No. 19-16550

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYNDSEY BALLINGER; SHARON BALLINGER,

Plaintiffs – Appellants,

v.

CITY OF OAKLAND,

Defendant – Appellee.

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

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This appeal raises a constitutional challenge to the City of Oakland's (City) Uniform Residential Tenant Relocation Ordinance (Ordinance). Excerpts of Record (RE) at 42-55. In relevant part, the Ordinance requires rental property owners to pay up to $10,000 (or more) to departing tenants before the owners are allowed to move back into their home. The law required Lyndsey Ballinger and her wife, Sharon Ballinger (the Ballingers), to transfer $6,582 to their software industry tenants so the Ballingers could lawfully move their family back into a small home they had leased out while on military assignment. RE at 26 ¶¶ 3-4, 30 ¶ 32.

The tenant payment mandate is primarily intended to help departing tenants afford new housing in Oakland's expensive market and to advance "social equity." RE at 70. But the Ordinance does not require tenants to spend the funds coerced from owners for housing purposes; they may use it for anything. For the Ballingers and others, being forced to pay a ransom to occupy their own home is a real hardship and affront to their rights as residential property owners. The payment requirement was especially objectionable to the Ballingers since the Ordinance was

not in effect when they first leased their home. RE at 30 ¶ 27. Thus, after paying their tenants, the Ballingers sued the City, seeking reimbursement for the payment, and invalidation of the relevant Ordinance provisions. RE at 28-39.

The Ballingers claim that the tenant payment requirement effects a "physical" taking of their property (money) for a private benefit, in violation of the "Public Use" Clause of the Fifth Amendment. If the Ordinance takes private funds for a valid public use, the requirement still causes an unconstitutional taking of property as applied to the Ballingers due to the absence of just compensation. In the alternative, the Ballingers assert that the tenant payment demand is an unconstitutional condition on the use of their property under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Lastly, they claim that the coerced transfer of money to their tenants effects an unreasonable seizure of their personal funds. RE at 32-36.

The district court dismissed all these claims, but it did so in error. RE at 1-20. The Ordinance took the Ballingers' money for private, tenant use, without compensation, and without any connection between the

Ballingers' activity (moving into their home) and the social problems the tenant payment mandate seeks to redress; i.e., high housing costs and social "equity," RE at 70. The Ballingers should not be forced to submit to such an irrational, extortionate, and unconstitutional taking of property to come home.

STATEMENT OF THE CASE

A. Statement of Facts

In 2015, the Ballingers were majors in the United States Air Force. RE at 29 ¶ 24. They owned and lived in a single-family home in the City of Oakland. *Id.* ¶ 23. When notified that they were being temporarily assigned to the Washington, D.C., area, the Ballingers rented their home to a pair of local software engineers. RE at 30 ¶ 26. The lease ended in September of 2017, at which time it converted to a month-to-month tenancy. *Id.* The Ballingers chose this type of lease because they knew they would come back to the Bay Area after their duty on the East Coast. RE at 30 ¶ 25.

In January 2018, more than a year after the Ballingers executed the lease, the City of Oakland amended its prior tenant relocation ordinance to include the tenant payment provisions at issue here. RE at

28 ¶ 12; *id.* at 30 ¶ 27. Included in a new Uniform Tenant Relocation Ordinance, the provisions require rental owners who seek to lawfully move into their own homes to make a payment to their tenants before doing so. RE at 28 ¶ 13.

The amount of the tenant payment varies depending upon the size of the unit. RE at 45. Rental owners must pay $6,500 to tenants leaving a one-bedroom unit, $8,000 for a two-bedroom unit, and $9,875 to tenants of a three-bedroom unit. Elderly, disabled, and lower-income tenants are entitled to an additional $2,500 payment. *Id.* The Ordinance punishes an owner's failure to make a payment through criminal, civil, and administrative penalties. RE at 46-47.

The tenant payment provisions are designed to address the City's belief that departing tenants experience "exorbitant housing prices" in Oakland and "social equity" burdens. RE at 69-70. More particularly, the tenant payment requirement addresses the City's belief that departing tenants may be unable to afford new housing in the City due to high rents. RE at 58, 70.

The "owner move-in" payment schedule derived from calculations the City had previously made when adopting a similar ordinance

requiring rental owners to make tenant payments when they permanently remove rental units from the market. RE at 69. Payments were calculated "at an amount sufficient to cover the average move in costs of first [month's rent], last [month's rent,] and security deposit as well as actual moving costs" of "$500.00." RE at 87-88. Thus, out of the thousands of dollars that rental owners must pay departing tenants under the Ordinance, only $500 is needed to actually move the tenant. *Id.* at 70, 87, 92, *see also*, ECF No. 32 (City's Motion to Dismiss) at 11. The rest of the required payment goes to mitigate high Oakland rental costs and to redress "social equity.'" RE at 70, 87-88.

The tenant payment requirement does not limit a tenant's use of the money taken from their landlords. Nothing in the law requires a recipient tenant to use a payment to acquire new housing. Nothing in the law requires the tenant to spend the money in the City of Oakland. Tenants can use a payment acquired under the Ordinance for any personal purpose they want and the Ordinance contains no mechanism to track how and where tenants use a payment. RE at 29 ¶ 20; *id.* at 30 ¶ 33.

When the Ballingers initially leased their home to carry out their assignment on the East Coast, the tenant payment requirement did not exist. *Id.* at 30 ¶ 27. However, the law was in force in 2018 when the Ballingers were reassigned to the Bay Area and learned they would soon be coming home. Dealing with a new baby and needing to move back into their home immediately upon their return, the Ballingers complied with the Ordinance. They paid their tenants $6,582.40 after giving them a 60 days notice of termination of the lease, as required by law. RE at 30 ¶¶ 28-30.

B. Procedure

The Ballingers sued the City of Oakland on November 28, 2018. Two months later, they filed a First Amended Complaint (FAC), RE at 25-39, which asserts six claims: (1) a facial claim for 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 unconstitutional conditions ("exactions") doctrine, (4) facial and as-applied claims for an unreasonable seizure in violation of 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 FAC seeks a declaratory judgment, permanent injunction, damages, fees, and costs. RE at 38-39.

The City moved to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6). On August 2, 2019, the district court granted the motion, dismissing all of the Ballingers' claims in a published opinion. RE at 1-20. It issued final judgment on August 28, 2019. RE at 21. The Ballingers timely appealed on August 7, 2019. RE at 22. On appeal, the Ballingers assert only four claims, waiving the final two in the FAC, i.e., the substantive due process and Contracts Clause claims.

SUMMARY OF ARGUMENT

The Ballingers' complaint states a valid claim that the Ordinance effects a taking of private property, within the meaning of the Fifth Amendment to the Constitution. There is no dispute that the Ordinance requires property owners like the Ballingers to transfer up to $10,000 of their personal funds to their tenants before they may lawfully move back into their private residence. The Ballingers had to pay more than $6,500 to their tenants. RE at 30 ¶¶ 29-32. That money is a form of property protected by the Takings Clause, particularly since it is linked to the use

of real property. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613-14 (2013).

When the government authorizes an invasion of private property by the general public or specific third parties, it is liable for a physical taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 432-33 (1982). The Ordinance creates such a taking by authorizing tenants to take control of, possess, and use personal funds owned by people like the Ballingers.

This taking is unconstitutional for two reasons. First, the taking is for the private benefit of tenants, a reality evidenced by the City's lack of control over the transfer and lack of any restriction on the tenants' use of the money for private needs. As a result, the taking fails to serve a valid public purpose. *Kelo v. City of New London*, 545 U.S. 469, 477-80 (2005). In the alternative, if the transfer of owner funds to tenants serves a public purpose, the Ordinance is unconstitutional as applied here because it takes the Ballingers' property without compensation. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2168 (2019) (A "property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation[.]").

If physical takings standards do not apply in this case, the Ordinance's tenant payment requirement is nevertheless unconstitutional under the unconstitutional conditions doctrine set out in *Nollan*, *Dolan*, and *Koontz*. Pursuant to that doctrine, the government may condition the use of property on a dedication of property to the public (an "exaction") only if and when there is a clear and proportionate connection between the property at issue and the purpose of the exaction. *Koontz*, 570 U.S. at 605-06 (citing *Nollan*, 483 U.S at 837; *Dolan*, 512 U.S. at 391). There is no such connection here. The tenant payment mandate exacts money primarily to address high tenant housing costs and "social equity," RE at 70, 87-88, but owners like the Ballingers do not cause either concern by moving back into their home. Oakland's high tenant housing costs and related "social inequities" are caused by broad societal forces, such as Silicon Valley and the lack of housing supply, not by owner move-ins. Moreover, even if there is a connection, the payment exaction is not a proportionately tailored means to address tenant housing costs because there is no requirement that the money be used for housing.

The City will argue, and the district court held, that the *Nollan* and *Dolan* tests do not apply to a monetary exaction that emanates from legislation. RE at 10-12. But that question has not been resolved in this Circuit. The Court should hold here that the *Nollan* and *Dolan* tests apply to any condition on property use that qualifies as an "exaction," regardless of whether it derives from legislation or executive agency action. The constitutionality of a monetary exaction hinges on the existence of a "reasonable relationship" between the exaction and the social impact of the property, not on the governmental sponsor of the exaction. 512 U.S. at 391. If it were otherwise, an exaction that is unconstitutional when imposed on a few people by a commission would suddenly become proper when the legislature does the same thing to many. That cannot be correct. No property rights doctrine gives the government a special pass to take property simply because it uses legislation, and it should be no different in the context of unconstitutional exactions. The Ballingers state a valid unconstitutional conditions claim under *Nollan* and *Dolan*.

The Ballingers also state a valid claim that the tenant payment requirement effects an unreasonable seizure of property because it interferes with the Ballingers' funds in an unreasonable manner. In holding otherwise, the district court concluded that there was no "state action" involved in the transfer of the Ballingers' money to tenants, as needed to state a "seizure." RE at 15-16. It was mistaken. *Stypmann v. City & Cty. of San Francisco*, 557 F.2d 1338, 1343 (9th Cir. 1977). The seizure of the Ballinger's funds occurred with the tenants' participation and under authority of a duly enacted City ordinance enforced by the threat of civil penalties. This is an actionable seizure. *Id.* It is an *unreasonable* seizure because it permanently dispossesses the Ballingers of their property, there is no reasonable connection between the Ballingers' action in moving home and the need for a seizure, and the seizure serves private interests.

ARGUMENT

I.

THE BALLINGERS STATE A CLAIM FOR AN UNCONSTITUTIONAL PHYSICAL TAKING OF PROPERTY, EITHER BECAUSE THE TAKING FAILS TO SERVE A PUBLIC PURPOSE OR BECAUSE IT LACKS JUST COMPENSATION

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation. U.S. Const. amend. V. This provision imposes two conditions on the government. First, a taking must be for a public use. If the taking serves a private purpose, it is unconstitutional and invalid. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) ("[I]f a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement . . . that is the end of the inquiry. No amount of compensation can authorize such action."). Second, a taking of property for "public use" must be accompanied by compensation. *Id.* If it is not, the taking is unconstitutional and the owner is entitled to monetary compensation as a remedy. *Knick*, 139 S. Ct. at 2168.

In this case, the Ballingers claim that the requirement that they transfer private funds to their tenants effects a physical taking of their

property for a private purpose. RE at 32-33. Alternatively, if the transfer serves a public purpose, it is unconstitutional because they have not received compensation. *Id.* at 35. Both of these claims require resolution of the threshold question of whether the tenant payment mandate effects a physical taking of property.

A. Background Takings Law

The Supreme Court has held that a person may challenge governmental action as an unconstitutional taking of private property on several different theories. *Lingle*, 544 U.S. at 538-42. Most simply, one may assert that the government has carried out a "physical invasion" or "occupation" of private property. *See Loretto*, 458 U.S. at 432-33. A physical intrusion is always a taking, no matter the public purpose or the scope of the invasion, in part because it destroys the owner's fundamental right to exclude others from their property. *Id.* at 434-36.

One may also raise a taking claim under a "regulatory takings" theory. Such a claim alleges that land use or other regulations have harmed the private use of property to a level creating a de facto taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (a denial of "all economically beneficial use" is a compensable taking); *Penn*

Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (a regulation may cause a taking even if fails to destroy all use of property based on a multi-factor analysis).

The Ballingers rely solely on physical takings law. In the physical taking context, a taking may be most obvious when the government itself takes possession of property for governmental purposes. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002). But the government need not invade property for its own ends to cause a taking. A physical taking also occurs when the government *authorizes* the public or third parties to invade private property. *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 31-32 (2012) (citing *Loretto*, 458 U.S. at 426) (A taking occurs whenever a physical occupation of property is "authorized by government."); *see also Nollan*, 483 U.S. at 833 (observing that a taking by physical occupation would exist if the government authorized individuals to traverse private land). Every physical taking requires compensation, *Lingle*, 544 U.S. at 538, and if it is not provided at the time of the taking, the affected owner is entitled to damages. *Knick*, 139 S. Ct. at 2170 (A "property owner has

a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it.").

B. The Tenant Payment Requirement Physically Takes the Ballingers' Protected Property Interest in Their Private Funds

In considering whether the Ordinance causes a physical taking, a critical initial issue is whether the $6,500 taken from the Ballingers is "property" subject to the Takings Clause. The district court held it is not. RE at 14. It was wrong. The money taken from the Ballingers to secure their right to use their home is constitutionally protected "property," a truth that leads inevitably to the conclusion that the transfer of the money to tenants is a physical taking of property.

1. The funds taken from the Ballingers is constitutionally protected property

In holding that the Ballingers' money is not a form of property subject to the Takings Clause, the district court relied on the dissenting and concurring opinions in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which together suggest that some general, legislatively-imposed obligations to pay money are not constitutionally protected. The district court further held that the Supreme Court's decision in *Koontz*, 570 U.S.

at 616-17, did not repudiate or narrow the relevant *Eastern Enterprises* opinions. RE at 14. The district court's view cannot be upheld.

In *Koontz*, the Supreme Court considered whether a local government's demand for money as a condition of a land use permit is an exaction subject to the *Nollan* and *Dolan* "nexus" and "rough proportionality" tests. 570 U.S. at 612. The Court explained that this issue hinges on a threshold determination as to whether the seizure of private property effected by an exaction would rise to the level of "taking" if demanded outside the land use conditioning process. *Id.* The *Koontz* Court noted that the lower court and defendants in that case relied on the concurring and dissenting opinions in *Eastern Enterprises* for the proposition that a government demand for money would not be a taking, and thus, that a land use condition demanding money cannot be treated as an exaction subject to *Nollan* and *Dolan*.[1]

[1] The *Koontz* Court specifically stated:

> we began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking. The Florida Supreme Court held that [Koontz's] claim fails at this first step because the subject of the exaction at issue here was money rather than a more tangible interest in real property. Respondent and the

In short, to decide the *Nollan/Dolan* monetary exactions issue in *Koontz*, the Court first had to address the issue here: whether a requirement to pay money is a taking. In fact, it addressed the position adopted by the district court in this case; that *Eastern Enterprises* forecloses takings claims based on a demand for money. *Compare* RE at 13-14 *with* 570 U.S. at 613.

Ultimately, the *Koontz* Court *rejected* the proposition that a demand for money is not a physical taking. 570 U.S. at 613-14. *Koontz* held that a seizure of a specific amount of money linked to the use of real property *is* a per se, physical taking. *Koontz* explains that *Eastern Enterprises* does not foreclose, but rather, permits a takings claim against a "monetary obligation [that] burdened [] ownership of a specific parcel of land." *Id.* at 613. The Court further explained that, "*when the government commands the relinquishment of funds linked to a specific, identifiable property interest* such as a bank account or *parcel of real*

> dissent take the same position, citing the concurring and dissenting opinions in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), for the proposition that an obligation to spend money can never provide the basis for a takings claim.

570 U.S. at 612 (citations omitted).

property," takings analysis applies. *Id.* at 614 (emphasis added) (citing *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235 (2003)). Based on the determination that a taking of money tied to real property use is a per se taking, *Koontz* held that "monetary" exactions are indeed subject to *Nollan* and *Dolan*.

The critical point is that *Koontz* "affirmed that confiscations of money . . . are only treated as a taking *when the confiscation operates upon or alters an identified property interest*," *United States v. King Mountain Tobacco Company, Inc.*, 745 Fed. Appx. 700, 702 (9th Cir. 2018) (emphasis added), like real property. *Koontz*, 570 U.S. at 613. Therefore, the issue of whether a physical takings analysis applies here boils down to whether the $6,542 taken from the Ballingers is "linked to a specific, identifiable property interest such as a . . . parcel of real property." *Id.* at 614. This is easily answered in the affirmative. As applied to the Ballingers, the Ordinance forced them to pay the funds to unlock their right to come home to 1685 MacArthur Boulevard. The payment altered their right to repossess their real property for personal use. It is therefore a property interest subject to Takings Clause protection. *Id.* at 613-14.

2. The tenant payment mandate is a physical taking

With the discreet funds paid by the Ballingers properly treated as a constitutionally protected interest, the next issue is whether the forced transfer of the funds to tenants is a per se, physical taking. *Koontz* and *Brown* make clear that it is. *See Koontz*, 570 U.S. at 614; *Brown*, 538 U.S. at 235 (a seizure of funds created by accruing interest is a physical taking). Nevertheless, the City argued below that the seizure of the Ballingers' funds is not actionable as a Takings Clause claim because the City did not take possession of the Ballingers' funds for its benefit. This argument comes close to being a concession that the taking of the money is for a private purpose, a scenario that would invalidate it under the Public Use Clause. *See infra* at 21-23.

In any event, the City's argument rests on the false premise that the government bears no takings liability as long as a third party ends up with possession of the subject private property. This view was rejected long ago in *Loretto* and other cases. In *Loretto*, a statute authorized a private cable provider to occupy a small part of a private residential building to provide tenants with cable access. 458 U.S. at 424-25. As such, the law required property owners to transfer a slice of their property to a

private company. *Id.* The Supreme Court held this was a physical taking—even though the government itself never possessed any property—because the government authorized the cable company's invasion. *Id.* at 426. To the same effect is *Arkansas Game and Fish Comm'n*, 568 U.S. at 31 (noting that a physical taking arises when the government "*authorized"* an invasion of property) (emphasis added); *see also*, *Nollan*, 483 U. S. at 832.

Here, the Ordinance authorizes former tenants to possess and use the Ballingers' and others' personal savings. Affected owners lose their right to exclude strangers from their personal funds, on pain of civil penalties. This is a quintessential physical taking. *Loretto*, 458 U.S. at 435-36; *Brown*, 538 U.S. at 235; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). The fact that the taking occurs as a result of the Ballingers' decision to leave the rental market makes no difference. A taking does not become a lesser intrusion simply because it is related to a commercial transaction. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2430-31 (2015) ("a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se 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.").

C. The Ballingers Have Stated a Claim That the Tenant Payment Taking Is Unconstitutional Because It Serves Private Parties or Because It Occurs Without Just Compensation

The physical taking of the Ballingers' protected, personal funds is unconstitutional for two potential reasons: it either violates the Public Use Clause, *Kelo*, 545 U.S. at 477, or, if it serves a public purpose, fails for lack of just compensation. *Knick*, 139 S. Ct. 2162 (2019).

The Public Use Clause limits legitimate takings to those that serve a "public purpose." While this standard is fairly lenient, it does not allow takings carried out "for the purpose of conferring a private benefit on a particular private party." *Kelo*, 545 U.S. at 477. Nor will it permit a taking designed "to benefit a particular class of identifiable individuals." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984). When a taking fails to benefit private parties rather than the public, no amount of compensation can render it valid. *Kelo*, 545 U.S. at 477.

The Ordinance's tenant payment mandate violates the "public use" requirement on its face. The law is designed to take property from rental owners like the Ballingers to benefit a "particular class of identifiable

individuals," namely, tenants. *Midkiff*, 467 U.S. at 245. The purpose of the law is to increase "social equity" and to subsidize tenant housing, RE at 70, and it does so by leaving tenants completely free to use the payment for any personal, private purpose. The City has not identified any genuine, predominant public benefit from this transfer of funds from one private class of people to another.

To be sure, the City speculates that some of the benefiting tenants may spend money for housing in Oakland in a manner that benefits the public, but it has no evidence of that and nothing in the Ordinance ensures use of the money for public benefit. As the City admits, it does not control the money and the Ordinance leaves tenants free to spend the funds on what they please, where they please. The only clear beneficiary under this scheme are the private tenants who get handed thousands of dollars of landlord money on their way out the door. The mere possibility that there may be some incidental public benefit from this transfer down the road is not enough to satisfy the Public Use Clause. *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (a highly "attenuated" link between a legal

classification and a valid public goal is inadequate to satisfy the rational basis test).

Indeed, "[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). Here, the City does not dispute that the Ordinance is meant to benefit private parties (tenants), and it has failed to identify anything more than a speculative or incidental public benefit from the taking. While it may be rare that a law violates the Public Use Clause as a private taking, the test is met here.

Even if the Court finds a valid public purpose, the tenant payment requirement violates the Takings Clause as an *uncompensated* physical taking. The Ordinance contains no promise or mechanism to reimburse affected property owners. The Ballingers had to pay more than $6,500 to their tenants to legally reoccupy their home in compliance with the Ordinance, and that burden fell on them "without just compensation." Indeed, the City denies a duty to provide compensation because it denies that the Ordinance causes a "taking" in the first place. Yet it is a taking,

and the lack of compensation renders it unconstitutional. *Knick*, 139 S. Ct. at 2168.

II.

THE BALLINGERS STATE VALID *NOLLAN/DOLAN* EXACTION CLAIMS

If no unconstitutional physical taking occurred, the Ballingers have stated a claim that the requirement is unconstitutional, as applied to them and on its face, under the unconstitutional conditions doctrine set out in *Nollan*, *Dolan*, and *Koontz*.

A. The *Nollan/Dolan* Unconstitutional Conditions Doctrine

In *Nollan*, the Supreme Court considered whether the government could constitutionally exact a dedication of property from a land use permit applicant as a condition of a building permit. 483 U.S. at 834. The case arose when the California Coastal Commission approved a permit allowing coastal property owners to remodel a beachfront home subject to the condition that they dedicate an easement for public beach access across their property. *Id.* at 827-28. The Nollans challenged the condition as an unconstitutional taking of their property. *Id.* at 828.

The Supreme Court held that principles grounded in the Takings Clause forbid the government from exacting property as a condition of a

permit if (1) that exaction would be a taking when imposed outside the permit context and (2) if, in the permitting context, there is no "essential nexus" between the exaction and the impact of the subject property use. *Id.* at 837-38. The Court recognized that the government can constitutionally exact property when doing so mitigates public harms directly caused by the subject property. *Id.* But when there is no connection between the property and a proposed condition, the condition is simply a disguised taking. *Id.* Under this test, the Court struck down the public easement exaction because the Nollans' proposed home did not harm public access or otherwise cause the need for the easement condition. *Id.* at 838-39.

In *Dolan*, the Court considered the nature and strength of the connection (between proposed use of property and exaction) needed to satisfy *Nollan*. 512 U.S. at 386. *Dolan* involved building permit conditions that required a hardware-store owner to dedicate portions of her land to the public for use as a public bike path and storm water protection. *Id.* at 377-83. The Court held that the government must show that the exaction bears "rough proportionality" "to the impact of the proposed development" to satisfy *Nollan*. *Id.* at 391. That is, the

government must make a "determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* The *Dolan* Court was careful to emphasize that the *Nollan/Dolan* tests are stricter than a rational basis standard. *Id.*

Lastly, in *Koontz*, the Court confirmed that a demand that a property owner pay money to secure a property use permit is an exaction subject to *Nollan* and *Dolan*. 570 U.S. at 613. *Nollan* and *Dolan* allow "the government to condition approval of a permit on the dedication of property [including money] 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 (emphasis added).

B. The *Nollan/Dolan* Tests Apply to Generally Applicable Exactions

In proceedings below, the City argued, and the district court held, that *Nollan* and *Dolan* do not apply to exactions arising from "generally applicable legislation" and therefore that the Ordinance's tenant payment requirement is immune from *Nollan* and *Dolan*. RE at 10-11. In so holding, the district court relied on *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008). RE at 11. This ruling also reflects a

misreading of precedent. The legislated exactions issue is unresolved in this circuit. Since there is no doctrinal or logical basis for treating a monetary exaction that is otherwise subject to *Nollan* and *Dolan* as an exception simply because it emanates from legislation, the Court should apply *Nollan* and *Dolan* here.

1. *McClung* does not resolve the legislated exaction issue

In *McClung*, this Court considered a takings claim against an ordinance requiring all developers to install certain types of storm pipes. This Court held that the regulatory takings test in *Penn Central*, 438 U.S. at 124, rather than the *Nollan/Dolan* unconstitutional conditions doctrine, controlled the challenge. This conclusion was not based on the understanding that *Nollan/Dolan* never apply to legislated exactions. It arose from the Court's conclusion that the storm pipe requirement in *McClung* was *not an exaction at all*, but an "ordinary" land use regulation. 548 F.3d at 1227-28. *McClung* notes that the decision does not address a property condition that clearly qualifies as an exaction, *id.*, and that it does not adopt a per se barrier to the *Nollan/Dolan* test when an exaction is clearly at issue: "We are not confronted . . . with a legislative development condition designed to advance a wholly unrelated

interest. We do not address whether *Penn Central* or *Nollan/Dolan* would apply to such legislation." 548 F.3d at 1225 n.3.

McClung simply did not address whether *Nollan* and *Dolan* apply to a recognized monetary exaction that is imposed through legislation, much less adopt a categorical bar against *Nollan/Dolan* review in such a case. Moreover, *McClung* cannot be stretched to create such a bar as doing so would require abrogation of this Court's prior decision in *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991). In *Commercial Builders*, this Court applied *Nollan* to a legislated monetary fee, holding that it satisfied the *Nollan* "nexus" test, as it was then understood. *Id.* The panel in *McClung* did not and could not abrogate the panel decision in *Commercial Builders*',[2] *Hart v. Massanari*, 266 F.3d 1155, 1171-72 (9th Cir. 2001), a fact that confirms *McClung* cannot be expansively read to exempt legislative exactions from *Nollan* and *Dolan*.

[2] It is true that *McClung* characterized *Commercial Builders* as "rejecting application of *Nollan* to [an] ordinance that conditioned the issuance of nonresidential building permits on the payment of a fee." 548 F.3d at 1228. But a plain reading of *Commercial Builders* shows that the panel in that case did no such thing.

Unlike the standard development requirement in *McClung*, the tenant payment fee at issue here clearly qualifies as an "exaction." *Koontz*, 570 U.S. at 612, 616; *California Building Industry Ass'n v. City of San Jose*, 351 P.3d 974, 990 (Cal. 2015) (noting that "[i]t is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called 'exaction'" including "the payment of money"). Thus, this case squarely presents the issue left open by *McLung*: whether an exaction that is otherwise subject to *Nollan* and *Dolan* is exempt from scrutiny merely because it was legislatively applied.

2. There is no doctrinal or logical basis for treating a legislated exaction differently than one imposed by an administrative decision

There is no logical basis or precedent for treating an exaction applied to a property owner under authority of legislation differently for purposes of *Nollan* and *Dolan* than one applied by an administrative decision. Exactions imposed by legislation can implicate the same fundamental concern as exactions imposed by an administrative decision —the danger that the government may leverage its regulatory powers to extract property without compensation. *Town of Flower Mound v.*

Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004) ("we think it entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud"). Moreover, the basic *Nollan* and *Dolan* test, whether there is a "reasonable relationship" between an exaction and property,[3] is as capable of application to legislative exactions as it is to administratively applied ones. Indeed, courts routinely apply similar means-ends testing to legislative challenges in other contexts. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 97 (1987) (invalidating a regulation on its face under a "reasonable relationship" test).

The district court suggested that a distinction between legislated and administratively-imposed exactions is warranted because the politicized legislative process provides some protection for property owners that is absent from administrative decision-making. RE at 12. If this were a valid argument, we should see a similar "legislative/administrative" distinction in other areas of property rights laws. Yet, the notion is foreign to constitutional law.

[3] In sanctioning the "reasonable relationship" test in *Dolan*, the Court defined it to mean an exaction must be roughly proportionate in "nature" and "degree" to the impact of property use.

Takings law offers an apt example. The *Penn Central* regulatory takings test, which governs most takings cases, considers the "character of the governmental action" and other factors in deciding whether a taking has occurred. 438 U.S. at 124. None of the factors hinge on whether a challenged land use restriction was legislatively or administratively imposed, nor does the overall *Penn Central* test vary in strength or result based on the source of the challenged governmental action. *Compare MHC Financing Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118 (9th Cir. 2013) (applying *Penn Central* factors to a use restriction emanating from a mobile home rent control ordinance), *with Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445 (9th Cir. 2018) (applying the same factors in a taking challenge to a rent control board's adjudicative decision to limit a mobile home owner's rent increase).

Similarly, the general unconstitutional conditions doctrine undergirding *Nollan* and *Dolan* makes no distinction between legislative and administrative conditions. *See Frost v. Railroad Comm'n of Cal.*, 271 U.S. 583, 592-93 (1926) (invalidating a state law that required a trucking company to dedicate personal property to public use as a condition of

highway use); *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963) (provisions of unemployment compensation statute held unconstitutional where government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (legislated provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine).

The City cannot identify any principled basis for holding that a monetary exaction generally within the purview of *Nollan* and *Dolan* escapes that doctrine as long as the government imposes the exaction through an ordinance rather than by an administrative decision. This Court should reject the spurious constitutional distinction between "legislative" and "adjudicative" exactions and hold that *Nollan* and *Dolan*'s "nexus" and "rough proportionality" tests apply here.

C. The Ballingers State Valid *Nollan/Dolan* Claims on the Merits

To meet the *Nollan* and *Dolan* tests, the City must demonstrate a direct "'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *See Koontz*, 570 U.S. at 599; *see also Parks v. Watson*, 716 F.2d 646, 651-53 (9th Cir. 1983).

That is, the City may seek a "dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands [i.e., the exaction] and the social costs of the applicant's proposal." *Koontz*, 570 U.S. at 605-06. This test requires a court to compare the property use at issue with the goals of the exaction to determine if there is a causal and proportional relationship between the two. Government "may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to [the] impacts" of the property use. *Id.* at 606.

Here, the property use at issue is the Ballingers' desire to move into their home for personal, non-rental use. On the other hand, the payment exaction is intended primarily to subsidize and reduce the cost of rental housing within the City for displaced tenants. RE at 69-70. The City may protest that the payment mandate is also meant to help tenants with actual moving expenses. But the City conceded that only $500 is needed to move a tenant to a new location. ECF No. 32 at 8 (City's Motion to Dismiss). That means that the vast majority of the tenant payment taken from rental owners (over 90% in the Ballingers' case) is meant to serve the City's broader goal of mitigating and subsidizing rental housing costs

for tenants and for promotion of "social equity." RE at 69 (explaining that "[d]ue to Oakland's exorbitant housing prices" tenants may not find housing unless the City takes landlord funds).

The problem for the City is that owner move-ins, like that carried out by the Ballingers, do not cause either the high rental housing costs or social inequities the payment seeks to mitigate. These are the result of larger market forces (Google, et al., and lack of housing supply), not owner move-ins. As California courts recently put it, "spiraling rents had *no relationship* to the adverse impacts caused by a landlord's decision to exit the rental market." *Coyne v. City & Cty. of San Francisco*, 9 Cal. App. 5th 1215, 1230 (2017). Nor does a property owner's decision to terminate a lease and move into their home cause a tenant's need for funds to pay rent and a deposit. That need arose from the tenant's choice to enter into a lease in the first place. The end of a lease cannot be the cause of a tenant's need for rental funds when the need first existed *at the beginning of the lease* and continued throughout its life. The lack of any concrete connection between the Ballingers' decision to move into their home and the tenant needs addressed by the payment mandate means the payment

is simply a windfall for tenants,[4] and an unconstitutional exaction under *Nollan*.

Even if there was a connection between owner move-ins and high tenant housing costs (there is not), the Ordinance is a disproportionate means of addressing that concern, for several reasons. First, the tenant payment taken from the Ballingers and others like them is totally unregulated. Benefitting tenants are not required to use the money for housing or in the City at all. They can take the money and go on vacation. They can choose to live in a car and save the money. They can move to a different country. The City does not track the funds and owners have no

[4] This case provides an example. The Ballingers' tenants voluntarily leased the Ballingers' home for the price of $3,395 a month, plus a security deposit in the same amount. When they departed, the tenants got their deposit back and no longer had to pay $3,395 per month to the Ballingers. All of that money was thus available for them to acquire and rent a new unit of the same or lesser value. Yet, the Ordinance required the Ballingers to give the tenants another $6,542 so the tenants could pay rent (first and last) and a security deposit. RE at 87. This is simply a handout, since the tenants had already incurred and met a need for funds for monthly rent and a deposit when they originally rented from the Ballingers. The tenants can take the money they invested in the Ballingers' lease/deposit when they depart the lease, invest it into a new lease, and use the $6,542 coerced from the Ballingers for some non-housing, private purpose. In other words, the Ballingers' decision to move into their home did not cause any additional need for tenant rental funds beyond what the tenants had incurred (and accounted for) in their original lease decision.

assurance that their money will not be spent for personal goods that have nothing to do with housing. Given these characteristics, the tenant payment exaction is not proportional in "nature" to any impact from the Ballingers' property use. *Dolan*, 512 U.S. at 391.

Second, the payment mandate is also disproportionate in "degree" to any impact that the Ballingers' move-in may have on tenant expenses. Assuming for the sake of argument that owner move-ins have some causal relationship to actual tenant moving costs,[5] a $6,500–$9,875 payment is a grossly disproportionate means of mitigating that expense when the City admits tenants need only $500 to move. RE at 88, 93. The scheme takes far more money from the Ballingers than needed to relocate tenants because the City primarily wants to give them free rental funds to address "social inequity," none of which can be laid at the Ballingers' door. Requiring a payment far in excess of true moving costs strips the Ordinance of "rough proportionality."

[5] It's hard to see any such connection. Prospective tenants know that if they rent property under a year-long lease, like that in this case, they must move when the lease ends. Moving costs are a natural and foreseeable result of the choice to rent property under a lease for a limited period, not of a property owner's decision to live in their own home.

For the foregoing reasons, the Ballingers have stated a valid *Nollan* and *Dolan* unconstitutional conditions claim against the tenant payment requirement, as applied to their circumstances, and on its face.[6]

III.

THE BALLINGERS STATE A VALID CLAIM THAT THE ORDINANCE EFFECTS AN UNCONSTITUTIONAL SEIZURE OF THEIR PROPERTY

The Ballingers' final claim asserts that the tenant payment obligation violates the Fourth Amendment's protection against unreasonable seizures as-applied to the Ballingers. The district court also dismissed this claim in error.

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[6] Relying on *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998), the City contends that facial *Nollan* claims are not viable. But the fractured, three-opinion *Garneau* decision cannot be pieced together to create a facial claims barrier. At most, one might read *Garneau* to bar fact-dependent, facial *Dolan* "rough proportionality" claims. But it does not bar facial "nexus" and "rough proportionality" claims targeting the excessive "nature" of an exaction. 512 U.S. at 391. Nor does *Garneau* bar facial, *Dolan* "*degree* of proportionality" claims in a case, like that here, where the facts necessary for a "proportionality" comparison between an exaction and the alleged property impact are evident in the law itself. *See* RE at 88, 93 (showing the cost of moving a displaced tenant is $500).

The Fourth Amendment protects "persons, houses, papers, and effects, against unreasonable searches and seizures." This provision applies to "seizures in the civil context" as well those that occur in the course of criminal investigations. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 51 (1993). Moreover, "seizures of property are subject to Fourth Amendment scrutiny even though no search . . . has taken place," *Soldal v. Cook Cty.*, 506 U.S. 56, 68 (1992), and even when "privacy or liberty is not implicated." *Id.* at 56. A "seizure" is defined as "a 'meaningful interference with an individual's possessory interests in [her] property.'" *Brewster v. Beck*, 859 F.3d 1194, 1196 (9th Cir. 2017) (quoting *Soldal*, 506 U.S. at 61). The City does not dispute that money is protected by the Fourth Amendment. *See generally*, *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984) (The "effects" protected by the Fourth Amendment include personal property.).

Nevertheless, the district court held, at the urging of the City, that the Fourth Amendment is not implicated here because tenants, and not government agents, take possession of the Ballingers' money. This is without merit. If the government's authorization of an invasion of property by third parties gives rise to governmental liability for a

"taking" (and it does), the same authorization is enough to create an actionable claim of a "seizure." *Stypmann*, 557 F.2d at 1343 (holding a 1983 action viable even though a private towing company physically engineered a deprivation of property). The Ballingers' tenants are a "willful participant in joint activity with the State or its agents," *United States v. Price*, 383 U.S. 787, 794 (1966), and as a result, the tenant payment seizure involves state action. *Stypmann*, 557 F.2d at 1343.

The legally compelled, permanent transfer of the Ballingers' $6,500 to third parties, for their exclusive use, is a "meaningful interference" with the Ballingers' "possessory interest." *Brewster*, 859 F.3d at 1196. It is, in short, a "seizure" subject to the Fourth Amendment. *See Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006) (a seizure occurred when a city encouraged the public to repeatedly trespass on private property even though there was no government entry).

Whether a seizure is reasonable depends "'on all of the circumstances surrounding the . . . seizure and the nature of the . . . seizure itself.'" *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). The question requires "a weighing of the gravity of the public

concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 50-51 (1979). Here, the tenant payment mandate eviscerates the Ballingers' fundamental property right—the right of exclusive possession—on a permanent basis. While the City may highlight its interest in lowering rental housing costs and advancing equity, the need to address these things does not arise from the Ballingers' decision to live in their own home. *See Coyne*, 9 Cal. App. 5th at 1230. Moreover, the seizure of the Ballingers' money does not reasonably advance the City's interests since tenants are not required to use it for housing needs. *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1083 (9th Cir. 2013) (rejecting the seizure of a person who had no connection to the criminal conduct being investigated). As a result, the Ballingers have stated a viable claim that the Ordinance unreasonably seizes their property in violation of the Fourth Amendment.

CONCLUSION

The Court should reverse and remand for further proceedings.

DATED: November 12, 2019.

Respectfully submitted,

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J. DAVID BREEMER

Attorneys for Plaintiffs – Appellants Lyndsey Ballinger and Sharon Ballinger

STATEMENT OF RELATED CASES

Plaintiffs – Appellants are aware of no related cases within the meaning of Circuit Rule 28–2.6.

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