No. _____

In The
Supreme Court of the United States

LYNDSEY BALLINGER; SHARON BALLINGER,
Petitioners,

v.

CITY OF OAKLAND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the unconstitutional conditions tests in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), apply to an ordinance that requires rental owners to make a payment to a tenant before the owners may end the tenancy and reoccupy their home.

2. Whether "state action" sufficient to justify a Fourth Amendment "seizure" claim exists when a law directs the transfer of property from one private citizen to another.

LIST OF ALL PARTIES

Lyndsey and Sharon Ballinger were the plaintiffs in the district court and appellants in the Ninth Circuit Court of Appeals and are the petitioners herein.

The City of Oakland, California, is the municipal respondent.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Ballinger v. City of Oakland, No. 18-cv-07186-HSG, 398 F. Supp. 3d 560 (N.D. Cal. Aug. 2, 2019).

Ballinger v. City of Oakland, No. 19-16550, __ F.4th __, 2022 WL 289180 (9th Cir. Feb. 1, 2022).

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PETITION FOR WRIT OF CERTIORARI

Lyndsey and Sharon Ballinger respectfully request that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Ninth Circuit is published and reported at *Ballinger v. City of Oakland*, __ F.4th __, 2022 WL 289180 (9th Cir. Feb. 1, 2022), and is reproduced in Petitioners' Appendix (App.) at A. The district court's opinion is published and reported at *Ballinger v. City of Oakland*, 398 F. Supp. 3d 560 (N.D. Cal. 2019), and appears at App. B.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Ninth Circuit Court of Appeals dismissed this federal constitutional case in an opinion issued on February 1, 2022.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourth Amendment states, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Oakland Municipal Code Sections 8.22.800-8.22.870, the text of which is attached as App. C.

INTRODUCTION

Lyndsey and Sharon Ballinger (Ballingers) are nurse practitioners in the United States Air Force. In 2016, while living in Oakland, California, they were assigned to temporary military duty on the East Coast. App. B-4-5. Prior to leaving California, they leased their three-bedroom home to a pair of software engineers. Knowing their East Coast duty would be short, they agreed only to a year-long lease with the tenants, one which could be terminated at the end of the year with a 60-day notice. *Id.* In 2018, they were ready to give that notice as they prepared to return to Oakland with a new baby. App. B-5.

However, the Ballingers soon learned that, while they were away, the City of Oakland (City) passed a law requiring rental property owners to pay between $6,500 and $10,000 to their tenants—sometimes called a "relocation payment"—before the owners could lawfully end a tenancy and move home. App. B-3-4. Oakland is one of approximately a dozen West Coast cities that have adopted such ordinances in the last decade. The tenant payments required by these

laws can range from a few thousand dollars to more than a hundred thousand dollars. *See Owen v. City of Portland*, 497 P.3d 1216, 1219 (Or. 2021) ("The amount of relocation assistance required varies from $2,900 for a studio to $4,500 for larger units."); *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072, 1078-79 (N.D. Cal. 2014) (noting payment amounts of "$117,958.89" and "$223,782.25"). Such requirements are typically justified as a means to mitigate for the high cost of acquiring rental housing in West Coast cities. *Levin*, 71 F. Supp. 3d at 1085 (payments meant to mitigate high, open market rental costs); *Apartment Ass'n of Greater Los Angeles v. City of Beverly Hills*, No. CV 18-6840, 2019 WL 1930136, at *1 (C.D. Cal. Apr. 17, 2019) (relocation payment scheme meant to address "the shortage of affordable housing in the City, to halt the dramatic rise in rent").

The 2018 enactment of Oakland's tenant payment provisions meant that the Ballingers had to pay $6,582.40 to their tenants before they could end their tenancy according to the lease and return to their home. Subject under the law to stiff penalties for noncompliance, the Ballingers made the payment. App. B-5; App. A-5.

The Ballingers then sued, claiming, in part, that the ordinance provision requiring the transfer of their money to their tenants was an unconstitutional condition on their right to exclusively possess and use their home. App. B-5-6. The Ballingers relied significantly on this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994),

which hold that "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 599 (2013) (restating the *Nollan*/*Dolan* inquiry). The Ballingers further claimed that the tenant payment requirement amounted to an unreasonable seizure of their property; *i.e.*, the $6,582.40 sum transferred to their tenants under the law. App. B-22-24.

In a published decision, the Ninth Circuit dismissed the Ballingers' claims, holding that the *Nollan* and *Dolan* tests do not apply to the ordinance-imposed payment condition. *See* App. A-20-23. The court dismissed the Ballingers' unreasonable seizure claim on the ground that the loss of their money was not "state action." App. A-23-25.

The Ninth Circuit's decision thus presents this Court with the opportunity to address two important and persistent questions. First, it raises an issue as to the scope of the *Nollan* and *Dolan* unconstitutional conditions tests and, particularly, whether those tests apply to generally applicable regulations that impose monetary conditions on the exercise of traditional property rights. Many lower courts have adopted an improperly narrow view of *Nollan* and *Dolan*, leaving property owners without protection from regulations that unconstitutionally extract property interests as a condition of the exercise of a protected property right. Further, courts are in conflict on the issue, a problem that "stems in part from the Supreme Court's lack of

clear guidance." *Washington Townhomes, LLC v. Washington Cty. Water Conservancy Dist.*, 388 P.3d 753, 758 n.3 (Utah 2016).

Justices of this Court have accordingly expressed a desire to address the issue. *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, J., dissenting from denial of certiorari); *California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari); *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., and O'Connor, J., dissenting from denial of certiorari). That this Court has not yet done so "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money." *Koontz*, 570 U.S. at 627-28 (Kagan, J., dissenting).

Second, the decision below raises an important issue as to whether a legally required transfer of private funds from one private party to another involves sufficient "state action" to justify a 42 U.S.C. § 1983 claim under the Fourth Amendment. "Despite the great number of cases and the seemingly well-honed lexicon of 'tests,' the concept of 'state action' remains a difficult one." *Spencer v. Lee*, 864 F.2d 1376, 1382 (7th Cir. 1989) (Ripple, J., concurring in part and dissenting in part). The Ninth Circuit's failure to find that state action arises when a law directly compels the transfer of property from one party to another highlights the continuing problem and conflicts with this Court's precedent and with the decisions of other circuits.

The Court should grant the Petition to decide that the unconstitutional conditions doctrine applies when

a regulation requires a property owner to cede property prior to engaging in a traditional use of property, such as the right to occupy one's home, thereby resolving the disagreement among lower courts. It should further grant the Petition to hold that when a law compels one private party to transfer property to another, the law itself creates "state action" subject to redress under the Fourth Amendment. Since both issues were addressed below on the merits, and without procedural impediment, this case presents a clean vehicle for resolving the questions presented.

STATEMENT OF THE CASE

This Petition arises from the Ninth Circuit's conclusion that the Ballingers have no viable claim, under the unconstitutional conditions doctrine or Fourth Amendment, against an ordinance requiring them to transfer $6,582.40 to their tenants before they could end a tenancy and reoccupy their home for personal use.

A. The Ballingers' Lease and Enactment of the Tenant Payment Requirement

In 2015, while serving in the Air Force as nurse practitioners, the Ballingers owned and lived in a single-family home in Oakland. App. B-4. When the Ballingers were notified that they were being temporarily assigned to the Washington, D.C., area, they decided to rent their home to a pair of local software engineers. App. B-4. Knowing they would have to return to the Bay Area before too long, the Ballingers entered into a one-year lease that ended in September of 2017. At that point, the lease converted

to a month-to-month tenancy which either party could terminate. *Id.*

In January 2018, the City of Oakland amended prior ordinances to include new sections requiring rental property owners to make a tenant "relocation payment" before ending a tenancy and moving back into a home. *See* App. C. As part of a "Uniform Tenant Relocation Ordinance," the new provisions directed rental owners to make payments according to a schedule that calculates the amount due based on the size of the unit. App. B-3-4. Tenants are entitled to a $6,500 payment if they leave a one-bedroom unit, $8,000 when departing a two-bedroom unit, and $9,875 for a three-bedroom unit. App. C-3. Tenant households that "include lower income, elderly or disabled Tenants, and/or minor children shall be entitled to a single additional relocation payment of two thousand five hundred dollars ($2,500.00) per unit from the Owner." *Id.* at C-4.

In enacting the ordinance, the City explained that the mandated payments are necessary to mitigate for displaced tenants' relocation costs and related "social equity" issues. Excerpts of Record on Appeal at 42-43, 67-70 (Ninth Circuit Docket No. 8). More particularly, the tenant payment is designed to mitigate for the high cost of new tenant housing in Oakland. App. B-3. However, the ordinance does not require a departing tenant to use the payment for housing needs. A tenant may use a "relocation" payment for any personal purpose. App. A-5.

Owners who fail to make the required tenant payment are subject to criminal, administrative, and

civil penalties. App. C-8-9 (Oakland Mun. Code § 8.22.860).

B. The Ballingers' Payment and Federal Suit for Reimbursement

In 2016, when the Ballingers executed a one year lease to rent their home, the tenant payment requirement did not exist. App. B-4. However, by the time the Ballingers were ready to return to the Bay Area from their East Coast assignment, the ordinance was in force. Needing to return to their home immediately, the Ballingers complied with the ordinance. They gave their tenants a 60-day notice of termination of the lease, in accordance with the lease, and paid the tenants $6,582.40, as required by the City ordinance. *Id.* at B-5.

On November 28, 2018, the Ballingers sued the City of Oakland in the U.S. District Court for the Northern District of California. Two months later, they filed a First Amended Complaint (FAC), the operative complaint. In that pleading, the Ballingers asserted six claims: (1) a facial claim for a *per se*, 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 *Nollan/Dolan* unconstitutional conditions doctrine, (4) facial and as-applied claims for an unreasonable seizure under 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 Ballingers sought damages (just compensation) and equitable relief.[1] App. B-5-6.

The City moved to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6). In the ensuing litigation, the Ballingers argued that the tenant payment requirement violates the *Nollan*/*Dolan* unconstitutional conditions doctrine because it forces them to surrender property (money) to exercise their right to occupy their home, without any connection between the monetary demand and the impact of their property use. In response, the City argued that the *Nollan*/*Dolan* tests are inapplicable to the tenant payment mandate because "generally applicable legislation is not subject to" such tests, App. B-14. It also contended that the Ballingers' Fourth Amendment seizure claim fails due to the absence of "state action." App. B-22.

In a published opinion, the district court granted the City's motion. Explaining that the *Nollan*/*Dolan* unconstitutional conditions doctrine only "exists to prevent the government from using its coercive power to demand unconstitutional conditions in adjudicative settings, not to impede the enforcement of generally applicable laws," the district court held that the tenant payment requirement was outside the scope of *Nollan*/*Dolan*. App. B-15-16. With respect to the seizure claim, it held that "the Ballingers . . . have not met the preliminary requirement of alleging that a state actor caused the deprivation." App. B-23.

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[1] Because the Ballingers have recently moved out of the City of Oakland, they no longer press their request for equitable relief. They continue to seek reimbursement and damages under 42 U.S.C. § 1983.

Relying on *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999), the court explained, "The City's mere authorization [of a seizure], as opposed to encouragement, is not state action." App. B-24. The district court accordingly dismissed the Ballingers' claims.

The Ballingers timely appealed to the Ninth Circuit. In so doing, they relied solely on their federal takings, unconstitutional conditions, and unreasonable seizure claims.

C. The Ninth Circuit Opinion

In an opinion issued on February 1, 2022, the Ninth Circuit affirmed the district court judgment. App. A. With respect to the unconstitutional conditions claim, the Ninth Circuit held that the tenant payment is not the type of land use condition subject to *Nollan* and *Dolan*. The court's reasoning varied. It pointed first to the "landlord/tenant" regulatory context, App. A-7, 9, and the payment mandate's character as a general "monetary obligation," rather than a demand for a "specific, identifiable pool of money," App. A-10-11, as a basis for concluding that no taking of property or actionable claim under *Nollan* and *Dolan* existed. App. A-18. The court later held that *Nollan* and *Dolan* also do not apply because the payment mandate is not tethered to a "government benefit, such as a permit." App. A-23. While the court recognized that *Nollan* and *Dolan* might theoretically apply to legislation, it concluded that the absence of an explicit "government benefit,

like a permit," defeated the Ballingers' *Nollan* and *Dolan* claims. App. A-22-23.

In affirming dismissal of the "unreasonable seizure" claim, the Ninth Circuit concluded that the tenant payment mandate did not involve "state action." It stated:

> The City did not participate in the monetary exchange between the Ballingers and their tenants. Neither did it "exercise[ ] coercive power" . . . . At most, the City was only involved in adopting an ordinance providing the terms of eviction and payment. But enacting the Ordinance of this nature is not enough—entitling tenants to demand a relocation payment is a "kind of subtle encouragement . . . no more significant than that which inheres in [a government entity]'s creation or modification of *any* legal remedy." Adopting the Ballingers' expansive notion of state action would eviscerate the "essential dichotomy between public and private acts."

App. A-24-25 (citations omitted).

REASONS FOR GRANTING THE PETITION

Although this Court has affirmed the applicability of the unconstitutional conditions doctrine to property regulation, through the *Nollan* and *Dolan* "nexus" and "rough proportionality" tests, lower courts remain confused about the scope of those standards. Many courts limit *Nollan* and *Dolan* to only certain contexts, such as when a condition arises from a formal "permit" decision. This conflicts with this Court's broader

articulation of the doctrine, and with other court decisions that give *Nollan* and *Dolan* a broader reach, including to generally applicable conditions. Timothy M. Mulvaney, *The State of Exactions*, 61 Wm. & Mary L. Rev. 169, 219 (2019) (observing that "application of *Nollan*'s and *Dolan*'s 'nexus' and 'proportionality' standards generally has been confined to a narrowly construed set of 'concrete and specific,' ad hoc demands").

This case also raises a fundamental constitutional question as to whether a legally required transfer of property from one person to another involves "state action" sufficient to justify a claim under 42 U.S.C. § 1983. Long ago, this Court recognized that state action exists where a challenged wrong occurs "by virtue of state law and [is] made possible only because the wrongdoer is clothed with the authority of state law," *United States v. Classic*, 313 U.S. 299, 326 (1941). Yet, some circuits, including the Ninth Circuit in this case, have failed to apply this core principle. This is troubling. If a law that authorizes and directs a private citizen to appropriate another's property is not constitutionally actionable as "state action," as the decision below holds, governments can escape the property rights protections found in the Constitution by the expedient of authorizing private parties to directly appropriate property for a public good. Moreover, the decision below adds to a conflict among lower courts on the effect of coercive law in the state action inquiry.

This Court should grant the Petition to confirm that *Nollan/Dolan* broadly apply to government actions, including generally applicable regulation,

that require citizens to surrender property as the price of exercising basic property rights. *See, e.g.*, *Lambert*, 529 U.S. at 1045 (Kennedy, J., dissenting from denial of certiorari). It should also grant the Petition to hold that state action exists when a law compels a transfer of property from one party to another.

I.

THE DECISION BELOW RAISES AN IMPORTANT CONSTITUTIONAL QUESTION ABOUT THE REACH OF *NOLLAN* AND *DOLAN* AND DEEPENS A PERSISTENT CONFLICT ON THE ISSUE

Under *Nollan* and *Dolan*, the government may require a person to cede a property interest as a condition of using real property when necessary to mitigate for the impact of the proposed use. There must be an "essential nexus" and "rough proportionality" between the condition and the impact of the property use. *Koontz*, 570 U.S. at 604-05; *see also Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up a constitutional right . . . to receive just compensation when property is taken for a public use [ ] in exchange for a discretionary benefit [that] has little or no relationship to the property."); *Koontz*, 570 U.S. at 604 (the doctrine prevents "the government from coercing people into giving [rights] up").

As the following shows, this Court has portrayed the *Nollan*/*Dolan* inquiry as a broadly applicable means to separate conditions that are properly tailored to mitigate negative externalities related to property use from those that improperly force

property owners to solve public problems. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). The Ninth Circuit's decision in this case is inconsistent with this view and conflicts with other lower court decisions that apply the *Nollan* and *Dolan* tests to property rights conditions that arise from generally applicable regulation. *Parking Ass'n of Georgia*, 515 U.S. at 1117 (Thomas, J., dissenting from denial of certiorari) (recognizing a nationwide split of authority); *California Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (Thomas, J., concurring in denial of certiorari).

A. The Decision Below Conflicts With the Court's Precedent

1. The *Nollan/Dolan* tests

In its most general sense, the unconstitutional conditions doctrine enforces constitutional limitations on state power by forbidding the government from doing indirectly, through conditions on private activity, what it cannot accomplish directly. *Koontz*, 570 U.S. at 606. As this Court explained nearly a century ago,

> the power of the state . . . is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. . . . It is inconceivable that guarantees embedded in the Constitution . . . may thus be manipulated out of existence.

Frost v. R.R. Comm'n of Cal., 271 U.S. 583, 593-94 (1926); *see generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413,

1421-22 (1989) (noting that unconstitutional conditions problems arise when government imposes a condition that requires one to "forego an activity that a preferred constitutional right normally protects from government interference").

This Court has described the *Nollan* and *Dolan* tests as a "special application" of the unconstitutional conditions doctrine in the property rights context. In *Koontz*, the Court explained that the "nexus" and "rough proportionality" tests supply a balanced and fair method for gauging the constitutionality of conditions on the exercise of property rights. While the tests allow government to impose conditions that mitigate the negative externalities of a proposed property use, they ferret out and reject property use conditions that are vehicles for taking property for a public good. 570 U.S. at 604-06.

To ensure that *Nollan* and *Dolan* fulfill their intended purposes, the Court has repeatedly turned back attempts to limit their tests to only certain kinds of conditions or government actions. For instance, in *Dolan*, this Court applied the standards to invalidate two development conditions required by a generally applicable regulatory scheme. 512 U.S. at 377-78. The *Dolan* Court rejected the dissent's claim that the commercial nature of the property immunized the conditions from the unconstitutional conditions doctrine. *Id.* at 392 ("[S]imply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge."). The *Dolan* Court also rejected the dissent's insistence that application of *Nollan* and *Dolan* to the ordinance-mandated conditions would interfere with the

"necessary and traditional breadth of municipalities' power to regulate property development." *Id.* at 407 n.12 (Stephens, J., dissenting), *id.* at 390 (quoting *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)).

Subsequently, in *Koontz*, this Court rejected the argument that the *Nollan/Dolan* tests are inapplicable to conditions requiring monetary payments as a predicate to the exercise of a real property interest. 570 U.S. at 612. And in *Cedar Point*, the Court made clear that *Nollan* and *Dolan* apply to common property use conditions found in generalized health and safety regulatory schemes. 141 S. Ct. at 2079. Thus, the Court has articulated the *Nollan* and *Dolan* tests as a broadly applicable means to enforce the principles of fairness and justice—a central purpose of the Takings Clause—whenever government imposes conditions on "basic and familiar uses of property." *Id.* at 2080 (quoting *Horne v. Dep't of Agric.*, 576 U.S. 350, 366 (2015)).

2. The Ninth Circuit decision is irreconcilable with this Court's cases

In contrast, in the decision below, the Ninth Circuit adopted a narrow view of the unconstitutional conditions doctrine by refusing to apply *Nollan* and *Dolan* to a law requiring rental owners to pay tenants before the owner may lawfully reoccupy their home for their exclusive use. The court concluded that the *Nollan*/*Dolan* "essential nexus" and "rough proportionality" tests are inapplicable because the condition (1) is a regulation of tenant/landlord relations, App. A-7, 9, (2) does not take a "specific pool" of funds, but only imposes a general monetary

obligation, *id.* at A-9-11, *id.* at A-18, and (3) arises from a general regulatory scheme, rather than a specific permit decision. *Id.* at A-23.

This exception-riddled conception of *Nollan* and *Dolan* is inconsistent with this Court's understanding of the unconstitutional conditions doctrine. Indeed, in its early and foundational decision in *Frost*, the Court applied the doctrine to a state law that required trucking companies to dedicate personal property as a condition of using highways. 271 U.S. at 593-94. The Court did not consider it necessary for a formal permit to be at issue to apply to invalidate the legislated requirements.

More recently, the Court has repeatedly refused to adopt the idea, accepted below, that property owners can be subject to otherwise objectionable conditions if they put property into "business" or "commercial" use. *Cedar Point*, 141 U.S. at 2080 ("basic and familiar uses of property" are not a special benefit that "the Government may hold hostage, to be ransomed by the waiver of constitutional protection" (quoting *Horne*, 576 U.S. at 366)); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982) ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation" for a physical occupation). There is no basis for the Ninth Circuit's conclusion that *Nollan* and *Dolan* do not apply if a condition can be characterized as "a regulation of the landlord-tenant relationship." *Dolan*, 512 U.S. at 392 (rejecting an exemption for conditions rooted in "business regulation").

To be sure, property owners may expect some regulation when they rent, but they do not permanently cede their right to occupy their own property because of that (temporary) business decision. *Id.*; *see also*, *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) ("A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy."); *Alabama Ass'n of Realtors v. Dep't of Health & Human Services*, 141 S. Ct. 2485, 2489 (2021) (confirming that restrictions on an owner's ability to recover possession of rental property are subject to substantial scrutiny because they burden the protected "right to exclude" others). By the same token, owners should not be deprived of the protections afford by the unconstitutional conditions doctrine when the exercise of a basic property right—such as the right to personally occupy one's home—is subject to an unrelated or disproportionate condition. But that is exactly where the decision below leaves the law.

The Ninth Circuit's other reasoning is equally out of line with this Court's jurisprudence. The Ninth Circuit's conclusion that *Nollan* and *Dolan* do not apply when a condition arises without a formal "permit" decision conflicts with *Cedar Point*'s application of the doctrine to health and safety regulations. 141 S. Ct. at 2079. To be sure, the Ninth Circuit disclaimed any intent to rely on the "legislative" nature of Oakland's tenant payment requirement as a sole basis for declining to apply the *Nollan* and *Dolan* tests. Yet, its subsequent conclusion, that the tests do not apply unless there is

a "grant of a government benefit, such as a permit," renders the former disclaimer of no effect. After all, legislatures rarely grant "permits;" that task is left to executive branch agencies acting in an administrative or adjudicative capacity. The court's conclusion that a formal "permit" is required to trigger *Nollan* and *Dolan* is just a more subtle way of holding *Nollan* and *Dolan* inapplicable to legislative demands, and that is unsupportable. *Parking Ass'n of Georgia*, 515 U.S. at 1117-18 (Thomas, J., dissenting from denial of certiorari) ("the general applicability of the ordinance should not be relevant").

Finally, the Ninth Circuit's holding that a condition must take a "specific, identifiable" pool of money to trigger *Nollan* and *Dolan* is inconsistent with *Koontz*. There, of course, this Court applied *Nollan* and *Dolan* to a condition that required the payment of an amount of money that could come from any source; the same type of monetary demand in this case. *Koontz*, 570 U.S. at 612.

This Court should grant the Petition to explicitly hold what its precedent already implies: the *Nollan* and *Dolan* tests apply to conditions that demand a concession of property as the price of exercising a traditional property right—whether they arise from an individualized permit decision or a generally applicable regulatory scheme, whether in the land development context or the rental regulatory arena. Taking this step would not render all tenant payments or other conditions constitutionally infirm. *Cedar Point*, 141 S. Ct. at 2079. It would simply allow courts to distinguish between conditions that are properly tailored to mitigate negative externalities

and those that wrongly force property owners to solve problems that are more properly remedied by the public as a whole. The Ninth Circuit's decision leaves the Ballingers and other property owners within the Ninth Circuit's jurisdiction devoid of that sensible protection.

B. The Decision Below Conflicts With the Decisions of Other Federal and State Courts

Review is additionally warranted because the Ninth Circuit's decision deepens a longstanding split among the courts on the question whether and when generally applicable permit conditions are subject to review under *Nollan* and *Dolan*. *See Parking Ass'n of Georgia*, 515 U.S. at 1117 (Thomas, J., dissenting); *California Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (Thomas, J., concurring); David L. Callies, *Public and Private Land Development Conditions: An Overview*, 52 UIC J. Marshall L. Rev. 747, 767-69 (2019) (discussing conflicts among courts); Deborah Rosenthal, Nollan, Dolan, *and the Legislative Exception*, 66 Plan. & Envtl. L. No. 3, p. 4 (2014) (discussing the difficulty that courts have in applying the doctrine to regulatory exactions and their inconsistent results). This split of authority is firmly entrenched and cannot be resolved without this Court's intervention. *Koontz*, 570 U.S. at 628 (Kagan, J., dissenting) (noting that Court's "refusal 'to say more'" about the doctrine's application to generally applicable conditions injects uncertainty into local government decisions to impose monetary conditions); *see also* Mulvaney, 61 Wm. & Mary L. Rev. at 194 (describing the issue of the scope of *Nollan/Dolan* as

"[o]ne of the most pressing questions across the entire realm of takings law").

1. The decision below conflicts with the Sixth Circuit's approach

In *F.P. Dev., LLC v. Charter Twp. of Canton, Mich.*, 16 F.4th 198, 206 (6th Cir. 2021), the Sixth Circuit held that an ordinance-mandated condition on the development of private property violated *Nollan* and *Dolan*. At issue was a municipal ordinance that requires property owners to either plant trees or pay a mitigation fee as a condition of approval of development actions that will remove trees. *Id.* at 201-02. The quantity of mitigation was preset by the ordinance. *Id.* As a result of clearing activities on the plaintiff's property, the township demanded that it either plant 187 new trees or pay $47,898 into a tree fund. *Id.* at 202.

On appeal, the Sixth Circuit applied *Nollan* and *Dolan* to the requirement, holding that the Township had failed to show that the ordinance-mandated conditions were roughly proportional to the impacts of the development. *Id.* at 206-07. The court did so despite the fact the conditions did not arise from an individualized permit decision.

In contrast, in this case, the Ninth Circuit refused to apply *Nollan* and *Dolan* to the tenant payment requirement in part because "the Ordinance does not conditionally grant or regulate the grant of a government benefit, such as a permit, and therefore does not fall under the unconstitutional-conditions umbrella." App. at A-22-23.

2. The decision below conflicts with state court decisions

The Ninth Circuit's decision is also in conflict with state court decisions that broadly apply *Nollan* and *Dolan* to generally applicable monetary conditions, including decisions from courts in Minnesota, Texas, and Ohio.

In the recent case of *Puce v. City of Burnsville*, a Minnesota appellate court held that a law requiring developers to pay a park impact fee of 5% of a project's value was subject to the *Nollan* and *Dolan* tests. *See* __ N.W.2d __, 2022 WL 351119, at *8 (Minn. Ct. App. Feb. 7, 2022). In Texas, an appellate court reached a similar result in *Mira Mar Development Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. Ct. App. 2013). There, the Texas court held that *Nollan/Dolan* apply to generally applicable monetary conditions and that a tree mitigation fee violated the doctrine, because it was based on a formula that was not related to actual development impacts. *Id.* Finally, the Ohio Supreme Court held that *Nollan* and *Dolan* applied to an ordinance establishing a system of impact fees payable by developers of real estate to aid in the cost of new roadway projects. *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349 (Ohio 2000).

The tenant payment requirement in this case is comparable to the generally applicable monetary conditions in *Puce*, *Mira Mar*, and *Beavercreek*. In each case, the condition was mandated by legislation and a payment amount preset by a generally applicable formula. App. A-4-5. But, unlike the aforementioned state court decisions, the decision

below holds that *Nollan* and *Dolan* do not apply to such conditions. As a result, the court below refused to even consider whether the $6,582.40 payment required of the Ballingers—most of which is supposed to mitigate the high cost of replacement housing—is reasonably related to the Ballingers' reoccupation of their home. App. A-19-23.

In this respect, the Ninth Circuit's decision is in line with other lower court decisions that evade *Nollan* and *Dolan*. Such decisions allow the government to impose conditions that do not address any adverse impact from property use and which consequently function as an indirect means to acquire private property interests for public use. Indeed, since *Koontz*, numerous state courts have found ways to exclude generally applicable monetary conditions from *Nollan* and *Dolan*. These decisions include: *Douglass Properties II, LLC v. City of Olympia*, 479 P.3d 1200, 1203 (Wash. Ct. App. 2021) ("the *Nollan/Dolan* test does not apply to . . . generally applicable fees"); *Anderson Creek Partners, L.P. v. Cty. of Harnett*, 854 S.E.2d 1, 13-14 (N.C. Ct. App. 2020) (a generally applicable fee does not invoke the unconstitutional conditions doctrine); *Dabbs v. Anne Arundel Cty.*, 182 A.3d 798, 811 (Md. 2018) ("fees imposed on a generally applicable basis are not subject to a rough proportionality or nexus analysis"); *California Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 998, 990 n.11 (Cal. 2015) (exempting general "conditions that require an applicant to pay a monetary fee as a condition of obtaining a permit" from heightened scrutiny); *Am. Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099, 1106 (Ariz. Ct. App. 2018) (holding that generally applicable

conditions are not subject to scrutiny under *Nollan/Dolan*).

Still other courts are so confused on the issue of whether *Nollan* and *Dolan* extend to generalized regulatory conditions on the use of property that they have largely given up trying to resolve the issue until this Court addresses the issue. *See Highlands-In-The-Woods, L.L.C. v. Polk Cty.*, 217 So. 3d 1175, 1178 n.3 (Fla. Dist. Ct. App. 2017) ("[I]t is unclear whether the *Nollan* and *Dolan* standard applies to generally applicable legislative determinations that affect property rights[.]"); *Washington Townhomes, LLC v. Washington Cty. Water Conservancy Dist.*, 388 P.3d 753, 758 & n.3 (Utah 2016) (noting confusion among the courts after *Koontz* and remanding the case to the lower court to determine the "difficult" question of whether an impact fee regime is subject to *Nollan/Dolan*).

The decision below continues the misguided attempts by some courts to limit *Nollan* and *Dolan* to the individualized permit context, in conflict with courts that properly apply *Nollan* and *Dolan* to extractive property conditions, regardless of the source or generality of the demand. The central purpose of the *Nollan* and *Dolan* tests—to ensure that the government does not "thwart the Fifth Amendment right to just compensation" by pressuring a landowner to surrender constitutionally property interests to use, or occupy, their property—can only be satisfied if the doctrine is applied in a consistent manner throughout the nation. This case provides the Court with a clear, clean, and much-needed opportunity to address the judicial split on the

applicability of *Nollan* and *Dolan* when a claim targets generally applicable property use conditions arising outside the permitting context. *California Bldg. Indus. Ass'n*, 136 S. Ct. at 929 (Thomas, J., concurring) (noting the "compelling reasons for resolving this conflict at the earliest practicable opportunity"). The Court should accordingly grant the Petition.

II.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND THE DECISIONS OF OTHER CIRCUITS IN HOLDING THAT A LAW THAT COMPELS A SEIZURE OF PROPERTY IS INSUFFICIENT TO CREATE "STATE ACTION"

The decision below also raises a significant question about the proper "state action" analysis when a law authorizes a private party to seize the property of another. The understanding that constitutional plaintiffs can contest "state actions," but not private actions, reflects the truth that "most rights secured by the Constitution are protected only against infringement by governments." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). The state action requirement helps ensure "the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974). Indeed, "adherence to the 'state action' requirement

preserves an area of individual freedom by limiting the reach of federal law and federal judicial power" to governmental action.[2] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

Thus, seizures of property effectuated by the government are subject to constitutional challenge under 42 U.S.C. § 1983, in general, while those carried out through private conduct are generally not. In the decision below, the Ninth Circuit held that the Ballingers could not raise a Fourth Amendment "seizure" claim against the ordinance-mandated transfer of money to their tenants because it was not accomplished through "state action." App. A-24-25. This conclusion is irreconcilable with this Court's "state action" precedent and highlights a conflict among the federal circuit courts on the role and weight of coercive law in the state action inquiry in cases where the law authorizes one private party to seize the property of another.

A. The Decision Below Conflicts With This Court's Emphasis on the Role of Coercive Law in the "State Action" Analysis

As a general guidepost, this Court has explained that "state action may be found if . . . there is such a 'close nexus between the State and the challenged action'" that seemingly private behavior "may be fairly treated as that of the State itself." *Brentwood Academy v. Tennessee Secondary School Athletic*

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[2] This Court has held that, in a § 1983 action, "the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical." *Lugar*, 457 U.S. at 929.

Ass'n, 531 U.S. 288, 295 (2001) (quoting *Jackson*, 419 U.S. at 351). The Court has further noted that the criteria which inform this test "lack rigid simplicity." *Id.* No "set of circumstances [is] absolutely sufficient." *Id.*; *see id.* at 296 ("Our cases have identified a host of facts that can bear" on test.).

Nevertheless, the Court has repeatedly emphasized that the government's role in enacting a law that compels a private party's invasion of a constitutional right is a critical, and sometimes dispositive, factor. In *Lugar*, the Court stated that state action could largely be determined by whether the deprivation "resulted from the exercise of a right or privilege having its source in state authority." 457 U.S. at 939. The Court has similarly stated that a challenged action is likely to qualify as state action when it results from the exercise of "coercive power." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Thus, while a state's "mere acquiescence in a private action" is not enough for state action, *Flagg Bros.*, 436 U.S. at 164, "a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." *Id.* (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970)). A seizure of property that results from a "procedural scheme created by the statute" is often "state action." *Lugar*, 457 U.S. at 941.

The Ninth Circuit's conclusion in this case, that the Ballingers' unreasonable seizure claim against the City fails for lack of "state action," is incompatible with the Court's framework for deducing "state action." In this case, the City enacted a law that "*requires* landlords re-taking occupancy of their homes upon the expiration of a lease to pay tenants a

relocation payment" of between $6,500-10,000. App. A-2 (emphasis added). Under the ordinance, "[t]he Owner *must* pay the tenant half of the relocation payment . . . when the termination [of lease] notice is given to the household and the remaining half when the tenant vacates the unit." App. C-6 (Oakland Mun. Code § 8.22.850.D.1). Further, these payment requirements are backed by the threat of criminal penalties and substantial civil penalties outlined in the law. App. C-8-9 (Oakland Mun. Code § 8.22.860). The only reason the Ballingers paid their tenants $6,500 was the command of the ordinance and the threat of penalties. The tenants took the sum and left.

The Ninth Circuit should have quickly identified this set of circumstances as a form of state action subject to a Fourth Amendment claim. After all, the City, "by its law, has compelled" the taking of money from the Ballingers and its transfer to tenants. *Flagg Bros.*, 436 U.S. at 164. This transfer results solely from a "procedural scheme" that exists and operates by law. *Lugar*, 457 U.S. at 941. Yet, the Ninth Circuit ignored the coercive role of the City's ordinance in its state action analysis, holding that it is "not enough" that an ordinance compels a transfer of property from one party to another. App. A-25.

The Court should take this case to affirm that a seizure "by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is state action taken 'under color of' state law." *Classic*, 313 U.S. at 326; *Blum*, 457 U.S. at 1004-12 (indicating that "coercion" or "significant encouragement," would create a "nexus" between the state and the action). Without such intervention, the

government will be able to evade constitutional limits on property seizures designed to serve some public purpose simply by passing laws that cause seizures to occur directly between private parties. The Court should close this constitutional loophole. *Cf. Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614-15 (1989) (when a search of property derives from the encouragement of a statute or regulation and is thus not "primarily the result of private initiative," the Fourth Amendment applies).

B. The Decision Below Exacerbates a Conflict Among the Circuits on the Proper "State Action" Analysis When Laws Authorize a Private Seizure of Property

The Ninth Circuit's resolution of the state action requirement is also worthy of review because it highlights, and adds to, a persistent conflict among the circuit courts on the proper state action analysis when a law allows a private party to seize property. The decisions of some circuit courts, including the Third, Fourth, Fifth, Eighth, and Tenth Circuits, focus heavily on the role and force of state law in considering whether a private seizure involves state action. Under this approach, the courts typically find that state action exists.

In contrast, the First Circuit focuses less on the role of state law in authorizing a seizure and more on the nature of the private party acquiring property in deciding whether a seizure results from state action. That approach does not result in a finding of state action. The decision below sides with the First Circuit, in conflict with the majority of other circuits addressing the issue. In so doing, the decision below

deepens the split among federal courts on the proper approach to the state action requirement when state law authorizes a private party to seize the property of another. *See* John Dorsett Niles, et al., *Making Sense of State Action*, 51 Santa Clara L. Rev. 885, 886 (2011) (noting that that judicial inconsistency in the weight afforded to certain state action factors renders "state action" issues difficult for practitioners and courts to predict); Christian Turner, *State Action Problems*, 65 Fla. L. Rev. 281, 290 (2013) (The lower federal courts have reached little agreement as to "which facts truly matter, how much they matter, or why they matter.").

1. The Third, Fourth, Fifth, Eighth, and Tenth Circuits give weight to the authority of state law in gauging whether a seizure by a private party involves "state action"

As noted above, decisions from the Third, Fourth Fifth, Eighth, and Tenth Circuits give heavy weight to the role of law in directing a seizure of property by a private party when considering if state action is present.

In *Coleman v. Turpen*, 697 F.2d 1341, 1345 (10th Cir. 1982), the Tenth Circuit held that the seizure and sale of a vehicle by a private party acting under authority of state law involved "state action" sufficient to justify a Fourth Amendment claim. In so holding, the Tenth Circuit explained that "[t]he State, in enacting section 7–210 [of a statute], created the right exercised by [the private seller] when it sold the truck." *Id.* The court accordingly held that in thus "allowing [the private party] to sell the camper, the State . . . deprived [the vehicle owner] of his property

in joint participation with [the seller]," creating "state action." *Id.*

To the same effect is the Eighth Circuit's decision in *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.*, 554 F.2d 356, 360 (8th Cir. 1977). There, a bakery owner asked a manager to store $25,000 worth of business equipment after the bakery's closure. The equipment was soon stored with a private moving and storage company. When that company and the bakery could not agree on payment for the storage, the storage company sold the disputed equipment without notice at a public auction. It did so under authority of a North Dakota statute. The Eighth Circuit focused on this state law authority in finding state action, ruling that "where a creditor is given authority by the state to unilaterally act on the resolution of legal disputes, his exercise of such authority must be delimited by the restraints of due process." *Id.*

The Fourth Circuit also accords great weight to the role of legal authorization in considering whether an alleged seizure arises from state action. *See Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006). In *Presley*, a city published and distributed a map that showed a public trail crossing private property. When people began relying on the map to trespass, the owner complained to the city, but it did not rescind the map. *Id.* at 482. When the owner asserted an unreasonable seizure claim, the Fourth Circuit held that the claim was viable—even though the trespassing and seizure was by private parties—because the city

> knew that the [ ] trail map would encourage public use of the trail—this was, after all, the map's purpose . . . [and] also knew that the City's involvement would communicate to trail users that there were no legal barriers to their use of the entire trail, including the portion that cut through Presley's property.

Id. at 488.

The Fifth Circuit uses a similar analysis to the state action issue. In *Hollis v. Itawamba County Loans*, 657 F.2d 746 (5th Cir. 1981), an automobile buyer claimed his car was unconstitutionally seized when a creditor summarily took it under authority of state law for nonpayment of debts. *Id.* at 750. The court found that state action existed simply because the creditor was acting pursuant to a statute that permitted prejudgment seizures without a hearing. *Id.*

The Third Circuit's precedent is in the same vein. In *Parks v. "Mr. Ford,"* 556 F.2d 132, 141 (3d Cir. 1977), a private repairmen retained and sold vehicles when the owners refused to pay for repairs. The owners asserted that this action violated their due process rights. The Third Circuit held that state action existed because the repairmen acted under the state statutory authority. The court observed that a "statute not only extended the power of sale to the garageman but also directed him to follow the same procedures employed by a sheriff or constable." *Id.* The court concluded: "by . . . authorizing sales to take place, directing how they are to be carried out, and giving them the effect of judicial sales," "state action

exists when a garageman sells a customer's vehicle pursuant to [the statute]." *Id.*

2. The First and Ninth Circuits discount the force of state law

The decisions of the First Circuit and Ninth Circuit afford less weight to the role of state law authorization in considering the state action issue in the private party seizure context. In *Jarvis v. Village Gun Shop, Inc.*, 805 F.3d 1 (1st Cir. 2015), for instance, the First Circuit considered whether a gun owner could challenge the transfer of his legally confiscated gun from police to a gun shop as an unconstitutional seizure. The court found no actionable state action. It noted at the outset that "[i]t is '[o]nly in rare circumstances' that private parties can be viewed as state actors." *Id.* at 8 (citation omitted). The First Circuit then discounted a Massachusetts statute that authorized the police to transfer the guns to a private business. It stated that, "[t]aken alone, that statutory authorization is too fragile a link: for purposes of demonstrating the required nexus between state action and private action, we think it insufficient simply to point to a state statute authorizing the actions of the private entity." *Id.* at 9.

The Ninth Circuit's precedent is consistent with the First Circuit. In *Melara v. Kennedy*, 541 F.2d 802, 804-05 (9th Cir. 1976), the Ninth Circuit held that there must be "significant state involvement" before the due process guarantees of the Constitution will attach to a seizure of property by a private person. It further held that "[t]he authorization by statute of the challenged conduct does not by itself require a finding

of state action." *Id.* at 804. Instead, "the central inquiry is whether the state of California is significantly involved or entangled" in a loss of property. *Id.*; *see also Adams v. S. California First National Bank*, 492 F.2d 324, 330 (9th Cir. 1973).

The Ninth Circuit's decision in this case is in the same vein. Here, the Ballingers argued that "[t]he 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 owners who do not pay up. This act of law is 'obviously is the product of state action.'" 9th Cir. Dkt. 29 at PDF pp. 29-30 (quoting *Lugar*, 457 U.S. at 941).

The Ninth Circuit disagreed in the decision below, explaining:

> Because the tenants were not willful participants in joint activity with the State, they cannot be fairly treated as the State itself. Nor did the City actively encourage, endorse, or participate in any wrongful interference by the tenants with the Ballingers' money. At most, the City was only involved in adopting an ordinance providing the terms of eviction and payment. But enacting the Ordinance of this nature *is not enough* . . . .

App. A-24-25 (citations omitted; emphasis added).

While this analysis is consistent with First Circuit precedent, it conflicts with the approach of a majority of other circuits. District courts within the Ninth

Circuit have already begun to follow the *Ballinger* analysis, further adding to the confusion among federal courts. *See Better Housing for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 936 (C.D. Cal. 2020). There, a federal court held that "[t]he only state action here is the Governor's signature on AB 1482. But *passing or signing a bill that may lead to the transfer of private property between private parties does not gives rise to a Fourth Amendment Claim*." *Id.* (emphasis added).

The Court should grant the Petition to hold that the demands of state law are a primary factor in the state action analysis and that state action exists when a law mandates the transfer of property from one private party to another.

CONCLUSION

The Court should grant the Petition.

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