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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LYNDSEY BALLINGER and SHARON BALLINGER,

Plaintiffs,

v.

CITY OF OAKLAND,

Defendant.

No. 4:18-cv-07186-HSG

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT**

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## I.

## INTRODUCTION

This case challenges the City of Oakland's (City) Uniform Residential Tenant Relocation Ordinance (Ordinance), which requires rental property owners to pay thousands of dollars to existing tenants before they may repossess and use their property for their own, non-rental purposes. The City claims that the payment requirement is designed to assist with tenants' moving expenses, but there is no requirement that the tenants use the money for that purpose. Nor is there any mechanism for accountability, or any controls to ensure that the Ordinance serves low-income tenants. In this case, the Ordinance required Lyndsey Ballinger and her wife Sharon Ballinger (the Ballingers) to pay over $6,000 to their software industry tenants before the Ballingers could return to, and live in, a small Bay Area home that they had rented out during a temporary East Coast assignment.

The Ordinance-mandated "relocation" payment was an unexpected expense and a hardship for the military family. It was also an unconstitutional and illegal imposition on the Ballingers' property rights, for multiple reasons. For example, the law effected an unconstitutional physical taking of the Ballingers' funds for the private use of their former tenants, imposed an unconstitutional condition on their state law right to remove their home from the rental market so they could use it, unreasonably seized their property, retroactively interfered with their lease (which was executed prior to the Ordinance) and property rights, and violated rights protected by California's Ellis Act. At bottom, the Ordinance unconstitutionally required the Ballingers to remedy a Bay Area affordable housing problem that they did not cause as landlords, through a payment mechanism that does not actually address that problem.

In its motion to dismiss, the City argues primarily that claims should be dismissed under the ripeness principles in *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). It does not argue that the City failed to make a

"final decision," *id.* at 186-92, but only that the case is not ripe because the Ballingers did not sue first in state court in compliance with *Williamson*'s second ripeness concept. *Id.* at 194-96. It is wrong. *Williamson County*'s state remedies requirement does not apply to non-takings claims, facial claims, or to claims that seek equitable relief. Even in the takings context, *Williamson County* is merely a discretionary prudential rule that should not be applied here to split the Ballingers' claims into parallel state and federal actions. Finally, in the event the Court believes that *Williamson County* may hinder the case, it should withhold a decision until the United States Supreme Court issues its pending decision in *Knick v. Township of Scott, Pennsylvania*, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, No. 17-647, 2018 WL 1143827 (U.S. Mar. 5, 2018), which asks the Court to overrule *Williamson County*'s second prong. On the merits, the City fails to show that the Ballingers lack viable claims.

## II.

## STATEMENT OF FACTS

The facts in this case, which must be taken as true at this stage, are clear and troubling. At the time the Ordinance was adopted, the Ballingers were majors in the United States Air Force. Complaint ¶ 24. They owned a single-family home in Oakland. *Id.* ¶ 23. When they were transferred to the Washington, D.C., area, the Ballingers negotiated a one-year lease ending in late 2017, and converting to a month-to-month tenancy thereafter. *Id.* ¶ 26. They chose this form of a lease because they anticipated that they would be reassigned to the Bay Area soon after their duty on the East Coast ended.

In January 2018, after the Ballingers executed the lease, the City of Oakland adopted the Ordinance. Complaint ¶ 12. The Ordinance requires property owners who want to take their property off the rental market, in order to move in themselves (or a relative), to make a cash "relocation" payment to their tenants. *Id.* ¶ 13. The Ordinance allows no exceptions, does not require tenants to use the money for moving

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expenses, and contains no mechanism to track whether tenants actually use the money for housing purposes. *Id.* ¶ 20.

The amount of the payment varies depending upon the size of the unit and the length of time a tenant has occupied the unit. *Id.* ¶¶ 13-17. Criminal, civil, and administrative penalties apply if a property owner does not comply. *Id.* ¶ 21. Dealing with a new baby and needing to move back into their home, the Ballingers had no choice but to comply with the Ordinance mandate. They therefore paid their tenants $6,582.40, in order to terminate the lease (which was month-to-month at that point), and move into their home.

## III.

## ARGUMENT

### A. Plaintiffs State a Facial Claim for a Taking of Private Property for a Private Purpose

The Ballingers initially claim that the Ordinance causes a facial physical taking of their property (monetary funds) for private purposes. *See generally Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321-22 (2002) (distinctions between physical and regulatory takings); *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (discussing private purpose takings). In *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the Supreme Court determined that money is property protected by the Takings Clause. *Id.* at 235. In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 613-14 (2013), the Court confirmed that discreet sums of money tied to the use of private property is constitutionally protected "property." *Id.*

While the government may physically take private property for public use upon payment of compensation, it may not take property for a private use, regardless of compensation considerations. *Kelo*, 545 U.S. at 477. The Ordinance violates this constitutional principle on its face. It forces the Ballingers to pay more than $6,000 to private tenants with no strings attached. The money does not go to the City nor does

the City control how it is used. It is a pure, private-to-private transfer of funds compelled by the City's law, under penalty of criminal, administrative, and civil penalties. Ordinance Article VIII, §§ 8.22.860 & 8.22.870. This is a relatively rare example of a taking that does not serve or benefit the public and is therefore unconstitutional. *Kelo*, 545 U.S. at 491-92 (Kennedy, J., concurring).

**B. The Ballingers State Valid Regulatory Claims**

**1. The Ordinance Fails *Nollan/Dolan* on Its Face and As-Applied to the Ballingers**

If the Ordinance takes the Ballingers' funds for a public use, it nevertheless fails as an unconstitutional exaction under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Generally speaking, the unconstitutional conditions doctrine prohibits the government from compelling a citizen to give up a constitutional right to secure a government benefit or permit. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 56-60 (2006).

*Nollan* and *Dolan* "'involve a special application' of this [unconstitutional conditions] doctrine," in the context of the use of private property. *Koontz*, 570 U.S. at 604. *Nollan* limited the government's ability to condition the use of private property on the owners' dedication of a property interest for the public good. Where the outright seizure of a property interest would be unconstitutional without just compensation, a land use condition that demands the same interest remains unconstitutional unless there is an "essential nexus" between the purpose of the condition and the impact of an applicant's use of property. *Nollan*, 483 U.S. at 833-37. *Dolan* added that a property condition must be roughly proportionate in nature and extent to the property's use. 512 U.S. at 391.

In *Koontz*, the Court made held an exaction of money is indeed a taking subject to *Nollan* and *Dolan's* heightened scrutiny. *Koontz*, 570 U.S. at 612; *see also id.* at 620-22 (Kagan, J., dissenting).

*Nollan* requires a direct, "reasonable relationship" between the property use at issue here, the withdrawal of rental units, and the purpose of the exaction. *See Parks v. Watson*, 716 F.2d 646, 651-53 (9th Cir. 1983). The tenant payment condition here is, of course, intended to address the "shortage of decent, safe, affordable and sanitary residential rental housing." Ordinance Article I, § 8.22.010. *See, e.g.*, *id.* Article V, § 8.22.610(A) ("There is a very significant demand for rental housing in Oakland leading to rising rents, caused in part by the spillover of increasingly expensive housing costs in San Francisco."). Thus, to apply *Nollan*, the Court must consider whether people who convert their temporarily rented homes into personal homes cause the housing problem sought to be redressed by the Ordinance's payment mandate. *Nollan*, 483 U.S. at 838-39. *Dolan* requires the Court to consider whether the required relocation exaction is proportional "in nature and extent" to the impact of a property owner's use. *Dolan*, 512 U.S. at 391.

The constitutionally mandated, direct connection between the Ballingers' activity and the relocation payment mandate simply does not exist. *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1085-86 (N.D. Cal. 2014).[1] The City does not claim, much less point to evidence, that the relatively few property owners who withdraw their homes from the rental market are responsible for the high cost of housing in Oakland. There is no "essential" nexus between the Ballingers' removal of their home from the market and a condition designed to lessen the cost of City

[1] The City seeks to undercut *Levin* by pointing to the now-appealed decision in *Building Ind. Ass'n – Bay Area v. City of Oakland*, 289 F. Supp. 3d 1056, 1057-58 (N.D. Cal. 2018). *BIABA* criticizes portions of Judge Breyer's opinion. But that criticism is itself suspect and should be ignored since it appears to derive from the *BIABA* judge's prior occupation as a San Francisco city attorney during *Levin* and his related, latent animosity toward Judge Breyer's decision against San Francisco. *See Building Ind. Ass'n – Bay Area v. City of Oakland*, Ninth Circuit Case No. 18-15368, Docket Entry No. 14, at 38 (July 27, 2018) (transcript of district court argument) (Judge Chiabra: "You know . . . I was involved in the drafting of the ordinance that Judge Breyer struck down. *Levin*. Terrible decision, terrible decision."); *id.* at 37 ("Maybe there's a Judge Breyer exception . . . either because he's been on the bench for so long or he has a close family relationship to a member of the Supreme Court . . . .").

housing. *See Coyne v. City & Cty. of San Francisco*, 9 Cal. App. 5th 1215, 1230 (2017) (finding that "spiraling rents had no relationship to the adverse impacts caused by a landlord's decision to exit the rental market").

Even if there was a real connection between the removal of housing from the rental market and purposes of the payment mandate (there is not), the Ordinance is a disproportionate means of advancing affordable housing goals because it does not even require payees to spend the exacted funds on housing. Despite the stated goal of helping tenants with housing costs, Ordinance Article VIII, § 8.22.850(A)-(D), tenants can use the funds to buy a new car or to take a vacation in Fiji. Such a payment scheme does nothing to bridge the gap between potential tenants and the high housing costs—costs created by market forces (Google, et al.) not couples who simply seek to move back into their own home after temporary lease. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way . . . ." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The requirement of relocation payments for owner or relative move-ins do not satisfy either *Nollan* or *Dolan*, and the Ballingers are entitled to equitable relief on their facial claims and damages under their as-applied unconstitutional conditions claim.

**2. *Nollan* and *Dolan* Apply to Legislative Conditions That Lack Any Connection to the Impact of Property Use**

The City argues that *Nollan* and *Dolan*'s tests do not apply to the relocation payment mandate because a legislature is the body that imposed the suspect condition. Motion at 9:1-7. It is wrong. The Ninth Circuit long ago held that *Nollan* and *Dolan* apply to legislatively imposed property exactions.[2] *See Commercial*

[2] The City suggests that the land use "coercion" which the *Nollan* and *Dolan* tests are designed to address is not present in the context of legislated exactions. It is wrong. The Ordinance compels rental property owners to pay tenants to re-possess property through the threat of continued unwanted occupation and substantial civil penalties. Ordinance Article VIII, §§ 8.22.860, 8.22.870; Motion at 7. This legislated coercion is

*Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 873-76 (9th Cir. 1991). Moreover, the unconstitutional conditions doctrine that underlies *Nollan* and *Dolan* has never varied based on the governmental source of the exaction condition. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-49 (2001); *Rust v. Sullivan*, 500 U.S. 173, 177, 196-99 (1991); *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 400 (1984); *Legal Aid Services of Oregon v. Legal Services Corp.*, 608 F.3d 1084, 1093-94 (9th Cir. 2010).

The City relies on *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), for the proposition that "generally-applicable legislation is not subject to an exaction analysis." Motion at 9:1-2. In *McClung*, it was not clear that the requirement at issue was an exaction, rather than a standard land use control. *See* 548 F.3d at 1227-28. Further, the court acknowledged it is not confronted with "a legislative development condition designed to advance a wholly unrelated interest." *Id.* at 1225 n.3. Thus, the court left room for an unrelated condition, such as the one in the Ballingers' case, to be subject to *Nollan* and *Dolan*. And finally, *McClung* did not overrule *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991).

The Ninth Circuit's decision in *Horne* further shows that *Nollan/Dolan* applies to legislative enactments. *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1144 (9th Cir. 2014), *rev'd on other grounds*, 135 S. Ct. 2419 (2015). In that case, the Ninth Circuit found that *Nollan/Dolan* applied to an ordinance which imposed an industry-wide use restriction. It emphasized that *McClung* applied only in the land permitting context "because the development of each parcel is considered on a case-by-case basis." *Id.* And while the Ninth Circuit's decision was overturned on other grounds, the

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no different, for Takings Clause purposes, than an adjudicative decision that makes a permit contingent on compliance with an exaction. In both cases, a property owner cannot put property to a desired personal use until they submit to a demand for a concession. *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1116-18 (1995) (Justice Thomas, with whom Justice O'Connor joins, dissenting on petition for writ of certiorari).

Supreme Court's decision does not undermine the Ninth Circuit's conclusion on the applicability of *Nollan/Dolan* to legislative enactments outside of the land development context. *See Rouch v. Enquirer & News of Battle Creek*, 357 N.W.2d 794, 802 n.10 (Mich. Ct. App. 1984) ("[O]ne overruled proposition in a case is no reason to ignore all the other holdings appearing in that decision.").

The City also suggests that facial *Nollan/Dolan* claims are not viable. Motion at 7:13-20. This is simply a re-packaged version of its argument that legislative conditions are exempt from *Nollan* and *Dolan*, and fails for the reasons stated above. *See Commercial Builders of Northern California*, 941 F.2d at 872-76. Further, contrary to the City's claim, the Ballingers' facial challenge does not raise intensely factual issues relating to the amount of the exaction[3] or otherwise. It is true that the Ninth Circuit's fractured decision in *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998), rejects fact-based *Dolan* "rough proportionality" claims raised on a facial basis. *Id.* But this has little import here. *Garneau* does not question the viability of *Nollan*-based facial claims—the proper result given the prior *Commercial Builders* decision—and the Ballingers' facial and as-applied constitutional exactions claim is premised heavily on the lack of a *Nollan* nexus. Moreover, the City's mistaken "no facial claims" arguments are irrelevant to the Ballingers' as-applied exactions claim.

### C. Plaintiffs State a Viable *Penn Central* Regulatory Takings Claim, As-Applied to the Ballingers

*Nollan* and *Dolan* should control here, but if they do not the Ballingers allege that the relocation payment causes a regulatory taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). A regulatory taking occurs when a law or rule restricting property is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner." *MHC*

[3] The Ballingers' *Nollan/Dolan* exaction claims do not rest on the amount of the payment condition, but primarily on its lack of a relationship to the Ballingers' decision to re-possess their property and the lack of any requirement that the payment be used for housing.

*Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)). In *Penn Central*, the Supreme Court identified several factors "that have particular significance" including (1) "the economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124.

Here, all of these factors favor the Ballingers. First, the economic impact of the regulation on the Ballingers is steep. Being required to add an unexpected $6,000 payment—the equivalent of almost two months of rental income—on top of the cost of a cross-country move is "a substantial sacrifice for a young Bay-area family on a military salary." Complaint ¶¶ 3-4.

Second, the Ballingers have "distinct investment-backed expectations" of being free to return to their own property without being compelled to pay thousands of dollars out of their pocket. After all, they leased their home prior to the Ordinance's enactment. The City argues that they lack reasonable expectations because real property is a "regulated field" and so owners "cannot object when regulation is later imposed." Motion at 13 (citing *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015)). This is meritless. The investment-backed expectations analysis often hinges on the timing of the challenged restriction relative to property use and investment. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633-34 (2001). Reasonable and protected expectations typically exist when a property owner bought property and made investment decisions before enactment of a restriction interfering with their investment. That is the situation here. The generalized possibility of regulation has never been enough to defeat expectations arising from specific investments made before the existence of the challenged restriction. The payment mandate at issue here was not in place when the Ballingers bought their home or leased it, and was not reasonably foreseeable, as the City has never previously adopted a law like the Ordinance at issue. Indeed, for more than 30 years, the Ellis Act has led property

owners to reasonably expect that they will not be "compel[led] . . . to offer, or continue to offer, accommodations in the property for rent or lease," Cal. Gov't Code § 7060(a), or be subject to unreasonable conditions. Given the timing of their lease and absence of any relocation payment law at the time, the Ballingers had reasonable expectations that they were free to lease their home and then take their unit off the market and to live there without the imposition of an onerous tenant payment fee.

Similarly, because the Ordinance prevents the Ballingers from taking possession and occupying their own property, its "character" is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner." *MHC Fin. Ltd.*, 714 F.3d at 1127 (quoting *Lingle*, 544 U.S. at 539). Unlike other measures which merely "adjust[s] the benefits and burdens of economic life to promote the common good," *id.* at 1128 (quoting *Penn Central*, 438 U.S. at 124), the Ordinance ousted the Ballingers from their own property, and forced an unwanted occupancy on them until they paid thousands of dollars in additional out-of-pocket expenses. The Ordinance accordingly effects a regulatory taking as applied to the Ballingers.

**D. Plaintiffs' Claims Are Properly Presented and Ripe**

The City argues that the Ballingers' claims are not ripe. It is mistaken. Facial takings and other claims become ripe upon "enactment" of a challenged law. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 495 (1987). There is no question that the Ordinance at issue here was formally and finally enacted. *Williamson County* does not change this, because its state compensation ripeness doctrine is inapplicable to facial claims. *Washington Legal Found. v. Legal Found. of Washington*, 236 F.3d 1097, 1104 (9th Cir.), *on reh'g en banc*, 271 F.3d 835 (9th Cir. 2001), *aff'd sub nom. Brown v. Legal Found. of Washington,* 538 U.S. 216 (2003) (emphasizing that *Williamson County* "does not exclude from federal court a claim for declaratory and injunctive relief to establish that a state law, on its face, violates the

Fifth Amendment"). One of the reasons for this understanding of *Williamson County* is that facial Takings Clause claims do not seek "just compensation;" they seek equitable relief only. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992) ("As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe."). Because compensation is not an element of the claim, *Williamson County*'s "seek compensation" rule does not apply.

Although *Williamson County* generally applies to as-applied takings claims seeking damages, it is not applicable here for prudential reasons. It is now clear that *Williamson County* is not jurisdictional; it is a prudential rule that allows federal courts to use their discretion to grant review. *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 (2013); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. at 734; *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc). In considering whether a court should require use of state compensation remedies under *Williamson* for prudential reasons, courts typically consider the posture of the claims, hardship of withholding review, judicial economy, and other fairness considerations. *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1109 (N.D. Cal. 2007) (remanding the case would create "extreme wastefulness and hardship); *DW Aina Le'a Dev., LLC v. Hawaii Land Use Comm'n*, No. CV 17-00113 SOM-RLP, 2017 WL 2563226, at *3 (D. Haw. June 13, 2017); *Aiuto v. San Francisco's Mayor's Office of Hous.*, No. C 09-2093 CW, 2010 WL 1532319, at *4 (N.D. Cal. Apr. 16, 2010) (not prudent to apply *Williamson County* because the plaintiffs had "substantially satisfied the *Williamson* requirement"); *Alpine Vill. Co. v. City of McCall*, No. 1:11-CV-00287-BLW, 2011 WL 3758118, at *2 (D. Idaho Aug. 25, 2011) (citing *Suitum v. Tahoe Reg'l Planning Agency* for the proposition that *Williamson County* ripeness is prudential).

All prudential considerations weigh in favor of holding that the Ballingers' taking claims are ripe without state court litigation. The claim is concrete. The claims

arise from a duly adopted ordinance that plainly requires property owners to pay tenants thousands of dollars to move out of their homes, when the owners seek to occupy the property. Further, the issues are capable of resolution now. The Ordinance has been enacted and applied, it provides no compensation or means to seek it administratively, and, in fact, the City denies that there is any compensable taking at all. There is a great risk that unfairness and hardship will result if the Court requires the Ballingers to split their takings claims from other claims to pursue state court litigation. Creating two parallel (federal/state) suits arising from the same City actions is inefficient and unwise. *See Archbold-Garrett v. New Orleans City*, 893 F.3d 318, 324-25 (5th Cir. 2018).

If the Court disagrees and believes *Williamson County*'s state remedies requirement applies here, it should withhold the decision until the Supreme Court decides whether to overturn (or otherwise modify) *Williamson County*'s state litigation prong in the pending case of *Knick v. Township of Scott, Pa.*, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, No. 17-647, 2018 WL 1143827 (U.S. Mar. 5, 2018).

**E. The Ordinance Violates the Due Process Clause**

The Due Process Clause protects individuals from being deprived of protected property interests in an arbitrary manner. *Lingle*, 544 U.S. at 548. The Takings Clause does not cover irrational or arbitrary government behavior. *Id.* at 542-44 Therefore, contrary to the City's position, Takings Clause claims do not subsume due process claims based on arbitrariness. *Crown Point Development v. City of Sun Valley*, 506 F.3d 851, 855-56 (9th Cir. 2007). The Ballingers' substantive due process claim stands on its own and must be analyzed independently from any takings claim. *Id.*; *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948, 960 (9th Cir. 2011). Here, Oakland's Ordinance fails due process standards as applied to the Ballingers because it retroactively deprives the Ballingers of their property rights in an irrational and unconstitutional manner. The Ballingers are accordingly entitled to both injunctive and monetary relief to remedy their injury.

### 1. The Ordinance Fails Robust Rational Basis Scrutiny Because of Its Retroactive Effect

One of the more striking features of the Ordinance is its ability to effect and unsettle leases and related property expectations created before the Ordinance's adoption. Oakland City Ordinance § 15.60.110. Retroactivity is, of course, "generally disfavored in the law . . . in accordance with 'fundamental notions of justice' that have been recognized throughout history." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). The Supreme Court's "decisions treat due process challenges based on the retroactive character of the statutes in question as serious and meritorious, thus confirming the vitality of our legal tradition's disfavor of retroactive economic legislation." *Eastern Enterprises*, 524 U.S. at 548 (Kennedy, J., concurring). Thus, while rational basis scrutiny applies to most due process challenges, a robust form of that review controls claims based on retroactivity. *Id.* Courts give "careful consideration to due process challenges to legislation with retroactive effects." *Id.* at 547.

The City argues that Oakland's Ordinance is not retroactive. But an ordinance need not be "explicitly retroactive" in order to be constitutionally dubious. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 268 (1994). The key question is whether the Ordinance "affect[s] vested rights and past transactions." *Id.* at 268-69. In this case, the Ballingers have made a facially plausible claim that the Ordinance interferes with vested contractual and property rights. Knowing that they would likely return to the Bay Area, the Ballingers negotiated with their tenants and crafted a lease agreement that would allow them to return and reclaim their home. The Ordinance thus attaches new legal consequences to the Ballingers' exercise of their preexisting contractual and legal right to return and occupy their unit. Plaintiffs entered into their lease agreement in full expectation that they would be able to return to their unit without penalty and are retroactively being forced to bear the costs of a rental housing problem

they did not create. The Ordinance interferes with preexisting rights and expectations without any legitimate basis for doing so.

The City does not and cannot contend retroactive payment obligations are necessary to secure its affordable housing goals. Since the Ordinance interferes with preexisting rights and expectations without any identified or legitimate basis, the due process claim must go forward.

**2. The Ordinance's Unusual Nature Defeats Dismissal**

Aside from its fatal retroactivity problems, Oakland's Ordinance also fails even under a more deferential rational basis review. The rational basis test's deferential standard may be refuted by evidence showing that the purpose of the regulation is illegitimate or its foundation is irrational. *See, e.g.*, *Williams v. Vermont*, 472 U.S. 14 (1985) (statute giving favorable tax treatment to Vermont residents, but not non-residents, who registered vehicles purchased in other states not rationally related to purpose of road maintenance).

The City argues that since the Ninth Circuit has upheld rent control ordinances as rational, the rationality of the tenant relocation payment must be presumed. Motion at 14. But that argument fails because it ignores important differences between the City's relocation payment scheme and rent control. Most importantly, rent control is more directly connected to the goal of minimizing tenant housing costs. In contrast, the Ordinance's payment requirement has no connection to such costs because it can be used by tenants for anything, anywhere. Rather than controlling rent, the Ordinance effectuates a direct transfer payment from certain landlords to certain tenants without regard to whether the money is ever utilized in connection with rental payments or any other housing costs. Moreover, while rent control merely reduces the amount of money a landlord takes from paying tenants, the Ordinance requires them to affirmatively invest in tenants who are leaving. This scheme is both unusual and irrational. "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid

private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law . . . ." *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874).

The City provides "no legal or logical authority for the proposition that a government's ability to regulate [rental] market prices implies an authority to require an affirmative lump-sum payment" that need not be used for rental costs. *Levin*, 71 F. Supp. 3d at 1088. The Ballingers have stated a valid claim that the Ordinance irrationally deprives the Ballingers of property interests by retroactively and irrationally burdening the lease with their tenants and their ability to use and occupy their private property.

**F. The Ordinance Is an Unconstitutional Seizure of the Ballingers' Property**

The Fourth Amendment applies to "seizures in the civil context" as well as the criminal context. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 51 (1993). It also applies to seizures of property even when "privacy or liberty is not [also] implicated," and even when the government has not conducted a search. *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 65, 68 (1992). A "seizure" is "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).

Oakland's Ordinance meaningfully interferes with the Ballingers' property interests in their real and personal property. Oakland's Ordinance directly interfered with the Ballingers' ability to possess their home by imposing a $6,000 ransom as the price to evict persons authorized by the City to occupy the home until payment was made. *Soldal*, 506 U.S. at 69 ("[T]he right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to . . . verify compliance with a housing regulation . . . ."); *see also Miranda v. City of Cornelius*, 429 F.3d 858, 860 (9th Cir. 2005) (the impounding of a car subject to an administrative fee constituted a Fourth Amendment seizure) The City's Ordinance coerced the

Ballingers to submit to the continued, unwanted occupation of their home, unless and until they handed over substantial sums of money to the tenants. It will require the same if they rent again.

The City argues that the Fourth Amendment does not apply because the City did not itself dispossess the Ballingers of their property. Motion at 16. But the seizure concept is not limited to instances where the government physically invades property by and through its own agents. It applies just as well when the government authorizes third parties to seize property for the government's purposes. *See Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006) (concluding that a seizure occurred when a city encouraged the public to repeatedly trespass on private property even though there was no government compulsion); *Severance v. Patterson*, 566 F.3d 490, 502 (5th Cir. 2009) (seizure existed when the government imposed an easement over beachfront land which restricted the owner's ability to use the property); *United States v. Place*, 462 U.S. 696, 705 (1983) (explaining that a "seizure may be made after the owner has relinquished control of the property to a third party"). Again, the City authorized the continued, unwanted occupation of the Ballingers' home and violation of the lease terms, until the Ballingers paid off the tenants. *See Koontz*, 570 U.S. at 608-09 (option to pay money to end a deprivation of property rights does not alleviate the constitutional injury). In effect, the City forced the Ballingers to choose between one of two City-authored seizures: the seizure of the home by tenants or the seizure of the Ballingers' money for unfettered use by the tenants. Both forms of interference (with the home and money) interfere with the Ballingers' property and trigger Fourth Amendment protections.

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)). This test requires "balancing [the] intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate

governmental interests." *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). Here, Oakland's Ordinance restricts one of the core elements of ownership of property—the right of possession—and so the Fourth Amendment interests are high. Furthermore, the length of the seizure is of potentially unlimited duration. *See Prouse*, 440 U.S. at 653 (describing the length of the seizure as a factor to weigh in the reasonableness calculation). In contrast, the Ordinance fails to effectively advance the City's interest in combating the high cost of rental properties in the Bay Area. *See Coyne*, 9 Cal. App. 5th at 1230 (finding that "spiraling rents had no relationship to the adverse impacts caused by a landlord's decision to exit the rental market"). The City also fails to explain why a seizure of property is necessary at all when any tenant relocation costs could be paid through a general assessment or through reimbursement payments for actual expenses without preemptively seizing real property. Furthermore, the City's interest in the seizure is particularly weak in light of the fact that the money seized need not be used for housing, but can be used for any purpose. For all of the foregoing reasons, the Ballingers have stated a viable as-applied claim that the Ordinance violates the Fourth Amendment and are entitled to injunctive and monetary relief on this claim. *Larez v. City of Los Angeles*, 946 F.2d 630, 640 (9th Cir. 1991) (compensatory relief is a proper remedy for an unreasonable seizure).

**G. The Ordinance Interferes with the Contract Clause**

The Constitution protects the right of contract by guaranteeing that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. "[T]he Contract Clause limits otherwise legitimate exercises of state legislative authority." *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 21 (1977). "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Id.* at 22. If an ordinance "operate[s] as a substantial impairment of a contractual relationship," then the government must show whether "the state law is

drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Sveen v. Melin*, 138 S. Ct. 1815, 1817 (2018) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978), and *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983)). An ordinance substantially impairs contractual relationships to the extent that it "undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Id.* at 1822.

The City argues that its Ordinance does not "substantially impair" the contractual relationship because the "Plaintiffs' ability to evict their tenants and move back in to their unit without paying the relocation payment" is not a "central provision" of the contractual agreement. Motion at 17. The City is wrong.

It is well-established in California and elsewhere that "the rent to be paid, the time and manner of payment, and the term for which the tenant will rent the property" are among the material terms of a lease. *Golden W. Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 30 (1994) (citation omitted). The $6,000 payment required by the Ordinance is tantamount to requiring the Ballingers to let their tenants remain in their home rent free for a period of several months that therefore substantially interfered with key aspects of the lease agreement. Furthermore, the Ballingers entered into their lease agreement with the mutual understanding that the Ballingers would be free to move back into their unit after the expiration of the one year lease. Complaint ¶¶ 25-26. Because the Ballingers could anticipate returning to the Bay Area in short order, their ability to return to their home was not of secondary concern to the Ballingers.

The City also argues that since the relationship between tenants and landlords is highly regulated, the Ballingers should have anticipated changes to the terms of their lease agreement. While it is true that many aspects of the landlord-tenant relationship are regulated, an ordinance that retroactively imposes a large ransom requirement to terminate the lease (in contravention of lease expectations) is unusual,

*Levin*, 71 F. Supp. 3d at 1080, and in tension with the protections for rental owners in the Ellis Act. Accordingly, as-applied to the Ballingers, the Ordinance violates the Contract Clause.

**H. Plaintiffs State an As-Applied Claim That the Ordinance Violates the Ellis Act**

The 1984 Ellis Act provides, in part, that no public entity may "compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease, except for [certain] guestrooms or efficiency units within a residential hotel." Cal. Gov't Code § 7060(a). Since the Ellis Act's enactment, California courts have routinely found that "the act bars local ordinances that condition a residential landlord's right to go out of business on compliance with requirements that are not found in the Ellis Act." *Reidy v. City & Cty. of San Francisco*, 123 Cal. App. 4th 580, 588 (2004), *as modified on denial of reh'g* (Nov. 23, 2004). If Oakland's Ordinance "conflicts with state law, it is preempted by the state law and is void." *Pieri v. City & Cty. of San Francisco*, 137 Cal. App. 4th 886, 889 (2006). "Local legislation contradicts state law when it is inimical to it." *Reidy*, 123 Cal. App. 4th at 587.

The City attempts to dodge the Ellis Act by arguing that the Ballingers have failed to "invoke [their] right under the Ellis Act." Motion at 19. But, the Ballingers have complied with all of Oakland's requirements concerning tenant relocation and are therefore fully entitled to invoke the Ellis Act. *See* Complaint ¶¶ 27-32 & Exhibit C (sixty-day notice provided and relocation payment paid in a timely fashion). In any event, the Ballingers were not required to exhaust the City's administrative remedies since the City has "no discretion to waive" the fee or determine whether its Ordinance is "preempted by the Ellis Act." *Reidy*, 123 Cal. App. 4th at 594.

The City believes the condition is consistent with the Act due to a provision stating the Act does not alter "any power in any public entity to mitigate any adverse

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impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations." Cal. Gov't Code § 7060.1(c). But "[t]he Ellis Act does not permit the City to condition plaintiff's departure upon the payment of ransom." *Bullock v. City & Cty. of San Francisco*, 221 Cal. App. 3d 1072, 1101 (1990). Specifically, the Ellis Act does not allow relocation payments that go beyond the need "to provide mitigation to tenants actually displaced by a conversion." *Id.* This exception does not allow municipalities to "require the owner to make expenditures that benefit society at large." *Id.* In this case, the tenant relocation payment granted a windfall to the Ballingers' tenants at the Ballingers' expense, without regard for the tenants' economic need (or lack thereof) and without any strings attached to their use of the money. This is not reasonable mitigation; it punishes Plaintiffs for trying to go out of the market under the Ellis Act, and puts the Ellis Act out of their reasonable grasp. *See Coyne*, 9 Cal. App. 5th at 1226 (holding that a relocation payment that places a "prohibitive price" on exiting the rental market is preempted by the Ellis Act). It thus violates that Act and is invalid. *See also City of Santa Monica v. Yarmark*, 203 Cal. App. 3d 153, 164-65 (1988) (striking down an ordinance that limited and conditioned withdrawal of the rental units from the market).

## I. Injunctive Relief Is Proper Because the Ballingers May Be Forced to Relocate Again

The City argues that the Ballingers are not entitled to declaratory or injunctive relief. But the Ballingers are in fact entitled to injunctive and prospective relief because they have suffered a "concrete and particularized" harm and there is "a sufficient likelihood that [they] will again be wronged in a similar way." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). The Ballingers remain the owners of a property in Oakland. Although the Ballingers anticipate remaining in their home for the foreseeable future, the Ballingers' Active Duty status in the United States Air Force means that they may be once again transferred to another part of the country with

little notice. Such a transfer is wholly foreseeable in light of the Ballingers' profession. If such circumstances were to arise, the Ballingers would want to rent out their home again, but would be reluctant to do so in light of the tenant payment requirement. The Ballingers would be required to choose between leaving their home vacant and being compelled to make a large lump-sum payment to their future tenants if their job circumstances changed once again. Injunctive and declaratory relief are necessary to prevent that outcome.

## IV.

## CONCLUSION

For these reasons, Plaintiffs respectfully request that the City's motion to dismiss be denied in its entirety.

DATED: February 4, 2019.

Respectfully submitted,

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J. DAVID BREEMER

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