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' REPLY BRIEF

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Respondent City of Oakland (City) fails to justify the dismissal of Appellants Lyndsey and Sharon Ballingers' (Ballingers) constitutional claims. All of the claims challenge a City ordinance (Ordinance) requiring the Ballingers to pay $6,582 to their tenants before the Ballingers could move back into their home at 1685 McArthur Blvd., Oakland, California, after the lease ended. The City believes the payment funds tenant relocation expenses allegedly arising from the Ballingers' move-in, thereby promoting "social equity" and "preventing homelessness." It contends these features immunize the payment from the Ballingers' claims. It is wrong.

The City has offered nothing to defeat the Ballingers' physical takings claim. In fact, its arguments on this issue mirror the *dissenting* arguments in *Koontz*, not the majority decision. The controlling majority opinion held, contrary to the City's position, that the taking of money linked to real property use *is* a per se taking. Since the City concedes the payment here is linked to the use of real property, City Brief at 13, physical takings tests apply. Secondarily, the City contends there can be no physical taking because the Ordinance regulates "landlord/tenant relations." There is no such exception. If the government confiscates

property, physical taking liability occurs, "no matter how weighty the public purpose." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

Ultimately, the City fails to explain how the unrestricted transfer of the Ballingers' funds to tenants, for their private benefit, serves a valid public purpose. And it does not deny that it has failed to provide compensation to the Ballingers, so even if there is a public purpose for the taking, it is unconstitutional.

Nor has the City provided a valid reason for the Court to refuse to weigh the payment under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), if the Ballingers' physical takings claim fails. Its claim that the doctrine does not apply to legislated exactions, but only administratively-applied ones, rests on inapposite precedent. It is also irreconcilable with the text of the Takings Clause, and in particular, with its nature as a provision constraining all government actors. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 713-14 (2010).

On the merits, the City fails to show how the Ballingers' decision to move in to their home at the end of a one-year lease causes their tenants' relocation needs. The Ballingers did not compel their tenants to sign a temporary lease which put the tenants on notice that they would have to relocate. Nor did the Ballingers' cause the "exorbitant" average City housing costs that the payment exaction is calculated to address. Finally, the City has not refuted the argument that the payment is disproportionate to any realistic impact arising from the Ballingers' move-in. The exaction of $6,542 from the Ballingers is an excessive, City pay-out to tenants, at the Ballingers' expense. While addressing tenant housing needs is a legitimate concern, the Constitution prevents the City from foisting the burden of solving that broad societal problem on the Ballingers and a few other owners.[1]

[1] The City argues that the Ballingers' appeal should be dismissed because their opening brief did not contain a separate statement of the issues. Dismissal of an appeal is "harsh[]" and an extraordinary remedy that is inappropriate here. *Mitchel v. Gen. Elec. Co.*, 689 F.2d 877, 879 (9th Cir. 1982). This Court has only employed such a remedy in instances of particularly egregious and persistent breaches of the rules. *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997). This is not such a case. The Ballingers' failure to include a separate issues statement does not "work[] a hardship on this court" and or prejudice the City. *Martin v. Reynolds Metals Co.*, 336 F.2d 876, 877 (9th Cir. 1964). The City correctly identified the issues from the Ballingers' arguments, and

ARGUMENT

I.

THE CITY FAILS TO SUPPORT ITS CLAIM THAT PHYSICAL TAKINGS STANDARDS DO NOT APPLY TO THE TAKING OF THE BALLINGERS' MONEY

A. The City Has No Answer to *Koontz*

In their Opening Brief, the Ballingers showed that *Koontz* resolved prior confusion about whether a governmental demand to relinquish money physically takes a property interest. The *Koontz* Court held that a per se taking exists as long as the money is "linked to a specific, identifiable property interest such as a . . . parcel of real property." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013).

The *Koontz* Court's decision on this issue was essential to its holding that monetary exactions are subject to *Nollan* and *Dolan*. *Id.* at 612. The Court had to decide that an outright governmental demand for money was a taking before applying *Nollan* and *Dolan* to a land use condition exacting money. *Id.*

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responded to the issues in its Answering Brief. Nevertheless, the Ballingers remain willing to file a corrected opening brief, a supplemental letter, or to adopt the statement of the issues in the City's Answering Brief, if necessary.

In response, the City cites a litany of older decisions that found money to be beyond the reach of the Takings Clause. City Brief at 18. Those decisions relied largely on Justice Kennedy's concurring opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998), but *Koontz* construed *Eastern Enterprises* to *allow* money taking claims when the money is tied to real property. *Koontz*, 570 U.S. at 612. The pre-*Koontz* decisions cited by the City were superseded by *Koontz* and are inapposite here. *Koontz*, 570 U.S. at 615 ("[W]e have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax.").

Indeed, the *Koontz* dissent clearly understood what the City does not: that the *Koontz* majority held that an outright government demand for money linked to real property is a per se taking. *Koontz*, 570 U.S. at 623-25 (Kagan, J., dissenting); *id.* at 626 n.1. That is, the majority squarely rejected the dissenting Justices' argument that "the government commits a taking only when it appropriates a specific property interest, not when it requires a person to pay or spend money." *Id.* at 635 (Kagan, J., dissenting).

The City must accordingly contend that the payment exaction is not linked to "a specific parcel of land." City Brief at 20. This is easily refuted. The Ballingers could not lawfully occupy their residential property until they made the required payment. This is not different, for purposes of takings analysis, than a requirement (as in *Koontz*) that a property owner submit to an exaction before developing property. Both demands "burden[] ownership of a specific parcel of land." 570 U.S. at 613. In any case, the City ultimately concedes the issue in arguing that this Court cannot "divorce" "the relocation payment from *the regulation of the use of their* [Ballingers'] *real property that gives rise to the relocation payment*." City Brief at 13 (emphasis added); *see also*, *id.* at 21 ("the Ordinance is a regulation of [the] use of property").

B. The City's Goals Do Not Allow It To Escape Physical Takings Liability

Stripped of its failed "no money takings" argument, the City asserts that (1) takings advancing the goal of adjusting landlord/tenant relations cannot be treated as physical takings, and that (2) takings which derive from regulation must be analyzed as "regulatory" takings. City Brief at 12-16, 20. Both points fail.

The first argument boils down the contention that regulating landlord/tenant relations is a special governmental purpose that triggers lenient takings scrutiny. But there is no such rule. The Supreme Court has repeatedly confirmed that authorization of an appropriation of property is a per se taking, regardless of the purpose of the appropriation. What matters in physical takings analysis is not what the government seeks to accomplish, but the burden its actions have on a property owner. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). If its actions physically occupy, invade or transfer property, that is the end of the inquiry. A per se taking results "no matter how weighty the public purpose" for the action. *Lucas*, 505 U.S. at 1015.

In *Loretto*, for instance, the Court held that a statutory requirement seeking to "adjust landlord-tenant relationships" caused a physical taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). *Loretto* recognized that regulatory takings analysis would apply to landlord/tenant regulations only if they "do not require the landlord to suffer *the physical occupation of a portion of his [property] by a third party*." *Id.* (emphasis added). Such a physical occupation exists here. The Ballingers personal property (money) has been entirely

appropriated under City law, for use by a third party; i.e., tenants. That triggers physical takings liability, not regulatory takings analysis. *Id.* at 441; *see also*, *Cwynar v. City and County of San Francisco*, 109 Cal. Rptr. 2d 233, 246-50 (Ct. App. 2001) (landlords could state a physical takings claim against a regulation barring landlords from moving into their homes).

The City's second contention—that regulatory takings standards always control a taking alleged to arise from regulation—also fails. An unconstitutional physical taking can arise from a regulatory requirement just as easily as from a completed invasion of property by government agents. Again, *Loretto* involved a challenge to a statutory provision requiring a property owner to install a cable box. No government seizure had occurred, but the Court found that the regulatory requirement caused an unconstitutional physical taking. Indeed, the Court has consistently found that rules and regulations authorizing a physical appropriation of property are analyzed as per se takings, not as regulatory takings. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176, 180 (1979) (federal order requiring a developer to open a private pond to public access subject to physical takings analysis); *Brown v. Legal*

Foundation of Washington, 538 U.S. 216, 235 (2003) (Washington Supreme Court rules requiring lawyers to place clients' funds into "interest on lawyers' trust accounts" account analyzed as a physical taking); *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2428 (2015) (a federal "marketing order" requiring raisin growers to set aside raisins held to be a physical taking).[2]

In the end, the City falls back on a parade-of-horribles argument, asserting that the Ballingers' physical takings claim threatens to turn every property regulation causing a transfer of wealth or a loss of value into a per se taking. City Brief at 11, 16. The Ballingers' claim is hardly so sweeping. It asserts only that, under the circumstances of this case, a provision directly requiring a property owner to hand over a distinct sum

[2] It is important to reiterate that the analysis does not change because the taking here is related to the commercial, rental use of the Ballingers' property. In *Horne*, this Court considered whether a taking resulted from an order requiring a raisin producer to give the government a certain amount of raisins to engage in commerce. This Court believed that the *Nollan/Dolan* unconstitutional conditions doctrine, rather than physical takings standards, governed the taking. *Horne v. U.S. Dep't of Agriculture*, 750 F.3d 1128, 1142 (9th Cir. 2014). But the Supreme Court disagreed, holding that physical takings law applied. *Horne*, 135 S. Ct. 2419. The same principle holds here. Though the tenant payment allows the Ballingers' to take their property off the rental market, that payment is treated as a physical taking due to its effect in entirely divesting the Ballingers of their funds. *Id.*

of money linked to real property is a per se taking. Other laws that result in a more generalized and indirect transfer of wealth (i.e., rent control and zoning) may be subject to a different takings analysis. But *Koontz* makes clear that an outright demand for a specific sum of money linked to real property use is not one of those cases; it is a per se taking. 570 U.S. at 612-15.

C. The City Fails to Defeat the Physical Takings Claim on the Merits

Once it is clear that the taking of the Ballingers' funds is a physical taking, it also becomes clear that the dismissal of their private use takings claim and uncompensated public use takings claim must be reversed. On the Public Use Clause issue, the City asserts the conclusory argument that "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 . . . ." City Brief at 38. But the City does not adequately explain how the payment is related to the alleged harms (the need to pay for relocation) when it is not restricted to use for housing or relocation purposes. *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) ("[T]ransfers intended to confer benefits on particular, favored private entities, and

with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.").

The City does argue that departing tenants will have to pay out of their own private funds to relocate, so even if they don't use the payment itself for relocation, giving them landlord money sufficient to cover relocation costs is ultimately related to relocation goals. This logic rests on two unsupported assumptions. First, it assumes that former tenants will pay for replacement, rental housing in the City of Oakland when a tenancy ends, foregoing other options, such as moving-in with family, moving-in with friends, going on vacation, or moving to another state or country (none of which reasonably advances the City's intention to relocate tenants within Oakland).[3]

[3] Amicus Western Center on Law and Poverty claims the Ballingers are "callous" in noting that, under the Ordinance, tenants can forego relocation and save the payment for personal use. It suggests the Ballingers are indifferent to homelessness or worse, cheering it on. Amicus Brief at 13. The context of the relevant briefing refutes the suggestion. The Ballingers made the statements at issue only to illustrate that, under the Ordinance, tenant payments do not have to go toward relocation expenses. More generally, the Ballingers do not dispute or disparage the sincerity of the City's desire to address homelessness. They simply contend that the City goes too far in singling them out to bear society's burden in this area.

Second, the City's position assumes that tenants incur "unanticipated," unfunded costs at the end of a tenancy. But this assumption fails to account for the reality that departing tenants gain the funds that they previously spent on the prior lease (i.e., amounts used for deposit, rent, and utility on the prior lease), for acquisition of a new unit. There is, in short, nothing in the record, Ordinance or logic to suggest that a large, "no-strings attached" landlord payment will be used for tenant relocation costs.

Yet, even if this is wrong, and the Court concludes the tenant payment satisfies the Public Use Clause, it still amounts to an unconstitutional taking in this case due to the City's failure to provide compensation. The City does not claim that it has provided or will provide compensation. The physical taking of the Ballingers' funds is accordingly unconstitutional.

II.

THE CITY HAS FAILED TO SHOW THAT *NOLLAN* AND *DOLAN* ARE INAPPLICABLE TO THE EXACTION OF THE BALLINGERS' MONEY

In response to the Ballingers' *Nollan/Dolan* unconstitutional exactions claim, the City argues that the "nexus" and "rough proportionality" tests do not apply here because the tenant payment is a legislated exaction. Alternatively, it believes that the tenant payment exaction is directly and proportionately related to the effects of the Ballingers' decision to move into their home, as required by *Nollan* and *Dolan*. It is wrong.

A. The City Has Not Supported Its Claim of an Exemption for Legislated Exactions

The only published, Ninth Circuit majority opinion the City cites for its claim that *Nollan* and *Dolan* do not bind legislated exactions is *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008). But the decision is of little value for all the reasons stated in the Opening Brief. To be sure, the City suggests that *San Remo Hotel L.P v. San Francisco City and County*, 364 F.3d 1088, 1097-98 (9th Cir. 2004), also holds that *Nollan* and *Dolan* do not govern legislated exactions. City's Brief at 25. But *San Remo* arrives at no such conclusion.

In *San Remo*, this Court reviewed the California Supreme Court's approach to *Nollan* and *Dolan* and concluded that its analysis was [ ] "equivalent to the approach taken in this circuit" to the extent the California court "*rejected the applicability of Nollan/Dolan to monetary exactions* . . . ." 364 F.3d at 1097. *San Remo*'s discussion of the application of the *Nollan* and *Dolan* tests to "monetary exactions" has no bearing here, as the City does not deny that monetary exactions are subject to *Nollan* and *Dolan* after *Koontz*.[4] On the issue that does matter—whether *Nollan* and *Dolan* apply to legislated exactions—*San Remo* says nothing.

The City's argument boils down to the proposition that government is free from *Nollan* and *Dolan* as long as it is clever enough to impose an exaction by ordinance or statute rather than by administrative order. Its rationale is that "[g]enerally-applicable legislation simply does not present the same sort of concern" that an administrative exaction does because legislative action is "subject to [] the will of the voters." City Brief at 28. The Supreme Court's precedent plainly refutes this "legislatures

[4] The City also no longer contends (as it did below) that the tenant payment at issue here is not an "exaction"—for good reason. *See, e.g.*, *California Building Industry Ass'n v. City of San Jose*, 351 P.3d 974, 990 (Cal. 2015).

are entitled to deference" theory of review. The Just Compensation Clause binds the legislative branch just as strongly as it binds an executive branch agency. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (holding that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may" physically take money without compensation). As a plurality of the Supreme Court explained in *Stop the Beach*:

> The Takings Clause (unlike, for instance, the *Ex Post Facto* Clauses, see Art. I, § 9, cl. 3; § 10, cl. 1) is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor ("nor shall private property *be taken*") (emphasis added)). There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle.

560 U.S. at 713-14.

In short, "the particular state *actor* is irrelevant" to analysis of whether a property owner has suffered a violation of the right of just compensation. *Id.* at 715 (emphasis in original). The *Nollan* and *Dolan* tests ensure that the government does not "thwart the Fifth Amendment right to just compensation" by pressuring a person to give up a property

interest without compensation in order to use property. Since the right to just compensation does not wax or wane based on the government actor, *Stop the Beach*, 560 U.S. at 714, there is no doctrinal basis for exempting the monetary exaction at issue here from the *Nollan* and *Dolan* test simply because a City Council, rather than a Planning Commission, imposed it on the Ballingers.

B. The City Has Not Established a Sufficient Relationship Between the Ballingers' Move-In and the Payment Exaction

On the merits of the *Nollan/Dolan* issue, the City argues that there is a nexus between the payment exaction and the City's goals in imposing the payment, and that the payments are "roughly proportional" to the costs of relocation. City Brief at 32. The City misunderstands and misapplies *Nollan* and *Dolan*.

1. The City has failed to identify a nexus between the impact of the Ballingers' move-in and the $6,582 payment

The *Nollan* nexus test is not a standard means-ends test that seeks a connection between the government's interest and the means it elects to employ. The issue is whether there is a direct connection between *the*

impact of the property use and the goals of the exaction. As the *Koontz* Court explained:

> the government [may] condition approval of a permit on the dedication of property to the public [the exaction] 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*. [citation omitted] . . . Under *Nollan* and *Dolan*, the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that *lack an essential nexus and rough proportionality to those impacts*.

570 U.S. at 605-06 (emphasis added).

The City fails this test. On the nexus requirement, the City does not explicitly explain how the Ballingers' move-in causes tenants to need a large payment to meet housing costs—$6,582.00 in the Ballingers' case.[5] Nevertheless, the City seems to believe that the Ballingers' move-in causes departing tenants to incur (1) a need to move and (2) expenses necessary to rent a new unit in Oakland (first month's rent, deposit, utilities, etc.).

[5] Puzzlingly, the City argues the issue in general terms, as if the Ballingers' *Nollan/Dolan* claim is only a facial claim. But their main claim arises as an as-applied claim alleging the payment fails *Nollan/Dolan* in their particular circumstances.

The Ballingers caused none of these needs. First, the Ballingers' move-in is not the cause of the tenants' need to relocate. The cause is the tenants' agreement to a lease that could and would end after a year and which thus inherently and explicitly required the tenants' ultimate relocation. ER at 61 (lease term discussing duration of the Ballingers' lease); *see generally, California State Teachers' Retirement System v. County of Los Angeles*, 156 Cal. Rptr. 3d 545, 553 (Ct. App. 2013) (reviewing principles of a leasehold). The Ballingers cannot be responsible for their tenants' relocation needs and expenses, when the tenants voluntarily entered a temporary lease at a time when it was lawful for the Ballingers to end the lease to move home, without penalty or relocation payment.

Even putting aside the tenants' self-created relocation needs, the City has not shown how the Ballingers' move-in causes the high City rental housing costs that the tenant payment seeks to address. The City claims that the payment was not adopted to remedy high rental costs, but the legislative record shows otherwise. ER 69. In enacting the payment provision, the City found: "Oakland ranks the seventh costliest rental market in the county, with one-bedroom apartments typically

renting for $2,025.00. Due to Oakland's exorbitant housing prices, many displaced tenants would be unable to relocate in the City if relocation payments are not authorized . . . ." *Id.*; *see also*, ER 87-88 (summarizing the City's method of calculating relocation payments for "Ellis Act" evictions, later adopted as the basis for the owner move-in payment). In short, regardless of how the City describes the payment, the record shows that the payment scheme was fundamentally devised as a way to help tenants defray high city rental costs. ER 69. The City ultimately confirms this truth. City Brief at 36. Yet, there it has no evidence or that owner move-ins like that sought by the Ballingers cause the "exorbitant [city] housing prices," ER 69, that the tenant payment mitigates. There is accordingly no "nexus" between the Ballingers' move-in and the $6,582.00 payment.

2. The City has failed to show the payment is proportionately related to the effects of the Ballingers' move-in

The City's attempt to justify the payment under *Dolan* also fails. The Ballingers argued in the Opening Brief that there is not a proportionate fit (in "nature") between the payment exaction and their move-in because the payment does not have to be spent on tenant

relocation or housing needs. *See Dolan*, 512 U.S. at 393 (holding that a condition requiring a builder to dedicate a public recreation easement was not sufficiently related to the City's desire to mitigate flooding impacts because the easement demand went beyond the need at issue). The City claims there is no constitutional "requirement that the relocation payment must be spent on relocation expenses," City Brief at 35, but that is exactly the sort of connection that *Dolan* requires. 512 U.S. at 393.

Secondarily, the City argues that tenants necessarily incur relocation expenses after an owner-move in, and thus, that requiring a payment addresses that need, whether not tenants use the exact funds from the payment for housing. This logic rests on the premise that tenants incur *new* "unanticipated" housing expenses after an owner move-in. City Brief at 35-36. As noted above, the premise is wrong. The Ballingers' tenants did not acquire new housing costs when the Ballingers' moved in and the lease ended. At that point, they had the same budgetary needs as when renting the Ballinger house; i.e., a need to pay monthly rent, utilities etc. The only difference is that the tenants had to pay those expenses elsewhere. Since the Ballingers did not cause

new tenant housing costs, there is no nexus between an exaction addressing that concern and their move-in.

Finally, the City fails to show that the tenant payment exaction is proportionately related "in degree" to the impacts of their move-in. The payment forces them to pay tenants far more money than the $500.00 it takes to physically move the tenant.[6] The City admits that the exaction is meant to assist tenants with "average move-in costs" of between $6,000-$9,375, and the record shows that all but $500.00 of this amount is accounted to City housing costs. City Brief at 33. But, again, the City has no evidence that owner move-ins cause the costs (i.e., high city rental/utility costs) that account for the tenant payment amounts above $500.00.

[6] The Ballingers do not concede that an owner-move causes a tenants' need to move and actual moving costs. Those costs are the inevitable result of tenants signing a temporary lease. However, even if the Ballingers are wrong on this point, the tenant payment exaction is disproportionate because it exacts an amount far beyond actual moving costs.

The payment is also disproportionate "in degree" because it fails to account for the fact that the Ballingers' tenants got back their deposit, and the sums they previously used to rent the Ballingers' home, when the lease ended. Here, the Ballingers' software industry tenants paid $3,395 rent per month while the one-year lease was in effect. ER at 60. They also paid a deposit of $3,395. *Id.* When the lease ended, the tenants regained the deposit, and no longer needed to use $3,395 to satisfy the Ballinger lease. They also had the money they had previously spent on utilities available for new utilities. That gave them more than $6,790 to relocate. Even if one assumes the Ballingers had a duty to provide the couple with a replacement three bedroom home (they did not), and that the tenants needed $9,500 to rent such unit (as the City calculates), the tenants' relocation funding need would be $3,340 or less, i.e., the unit cost of $9,500 minus $6,790 (the amount returned to tenant budget after lease ends). But the payment taken from the Ballingers' was for $6,528. That is about twice as much as the $3,340 need, a disproportionate demand.[7]

[7] Amicus Western Center on Law and Poverty contends that the extra money is needed because tenants may not get their deposit back until a few weeks after they vacate a unit, but their need to relocate is immediate. Amicus Brief at 13. Amicus does not explain what happens when the landlord is set to return the deposit few days or weeks later. Do

Dolan, 512 U.S. at 393. The fact that the Ballingers' tenants regained their deposit, and the amounts they previously used in the Ballingers' lease, means the Ordinance gave them far more than any possible relocation cost.

III.

THE CITY HAS FAILED TO SUPPORT THE DISMISSAL OF THE FOURTH AMENDMENT SEIZURE CLAIM

The City does not deny that the Ballingers' money is property covered by the Fourth Amendment's protection against unreasonable seizures. Yet, it contends that the Ballingers' Fourth Amendment seizure claim fails because requiring a transfer of funds to tenants is not "state action" and that the transfer is "reasonable" in any case. City's Brief at 39-40. Both points are unsupportable. The transfer of thousands of dollars of the Ballingers' funds occurs only because the City, a political subdivision of the State, enacted a law that requires it and penalizes

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the tenants allow their former landlord to keep the deposit because the landlord effectively "fronted" the money pursuant to the Ordinance? There is no requirement in the Ordinance along these lines and the Ballingers' tenants certainly did not take such a step. This means that the payment scheme is ultimately disproportionate. The tenants effectively get their deposit back twice—under the payment mandate when they leave and when the landlords return the original deposit.

owners who do not pay up. This act of law is "obviously is the product of state action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) (stating "the procedural scheme created by the statute obviously is the product of state action"); *Coral Constr. Co. v. King Cty.*, 941 F.2d 910, 926 (9th Cir. 1991) ("Actions taken pursuant to a municipal ordinance are made 'under color of state law' sufficient to trigger potential liability."), *overruled on other grounds by Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019); *Brown v. City of Lake Geneva*, 919 F.2d 1299, 1301 (7th Cir. 1990) ("no question" that plaintiffs alleged "action taken under color of state law"[8] in challenging an ordinance on constitutional grounds.).[9]

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[8] Like the "state action" requirement of the Fourteenth Amendment, the "color-of-state-law" element in Section 1983 law does not reach "'merely private conduct.'" *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)). Indeed, when there is an alleged deprivation of rights protected by the Fourteenth Amendment, the two concepts converge. *See Lugar*, 457 U.S. at 935 n.18.

[9] The City relies on two inapposite cases, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999), and *Fournier v. Cuddeford*, 573 F. App'x 641, 642 (9th Cir. 2014)). City Brief at 40. In Sullivan, employees challenged a law authorizing an employer to withhold workers compensation payments. *Sullivan* found no state action because the ultimate decision whether to withhold compensation "turns on . . . judgments made by private parties without standards established by the State." *Id.* at 52. In contrast, here the Ordinance compels the payment and sets the rules for its distribution. *Fournier* may be even less relevant.

As to reasonableness, the City argues "the Ordinance effectively mitigates the impacts of tenant relocations caused by owner move-in evictions, and the Ordinance is reasonable in its operation." City Brief at 41. Not so. The Ordinance is ineffective because it does not require tenants to spend the money on relocation needs and it is unreasonable in operation because the Ballingers' move-in did not cause the tenant relocation needs or housing expenses the payment mitigates.

CONCLUSION

The Court should reverse the dismissal of the Ballingers' claims and remand for further proceedings.

DATED: April 10, 2020.

Respectfully submitted,

J. DAVID BREEMER
DANIEL M. ORTNER

s/ J. David Breemer
J. DAVID BREEMER

Attorneys for Plaintiffs – Appellants Lyndsey Ballinger and Sharon Ballinger

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That case involved a dispute caused by a landlord's attempted self-help eviction. In finding no state action, this Court noted that an officer summoned to the scene did not cause or participate in the confrontation and was not responsible for the landlord's actions. *Fournier*, 573 F. App'x at 642.

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS
9th Cir. Case Number 19-16550

I am the attorney or self-represented party.

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