 42-43.)

C. The Ballingers Evict Their Tenants.

On March 21, 2018, the Ballingers gave their tenants notice to vacate the property by May 21, 2018. (*Id.* at 30, ¶ 29.) The Ballingers provided their tenants with one half of the $6,582.40

relocation payment with the notice to vacate.[2] (*Id*. at ¶ 30.) On April 20, 2018, the Ballingers' tenants vacated the property after having resided there for approximately 18 months. (*Id*. at ¶ 31.) Upon vacating the property, the Ballingers paid the remaining half of the relocation payment to their former tenants. (*Id*. at ¶ 32.)

II. Procedural History

The Ballingers filed their Complaint on November 28, 2018. The original Complaint asserted seven causes of action: (1) a facial claim for "Taking of Private Property for a Private Purpose," (2) facial and as-applied claims for "Unconstitutional Exaction of Private Property," (3) an as-applied claim for "Unconstitutional Regulatory Taking," (4) an as-applied claim for "Violation of Due Process," (5) an as-applied claim for "Unreasonable Seizure in Violation of the Fourth Amendment," (6) an as-applied claim for "Interference with the Obligation of Contract," and (7) "Violation of the Ellis Act (Cal. Gov't Code §§ 7060-7060.7)."

[2] Tenants subject to owner move-in evictions are eligible for relocation payments on a vesting schedule such that they are eligible for one-third of the total payment upon taking possession of the rental unit; two-thirds of the payment after one year of occupancy; and the full amount of the payment after two years of occupancy. Half of the payment must be made when notice is given, and the other half paid when the tenant vacates. (SER at 9-10.)

The parties fully briefed a motion to dismiss the original Complaint. Prior to any hearing, the parties stipulated that the Ballingers could file an amended complaint.

A First Amended Complaint was filed on February 26, 2019. The First Amended Complaint removed the causes of action for "Unconstitutional Regulatory Taking" and "Violation of the Ellis Act," and inserted a new cause of action for "Uncompensated and Unconstitutional Physical Taking." In addition, the claim for "Unreasonable Seizure in Violation of the Fourth Amendment" was alleged as both a facial and as-applied claim.

The parties fully briefed a motion to dismiss the First Amended Complaint. A hearing was held on April 11, 2019 at which the motion was argued. On August 2, 2019 the district court entered an order granting the City's motion to dismiss. The Ballingers filed a notice of appeal on August 7, 2019, while a clerk's judgment was entered on August 28, 2019.

SUMMARY OF ARGUMENT

Regulation of landlord-tenant relations – even regulations that effect a transfer of wealth between landlord and tenant – are not "physical" or per se takings. Such regulations have existed for

decades, if not centuries, and if each such regulation required the government to pay the landlord dollar-for-dollar the amount imposed by the regulation, government could no longer regulate the use of property. Numerous Supreme Court decisions confirm that regulations of landlord-tenant relationships, such as the City of Oakland's Uniform Residential Tenant Relocation Ordinance, must be analyzed through a regulatory takings framework. The Ordinance does not work a physical taking of the Ballingers' money.

Legislation generally applicable to various types of land use is not subject to an exaction analysis. The unconstitutional conditions doctrine in the takings context is narrowly confined to adjudicative decisions involving specific property because those decisions involve discretion and raise a potential for coercion. Courts defer to legislative judgments regarding land use, and decisions of both the Supreme Court and this Circuit confirm that generally-applicable legislation is not subject to an exaction analysis. Further, the unconstitutional conditions doctrine prohibits burdening a constitutional right by withholding a government benefit, but there is no government benefit here, and nothing coerced or conveyed to the

government. The exaction framework does not apply, but even if it did, the Ordinance satisfies it.

The Ballingers also appeal from dismissal of a claim that the Ordinance violates the Public Use clause of the Fifth Amendment. But this Court previously held that there is no such independent cause of action, and in any case the claim presupposes the existence of a taking, which is not present here.

Finally, the Ballingers assert that the City's regulation of landlord-tenant relations is an unreasonable seizure of their money in violation of the Fourth Amendment. But the City itself seizes nothing, and there is no state action here, nor is the Ordinance unreasonable.

For all these reasons, the judgment of the district court should be affirmed.

ARGUMENT

The Ballingers claim the City of Oakland's Uniform Residential Tenant Relocation Ordinance works an unconstitutional taking of their money without just compensation. But the Ballingers do not challenge this regulation under the applicable *Penn Central* framework for regulatory takings. Instead, they claim the Ordinance

is 1) a "physical" or per se taking of their money, or 2) an unconstitutional exaction, or 3) a physical taking for a private purpose. None of these claims have merit. Nor does the Ballingers' Fourth Amendment seizure claim. The judgment of the trial court should be affirmed.

I. The Ordinance Is Not A Physical Taking Of The Ballingers' Money.

A. Regulation Of Landlord-Tenant Relations Is Not A Physical Taking.

The Ballingers conflate regulating the use of private property with taking physical possession of private property. This is a central distinction in takings jurisprudence, and the City's regulation of the Ballingers' property is categorically not a physical taking.

> 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, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof…. But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, that bans certain private uses of a portion of an owner's property, or that forbids the private use of certain airspace, does not constitute a categorical taking. The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322-23 (2002) (citations and quotation omitted).

The Ballingers' "physical" takings cause of action focuses only on the requirement that the Ballingers pay money to their tenants, and divorces the relocation payment from its source: an eviction of tenants by their landlords. By isolating the payment requirement, the Ballingers attempt to artificially simplify the takings question. The government has required the transfer of money from one person to another, and that is a "quintessential physical taking" of money – end of story. (OB at 19-20.) The simplicity has appeal, until considering that every law imposing a requirement on one for the benefit of another could be reduced to the same formulation. Indeed, every "public program adjusting the benefits and burdens of economic life to promote the common good" would amount to a physical taking of something with a monetary value – yet such programs are categorically subject to a ***regulatory*** takings analysis, not a ***physical*** takings analysis. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

One cannot only focus on the transfer of wealth to pursue a physical takings claim. "[T]he aggregate must be viewed in its

entirety[,]" and artificially narrow claims, like those that attempt to "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated[,]" do not state a valid claim for a physical taking. *Tahoe-Sierra Pres. Council*, 535 U.S. at 327 (citations and quotations omitted). In narrowly focusing on only the monetary payment requirement in isolation, the Ballingers do not discuss, much less attempt to reconcile their claim with, the legion of Supreme Court and Ninth Circuit precedent upholding regulations of the landlord-tenant relationship under a regulatory takings analysis. Yet that is the analysis that applies here.

In *Yee v. City of Escondido*, the Supreme Court considered at length an argument that a mobile home rent control law worked a physical taking, and rejected it:

> ***Petitioners emphasize that the ordinance transfers wealth from park owners to incumbent mobile home owners. Other forms of land use regulation, however, can also be said to transfer wealth from the one who is regulated to another.*** Ordinary rent control often transfers wealth from landlords to tenants by reducing the landlords' income and the tenants' monthly payments, although it does not cause a one-time transfer of value as occurs with mobile homes. Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the

> value of his property may decline but the value of his neighbor's property may rise. The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more visible than in the ordinary case [citation], but ***the existence of the transfer in itself does not convert regulation into physical invasion.***

Yee v. City of Escondido, 503 U.S. 519, 529-30 (1992) (emphasis added). The ordinance was "a regulation of petitioners' *use* of their property, and thus does not amount to a *per se* taking." *Id*. at 532 (emphasis in original); *see also Pennell v. City of San Jose*, 485 U.S. 1, 12 n. 6 (1988) (rejecting argument that rent control is a per se taking). The same is true here. Plaintiffs cannot allege a viable claim for a "physical taking" of their money by divorcing the sum of the relocation payment from the regulation of the use of their real property that gives rise to the relocation payment.

Loretto v. Teleprompter Manhattan CATV Corp. confirms the same distinction between regulation and physical invasion. In that case, the Supreme Court found a physical taking where a regulation required a permanent physical invasion of a small portion of rooftop property. In so holding, the Court took pains to distinguish that physical taking from "the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the

like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (citing *Penn Central*). While regulations mandating smoke detectors, mailboxes, and the like require the landlord to expend money on those items, they are not takings of that money or of the real property that is being regulated. The Court noted that it "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." *Id.* Like *Yee*, *Loretto* compels a finding that no physical taking has occurred here.

In part, "statutes regulating the economic relations of landlords and tenants are not *per se* takings" because the act of renting out one's property is voluntary. *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987). Regulations substantially reducing the value of an agreement to rent out property are not per se takings because "it is the invitation, not the rent, that makes the difference." *Id.* at 252-53. "When a

landowner decides to rent his land to tenants, 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*, 503 U.S. at 529 (citations omitted). The Ballingers make no effort to address the fact that the Ordinance, like other landlord-tenant regulations, does not intrude on a landlord's dominion over her property, but simply regulates her voluntary use of her property.

Numerous Ninth Circuit decisions are in line with Supreme Court precedent, confirming that regulations of the use of land – including those that affect transfers of wealth between landlord and tenant – are analyzed as regulatory takings, not physical takings. *See Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 530-34 (9th Cir. 2019) (access regulation not a physical taking); *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, n. 1 (9th Cir. 2015) ("The Supreme Court laid to rest any argument that a mobile home rent control ordinance constitutes a physical taking in *Yee*…."); *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1126-27 (9th Cir. 2013) (analyzing challenge to mobile home rent control law as a regulatory taking); *Guggenheim v. City of Goleta*, 638 F.3d 1111,

1120 (9th Cir. 2010) (en banc) (same); *Hoeck v. City of Portland*, 57 F.3d 781, 787-88 (9th Cir. 1995) (restriction on maintenance of abandoned structure not a physical taking).

The distinction between regulation of private uses of property, and acquisitions of property for public use, is "fundamental" and "longstanding." *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 323-25. Yet the Ballingers' arguments obliterate this distinction. The Ordinance regulates the Ballingers' use of their property, and is not a physical taking.

B. *Koontz* Does Not Hold That Regulations Of Use Of Property Involving Payment Of Money Are Physical Takings.

The Ballingers propose that the Supreme Court's decision in *Koontz v. St. Johns River Water Mngmt. Dist.* "held that a seizure of a specific amount of money linked to the use of real property *is* a per se, physical taking." (OB at 17.) If that were so, both the *Nollan/Dolan* exaction framework and the *Penn Central* regulatory framework were swept away by *Koontz*. All regulation of real property can be reduced to some monetary value; now, according to the Ballingers, government must pay the dollar amount linked to regulation of real property in order to regulate it.

Koontz held no such thing. The Court cabined its decision: "We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." *Koontz v. St. Johns River Water Mngmt. Dist.*, 570 U.S. 595, 619 (2013). The "fulcrum" of *Koontz* was the direct connection between the government's demand and a specific parcel. *Id*. at 614. This key limitation embraced in *Koontz* flows from the view of five justices in *Eastern Enterprises v. Apfel* that a law requiring a payment, but not operating upon an identified property interest, is not a taking. *Id*. at 613 (discussing Justice Kennedy's concurrence in *Eastern Enters. v. Apfel*, 524 U.S. 498, 540 (1998)).

Eastern Enterprises was a challenge to a federal law requiring funding of health care benefits for coal industry retirees, claiming it violated the Due Process and Takings Clauses. Justice Kennedy and the four dissenters in *Eastern Enterprises* – a majority of the Court – found the Takings Clause simply inapplicable because no "specific property right or interest" was at stake. *Id*. at 541, 554-56. But even the remaining four justices recognized that the payment obligation "is not, of course, a permanent physical occupation of Eastern's property

of the kind that we have viewed as a *per se* taking." *Id*. at 530 (citing *Loretto*). Instead, Justice O'Connor's plurality opinion applied a regulatory takings analysis. *Id*. at 529. All nine justices agreed that the payment obligation imposed in that case was not a physical taking.

Since *Eastern Enterprises*, "all circuits that have addressed the issue 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 v. City of Cleveland*, 626 F.3d 280, 285 (6th Cir. 2010) (citations omitted). Among these decisions are *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 387 (4th Cir. 2011) ("the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause."); *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) ("the takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money."); *Commonwealth Edison Co. v. U.S.*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) ("regulatory actions requiring the payment of money are not takings."); *Parella v. Ret. Bd. of Rhode Island Emps.' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) ("a Takings Clause issue can arise only after a plaintiff's property right has been independently established.")

(citations omitted). Indeed, this Court has recognized as much, noting that in *Koontz*, "the Court confirmed that confiscations of money… are only treated as a taking when the confiscation operates upon or alters an identified property interest…." *U.S. v. King Mountain Tobacco Co., Inc*., 745 F. App'x 700, 702 (9th Cir. 2018) (citations omitted). In that case, the challenged law "simply requires King Mountain to pay a sum of fungible money" which without more, "is not a taking." *Id*.

Unlike an ordinary payment obligation, land use permitting decisions do operate on a specific parcel, and in that narrow context, an exaction analysis applies – even, as *Koontz* clarified, to permit decisions requiring the payment of money. *Koontz* specifically distinguished *Eastern Enterprises*: the permitting decision in *Koontz* "did 'operate upon… an identified property interest' by directing the owner of a particular piece of property to make a monetary payment…. [T]he monetary obligation burdened petitioner's ownership of a specific parcel of land." *Id*. (citation omitted). This is a far cry from a holding that all regulations of real property requiring transfers of money are per se takings.

In contrast to the permitting decision in *Koontz*, the Ordinance is not concerned with any specific parcel of land. Nor, as with other cases cited by the Ballingers, does it operate on a specific bank account or specific chattel property. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003); *Horne v. Dep't of Agriculture*, __ U.S. __, 135 S. Ct. 2419, 2427-28 (2015). Rather, as the district court recognized, "money is not specific, identifiable property." (ER at 14.) It is fungible. *U.S. v. Sperry Corp.*, 493 U.S. 52, 62 n. 9 (1989). A rule that payment of a fee or other requirement to pay money is a physical taking "would be an extravagant extension of *Loretto*." *Id.* It "would prove too much…. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-23 (1986). But that is precisely the Ballingers' claim.

Cases like *Koontz*, *Brown*, *Horne*, and *Loretto* also all involve government action that is or is like a physical taking, because in each case there was an appropriation. But there is a "settled difference in our takings jurisprudence between appropriation and regulation." *Horne*, 135 S. Ct. at 2428. Regulations that merely require transfers

of wealth between private parties do "not convert regulation into physical invasion." *Yee*, 503 U.S. at 530. "A physical taking of raisins and a regulatory limit on production may have the same economic impact on the grower. The Constitution, however, is concerned with means as well as ends." *Horne*, 135 S. Ct. at 2428. At most, land use regulations that may affect a transfer of wealth are subject to a regulatory takings analysis, not a physical takings analysis.

Here, the Ordinance is a regulation of use of property: an owner move-in eviction. There is no appropriation of specific property, as there must be to sustain a physical takings claim. There is nothing to distinguish this case from the many upholding regulation of the landlord-tenant relationship against takings claims. Dismissal of the physical takings causes of action should be affirmed.

C. The Implications Of The Ballingers' Argument Are Sweeping And Detrimental For All Land Use Regulations.

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). "Land-use regulations are ubiquitous and most of

them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights." *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 324.

As the Supreme Court has long recognized, if every regulation requiring the transfer of wealth were a per se taking, government regulation of private property would essentially cease. Yet contrary to established precedent, this is the result the Ballingers urge. They make no attempt to address the far-reaching implications of their physical takings claim. The Supreme Court has addressed these implications numerous times, repeatedly confirming that regulation of private property is subject to a regulatory takings analysis. The district court's dismissal of the physical or per se takings claims should be affirmed.

II. The Ordinance Is Not An Exaction For Several Reasons, And Even If It Were, The Ordinance Satisfies The *Nollan/Dolan* Test.

Alternatively, the Ballingers claim that the Ordinance should be analyzed as an "exaction" under the *Nollan/Dolan/Koontz* line of cases, and that it fails the test established by those cases. This claim fails for several reasons: an exaction analysis does not apply to generally-applicable legislation, the Ordinance lacks the basic indicia of an exaction, and even if an exaction analysis did apply, the Ordinance satisfies that test.

A. Legislation Is Not Subject To An Exaction Analysis.

In arguing that generally-applicable legislation is subject to an exaction analysis, the Ballingers abandon any discussion of Supreme Court precedent. *Dolan* itself distinguished between adjudicative decisions and legislative determinations, holding that the former may be exactions, while the latter are not. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). And the Supreme Court has "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." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

Nollan and *Dolan* "involve a special application of [the unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz*, 570 U.S. at 604. In that specific context, there are two concerns that drive the exaction doctrine: first, that "land-use permit applicants are especially vulnerable" to coercion "because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take[,]" and second, "that many proposed land uses threaten to impose costs on the public that dedications of property can offset." *Id*. at 604-05.

"*Nollan* and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public 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 (citation omitted).

Koontz makes plain that an exaction analysis is meant to address concern with "[e]xtortionate demands for property in the land-use permitting context[.]" *Id*. at 596. Indeed, "[t]he fulcrum [*Koontz*]

turns on is the direct link between the government's demand and a specific parcel of real property." *Id*. at 614. In arguing that *Nollan*, *Dolan*, and *Koontz* should apply to generally-applicable legislation, the Ballingers avoid any discussion of those very cases, because they do not support their argument.

Supreme Court precedent aside, the Ballingers contend that "[t]he legislated exactions issue is unresolved in this circuit." (OB at 27.) This is incorrect. Numerous decisions of this Court confirm that generally-applicable legislation is not subject to an exaction analysis.

In *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), this Court held that the *Nollan/Dolan* framework applies to "adjudicative, individual determinations conditioning permit approval on the grant of rights to the public" while the *Penn Central* regulatory takings analysis applies to legislative land use regulations. *Id*. at 1227. In *San Remo Hotel, L.P. v. San Francisco City & Cnty.*, 364 F.3d 1088, 1097-98 (9th Cir. 2004), this Court again confirmed – in reviewing a decision of the California Supreme Court – that *Nollan/Dolan* does not apply to generally applicable legislation, "because there is no discretionary application and because the group affected can use the elective processes to petition for change in the

law." *Id*. at 1097 (discussing *San Remo Hotel v. City & Cnty. of San Francisco*, 27 Cal. 4th 643 (2002)). And considering a challenge to a tenant relocation ordinance in *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998), this Court noted that the rationale for *Nollan/Dolan* is the Supreme Court's "concern that where the government demands individual parcels of land through adjudicative, rather than legislative, decision making, there is a heightened risk of extortionate behavior by the government."[3] *Mead v. City of Cotati*, 389 F. App'x 637, 638 (9th Cir. 2010) likewise held that a "generally applicable development fee is not an adjudicative land-use exaction subject to the 'essential nexus' and 'rough proportionality' tests….".

This Court recently confirmed the same principle again, squarely holding that a legislative act could not be challenged as an exaction, citing to *McClung* and *Garneau*. *Bldg. Indus. Ass'n – Bay Area v. City of Oakland*, 775 F. App'x 348, 349-50 (9th Cir. 2019). The Ballingers – represented by the same counsel as represented the

[3] *Garneau* also makes clear that "[t]he *Dolan* analysis cannot be applied in facial takings claims." *Garneau*, 147 F.3d at 811. And to the extent that the Ballingers purport to bring a facial exaction claim, they do not argue – as they must – that the "mere enactment" of the Ordinance deprived them of economically viable use of their property. *Id*. at 807. For these additional reasons, dismissal of the facial exaction challenge should be affirmed.

plaintiff in *Bldg. Indus. Ass'n – Bay Area* – cite no recent developments in case law undermining *McClung*, *San Remo Hotel*, and *Garneau*, and requiring this Court to diverge from *Bldg. Indus. Ass'n* less than a year after that unpublished opinion issued.

Instead, against all the weight of this Supreme Court and Ninth Circuit authority, the Ballingers point only to the aged decision in *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991). Both *McClung* and *San Remo Hotel* characterize *Commercial Builders* as ***rejecting*** application of *Nollan* to a generally-applicable ordinance that conditioned issuance of all non-residential building permits on payment of a fee designed to assist in financing low-income housing. *McClung*, 548 F.3d at 1228; *San Remo Hotel*, 364 F.3d at 1097-98.

Further, *Commercial Builders* rejected the primary argument the Ballingers make here: that regulation requiring payment of a sum is a physical taking. *Id*. at 875 (noting that "compensation would be required for every fee; therefore, every fee would be unconstitutional. We see no valid basis for such a rule."). To the extent *Commercial Builders* could be construed to apply an exaction analysis to a payment required by an ordinance, it has been overruled by the clear

limitations on *Nollan* discussed above in *Dolan*, *City of Monterey*, and *Koontz*, as well as the clarification made in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546-48 (2005) that *Nollan* and *Dolan* apply to "adjudicative land-use exactions[.]" As one district court noted, "[m]uch has changed in takings law since *Commercial Builders* was issued[.]" *Kamaole Pointe Dev. LP v. Cnty. of Maui*, 573 F. Supp. 2d 1354, 1366 (D. Haw. 2008).

Generally-applicable legislation simply does not present the same sort of concern with coercion that is present in individual land-use permitting decisions. Legislation does not involve the exercise of discretion with respect to any particular parcel, and unlike decisions involving specific parcels, it is not insulated from, but very much subject to, the will of the voters. The Supreme Court's regulatory takings jurisprudence reflects deference by courts to legislative judgments about regulation of use of property. *See Penn Central*, 438 U.S. at 132 (distinguishing between broadly-applicable landmark legislation and land-use decisions that single out specific parcels); *Lingle*, 544 U.S. at 545 (noting that deference to legislative judgments about land-use regulations is well-established). The Ballingers argue there is no principled reason that the variant of the "unconstitutional

conditions" doctrine embodied in *Nollan*, *Dolan*, and *Koontz* should not apply to generally-applicable legislation. But in so doing they entirely ignore the rationale underpinning those decisions, and entirely ignore the vast body of regulatory takings law. Their argument would apply an exaction analysis to all land use regulations – a result never so much as hinted at in any case they cite.

The district court's holding that generally-applicable legislation is not subject to an exaction analysis is well-founded in precedent as well as logic, and should be affirmed.

B. The Ordinance Lacks Several Other Fundamental Characteristics Of An Exaction.

The Ordinance requires a transfer of funds from landlord to tenant upon an owner move-in eviction. This is a regulation "adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transp. Co.*, 438 U.S. at 124. A well-developed body of regulatory takings law applies to this sort of alleged taking. While the Ballingers briefly assert that the Ordinance "clearly qualifies as an 'exaction,'" they make no attempt to explain why this is so, or to distinguish their claim from any ordinary regulatory takings claim – which they recognize "governs most takings cases[.]" (OB at 29, 31.)

The first step in an exaction analysis is whether "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 612 (citation omitted). As discussed above, governments can regulate landlord-tenant relationships – including regulations that cause a transfer of wealth – without violating the Fifth Amendment. *See, e.g.*, *Yee*, 503 U.S. at 529. The Ordinance is not different in this respect from any of the numerous cases cited above upholding rent control legislation against takings claims. Nor did the City "pressure" the Ballingers in any way. The predicate question for any alleged exaction must be answered "no" in this case. The claim fails at its outset.

Moreover, the "special context of land-use exactions" (*Lingle*, 544 U.S. at 538) is implicated only by "extortionate" demands on a specific parcel "that would amount to a per se taking[,]" i.e., the transfer of "an interest in property from the landowner to the government." *Koontz*, 570 U.S. at 605, 615. But there is nothing transferred to the government here, or anything tantamount to a per se taking.

More fundamentally, the whole idea of an exaction or unconstitutional condition is that there is a quid pro quo, where the government requires a citizen to give up a constitutional right in exchange for a government benefit. *See, e.g.*, *Dolan*, 512 U.S. at 385. "[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz*, 570 U.S. at 606. But there is no government benefit sought by the Ballingers here, and certainly no condition imposed to receive something from the government. There is no exchange at all. There is no condition on a benefit the City provides, let alone an unconstitutional condition.

Regulation of a private party – here, a landlord – is "simply a limitation on the use [the Ballingers] might make of [their] own parcel[.]" *Dolan*, 512 U.S. at 385. "Such forms of regulation are analyzed by engaging in the 'essentially ad hoc, factual inquiries' necessary to determine whether a regulatory taking has occurred." *Yee*, 503 U.S. at 529 (citation omitted). To apply an exaction analysis to such ordinary land use legislation is to untether the *Nollan/Dolan/Koontz* framework from the "special context" that animates it and from the unconstitutional conditions doctrine that

undergirds it. And as with the Ballingers' physical taking claim, the argument that the Ordinance is an exaction has no stopping point, and would collapse the vast body of regulatory takings law under a massively expanded concept of unconstitutional conditions. For these additional reasons, an exaction analysis does not apply to the Ordinance.

C. The Ordinance Satisfies The "Essential Nexus" And "Rough Proportionality" Requirements Of The Exaction Analysis.

Even if subject to an exaction analysis, the Ordinance nonetheless satisfies the essential nexus and rough proportionality tests, and is constitutional. Pursuant to *Nollan*, *Dolan*, and *Koontz*, there must be "a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz*, 570 U.S. at 605-06. Here, the amounts of the payments under the Ordinance are roughly proportional to the costs of relocation, and they have a direct nexus to "the end advanced as justification for" the Ordinance. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

As noted in the preamble of the City's 2016 Ordinance establishing relocation payment amounts for Ellis Act evictions,

which sets the dollar amounts at issue here, average move-in costs as of 2016 are $6,000 for a one-bedroom apartment, $7,500 for a two-bedroom apartment, and $9,375 for a three-bedroom apartment, and average moving costs according to a survey of three moving companies are approximately $500. (SER at 15.)

In this case, the Ballingers' tenants paid $6,790 in a security deposit and first month's rent alone. (ER at 65.) This amount does not include moving, cleaning, repairs, or other relocation costs, such as costs for utility hook-ups, temporary housing between rentals, and lost work time during housing searches, all of which are also common. (SER at 14 [recognizing these additional costs of eviction].) Meanwhile, the Ballingers allege the Ordinance required them to pay their tenants $6,582.40. This relocation payment is patently proportional to their tenants' likely relocation costs, and to relocation costs in the local market in general. And this has a direct nexus to the Ordinance's purpose of mitigating the impacts of displacement caused by no-fault evictions.

In arguing that they state a valid *Nollan/Dolan* claim on the merits, the Ballingers rely on the same straw man argument they advanced in the district court. They claim the relocation payment "is

meant to serve the City's broader goal of mitigating and subsidizing rental housing costs for tenants" and that owner move-in evictions "do not cause either the high rental housing costs or social inequities the payment seeks to mitigate." (OB at 33-34.) Instead, high rents are caused by market conditions and "Google, et al." and so the relocation payment lacks a nexus to its supposed purpose.

The Ordinance is not meant to address the "high rental housing costs" in Oakland. It is meant to mitigate the burdens created by the displacement of Oakland residents as a result of certain owner move-in evictions. The Ordinance and supporting staff reports demonstrate this purpose, and it is not disputed. (ER at 42-43, 67-70; SER at 25-29.) When the actual purpose of the Ordinance is analyzed, the nexus between the payment and its purpose is plain.

Hewing somewhat more closely to the scenario addressed by the Ordinance, the Ballingers also argue that an owner move-in eviction does not cause a tenant's need for funds to pay moving costs, rent and a deposit, because every tenant should foresee that her lease will end and she will have to relocate. (OB at 34-36.) Even assuming all tenants should expect to move out one day – which is not the case for many tenants – the Ordinance does not impose a relocation

payment on the landlord for every tenant who moves out. It imposes a relocation payment where the landlord evicts a tenant due to no fault of the tenant. That action by the landlord creates the relocation costs that inevitably ensue. *See Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1085 (N.D. Cal. 2014) (approving a relocation ordinance roughly proportional to typical relocation costs, and noting those costs "are the expenses *caused by* the property owner's withdrawal.") (emphasis in original); *see also Schnuck v. City of Santa Monica*, 935 F.2d 171, 175 (9th Cir. 1991) (limitations on permissible grounds for eviction "protect tenants from the high cost of dislocation in a tight housing market….").

With respect to proportionality, the Ballingers complain that use of the relocation payment is not restricted, and that only actual moving costs – but not the need for a security deposit or first month's rent – are caused by an owner move-in eviction.

The Ballingers do not cite a single case holding that the Constitution creates a requirement that the relocation payment must be spent on relocation expenses. A displaced tenant inherently incurs relocation expenses, and whether the tenant uses dollars from the landlord for relocation costs, or other dollars for relocation costs, the

tenant is still paying for relocation costs. The Fifth Amendment does not require a forensic accounting, and this issue has no bearing on the proportionality of the payment to the costs created by a no-fault eviction.

The claim that only moving costs are created by an eviction ignores the City's findings that average move-in costs are $6,000 for a one-bedroom apartment, $7,500 for a two-bedroom apartment, and $9,375 for a three-bedroom apartment, on top of moving costs. (SER at 15.) Displaced tenants face substantial unanticipated expenses, far beyond mere moving costs, when unexpectedly evicted due to no fault or plan of their own. These costs are inherent, and they are created by the landlord's move-in eviction. The amount of the payment required by the Ordinance is proportional to the costs created by the eviction.

For all of the reasons above, dismissal of the Ballingers' exaction cause of action should be affirmed.

III. The Ballingers' Public Use Claim Is Not A Cognizable Claim, There Is No Underlying Taking, And The Public Use Standard Is Satisfied.

As a third takings theory, the Ballingers claim that the Ordinance is a physical taking that fails to serve a valid public purpose, as any taking must.

This claim presupposes that there is a taking, which – as discussed above – there is not. If "there has been no taking in the first place, it is unnecessary to address whether the public use requirement is met." *Rancho de Calistoga*, 800 F.3d at 1093. The district court properly dismissed this claim on this ground.

Moreover, a "'private takings claim' is not a separately cognizable claim." *Id*. at 1087. It "cannot serve as an independent means to challenge an alleged regulatory taking. Rather, such a public-use challenge must function as part of the larger regulatory takings claim." *Id*. at 1092. The Ballingers voluntarily dismissed their regulatory takings cause of action, but that is nonetheless the appropriate framework through which to scrutinize the Ordinance. This Court recognized in *Rancho de Calistoga* that a plaintiff cannot bypass a regulatory takings analysis and "evade *Penn Central* scrutiny" by styling its challenge to a regulation as a taking for "private use." *Id*. at 1093. Yet evidently that is the purpose behind the "public use" claim in this case. The independent "public use" cause of action is not a cognizable form of a takings claim.

The Ballingers argued, and the district court held, that because *Rancho de Calistoga* dealt with a regulatory takings claim, it sheds no

light on whether the Ballingers can bring a claim for "physical taking of private property for a private purpose." However, the concerns identified in *Rancho de Calistoga* – bypassing the question of whether there was a taking by presuming it through an independent "public use" challenge, and evading a regulatory takings analysis by casting the claim as something else – apply with equal force to the Ballingers' claim for "physical taking of private property for private purpose."

Finally, the public use analysis is highly deferential, asking only whether the Ordinance is rationally related to a conceivable public purpose. *Kelo v. City of New London*, 545 U.S. 469, 490 (2005); *MHC Fin. Ltd. P'ship*, 714 F.3d at 1129 (upholding rent control ordinance against "private taking" claim). As discussed above, requiring a relocation payment for certain owner move-in evictions is rationally related to the goal of mitigating the harms of displacement caused by those owner move-in evictions, and this requirement is readily met. For all these reasons, the district court correctly dismissed the Ballingers' first cause of action for a physical taking for a private use.

IV. The Ordinance Is Not A Seizure Of The Ballingers' Money, And Even If It Were, It Is Reasonable.

The Ballingers claim the City "seized" their money by "authorizing" their tenants to seize their money. They do not advance any claim related to seizure of their home. The Ballingers assert that their tenants were a "willful participant in joint activity" with the City. (OB at 39 (quoting *U.S. v. Price*, 383 U.S. 787, 794 (1966)).)

This stretches agency principles beyond recognition. Every government regulation of a commercial relationship would be a "seizure" under the Fourth Amendment. The Ballingers make no attempt to grapple with the consequences of their sweeping view of state action, but courts have long recognized the "essential dichotomy" between state action and the mere regulation of private activity. *Am. Manufacturers Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999) (citation omitted).

> In cases involving extensive state regulation of private activity, we have consistently held that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." Faithful application of the state-action requirement in these cases ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts.

Id. at 52 (citations omitted).

To find state action, the deprivation of a right must be caused by some right or privilege created by the state, and the party charged with the deprivation must be a state actor. *See Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 838 (9th Cir. 2017). The second element of the analysis is completely missing here. The same is true of any eviction done pursuant to state law; it is not state action unless police officers become significantly involved in the proceeding. *See Fournier v. Cuddeford*, 573 F. App'x 641, 642 (9th Cir. 2014). No such involvement is alleged here; the challenge is simply to the legal operation of a local law. The City did not "seize" the Ballingers' property.

Seemingly the lead case on which the Ballingers rely, *Stypmann v. City & Cnty. of San Francisco*, 557 F.2d 1338 (9th Cir. 1977), involved the due process right to a hearing after a vehicle tow; it was undisputed that the vehicle was seized, and a police officer was directly involved in authorizing the tow. The state action was plain, and the case is inapposite. The other case on which the Ballingers depend, *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006), is also distinguishable. As noted by the district court, that case involved more than the simple authorization inherent in any

legislation, but the encouragement of trespasses by the public through the publication of a trail map. (ER at 16.) There is no such encouragement here.

Even if the Fourth Amendment could be applied to these facts, the Fourth Amendment does not prohibit all searches and seizures, only those that are unreasonable. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). This generally requires weighing the intrusion on the Ballingers' possessory interest in their property against the promotion of legitimate government interests, and application of the exceptions to the Fourth Amendment's warrant requirement. *Id*. The Ballingers do not cite, and the City is not aware of, any case applying the Fourth Amendment's test for the reasonableness of a seizure to legislation requiring the payment of a sum from one private party to another. In any event, the Ordinance effectively mitigates the impacts of tenant relocations caused by owner move-in evictions, and the Ordinance is reasonable in its operation.

CONCLUSION

For the foregoing reasons, Defendant/Appellee City of Oakland respectfully requests that the judgment of the district court be affirmed.

Dated: March 2, 2020

Respectfully submitted,

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STATEMENT OF RELATED CASES

Defendant and Appellee City of Oakland is aware of no related cases, as defined by Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 8,265 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: March 2, 2020

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PROOF OF SERVICE

I hereby certify that on March 2, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 2, 2020

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