No. 21-1181

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

REPLY IN SUPPORT OF 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.

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INTRODUCTION

The City of Oakland's (City) Brief in Opposition (Opp.) fails to negate the importance of the issues presented, the conflicts among the lower courts, or the necessity of this Court's review. With respect to the first question, 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-mandated payment condition on an owner's right to occupy real property after a tenancy, the City argues that the question does not address the entirety of the lower court's reasoning. It is mistaken. The question includes every necessary sub-issue, including whether the tenant payment condition is a "taking" or "exaction." Sup. Ct. R. 14(1)(a). The Ballingers have not abandoned the argument that, contrary to the decision below, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613-16 (2013), resolves that issue in the affirmative.

The critical issues in this case arise from the Ninth Circuit's conclusions that, despite *Koontz*, *Nollan* and *Dolan* are inapplicable to the challenged tenant payment condition because it arises (1) from a tenant/landlord regulatory scheme, App. A-9; *id.* at 18-19, (2) rather than from a formal permitting action. App. A-23. The City claims that this Court's precedent supports these conclusions and denies conflict among the lower courts. Not so. The unconstitutional conditions doctrine applies whenever government demands a concession of property as a condition of the lawful exercise of a protected right, like the right to occupy a home after a tenancy. It is irrelevant

whether government acts through the permitting process or a generally applicable regulatory scheme (as in the landlord/tenant context). But the Ninth Circuit believes otherwise, and courts are in conflict on the issue. The Court should grant the Petition.

As to the second question presented, whether a law requiring a transfer of property from one private party to another is "state action," the City defends the Ninth Circuit's negative answer to the question on the merits. Indeed, the City contends that under this Court's precedent, "a statutory obligation to make a payment to a private party is not state action." Opp. at 3. With this bold claim, the City confirms that the "state action" question is squarely presented and in need of review. It is entirely inconsistent with this Court's jurisprudence, and dangerous, to hold that a law that forces the transfer of property to another citizen is immune from review because it is not "state action." *See Peterson v. City of Greenville*, 373 U.S. 244, 247-48 (1963) (When an ordinance "has commanded a particular result, [the State] has saved to itself the power to determine that result," justifying a constitutional challenge.).

The Court should grant the Petition for argument on both questions. However, in the alternative, if the Court finds the second question proper for summary disposition, it should grant full argument on the first, *Nollan/Dolan*, question while issuing a per curium opinion addressing the "state action" question. *See Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226 (2021) (per curium).

ARGUMENT

I.

THE ISSUE OF THE REACH OF *NOLLAN/DOLAN* IS FULLY PRESENTED, AND CONFLICT AMONG THE COURTS IS UNDENIABLE

A. The *Nollan/Dolan* Issue Is Fully Presented

The City's primary objection to review of the first, *Nollan/Dolan*, question is its belief that the question does not address one of the reasons for the Ninth Circuit's affirmation of the dismissal of the Ballingers' *Nollan/Dolan* claim. The City specifically contends that the question does not address whether the challenged tenant payment requirement involves a taking or "exaction" of property, a threshold predicate to review under *Nollan* and *Dolan*. *See Koontz*, 570 U.S. at 613-16. Based on this claim, the City asserts that granting the first question cannot change the dismissal of the claim. The premise and conclusion are faulty.

The question presented is whether the unconstitutional conditions tests in *Nollan* and *Dolan* "apply" to an ordinance provision forcing property owners to pay tenants before reoccupying their home. This question of application includes every predicate sub-issue relevant to the issue, including whether the challenged requirement is a taking or "exaction" under *Nollan* and *Dolan*. Indeed, the City itself argues that deciding whether *Nollan* and *Dolan* apply necessarily requires first deciding whether a challenged condition is a taking or exaction. Opp. at

11-12. Thus, the question of applicability posed here includes that issue.[1]

If the Court agrees to review the *Nollan* and *Dolan* question, the Ballingers will more fully address the initial issue of whether the City's tenant payment mandate exacts property for purposes of *Nollan/Dolan*.[2] *See Koontz*, 570 U.S. at 612-13. They will contend, as they did below, that *Koontz* quickly and decisively answers that threshold question in the affirmative by holding that a "monetary obligation [that] burden[s] petitioner's ownership of a specific parcel of land" (like the payment here) is a taking/exaction. *See id.* at 613.

It is true that the court below held the challenged tenant payment condition is not a taking/exaction, largely because the condition arose from a regulatory scheme on rental properties.[3] App. A-9; *id.* at 17-19.

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[1] The City's concern may be grounded in the fact the Ballingers did not raise a third question challenging the lower court's disposition of their separate physical taking claim. *See* Opp. at 12. The Ballingers' abandonment of their separate physical takings claim (Count I in the Complaint) is not a waiver of any takings arguments arising under their *Nollan/Dolan* claim (Count III). Litigation of a separate physical takings claim is not required to argue takings issues under *Nollan/Dolan*. *See Nollan*, 483 U.S. at 831-33; *Koontz*, 570 U.S. at 613-15.

[2] The Ballingers' Petition in fact objected to those conclusions as part of their *Nollan/Dolan* arguments. Pet. at 17-19.

[3] In rejecting reliance on *Koontz*, 570 U.S. at 613-16, the Ninth Circuit also observed that the tenant payment requirement burdens property "no more so than property and estate taxes" (which are not treated as takings). App. A-16. This is untrue. Taxes do not burden the right to exclude others from property; the tenant payment requirement does.

Incorporating prior conclusions from its rejection of the Ballingers' separate physical takings claim, the Ninth Circuit held the tenant payment condition is not a *Nollan/Dolan* exaction because it merely "regulate[s] [the Ballingers'] *use* of their land by regulating the relationship between landlord and tenant." App. A-9 (emphasis in original) (citing *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992)).

The City does not attempt to reconcile this incorrect ruling with this Court's unconstitutional conditions precedent, for good reason. The Court has never held that citizens seeking to exercise traditional property rights, like the right to reoccupy a home after a lease period, lose the protections of the unconstitutional conditions doctrine because they chose to temporarily rent. While such owners may relinquish possessory rights for a finite period pursuant to the lease, such leases (including the one in this case) allow the owner to regain possession at the lease's end. The problem in this case is that the challenged ordinance provision interposes an extra (non-lease) tenant payment condition on the owner's exercise of their repossession rights. The condition burdens the right to lawfully and exclusively occupy real property. No precedent from this Court holds that *Nollan* and *Dolan* are impotent to test whether such a condition is appropriate mitigation for the owner's use of the property, or an unconstitutional appropriation of property, simply because it arises from landlord/tenant regulation.

B. The City Has Failed To Support the Ninth Circuit's Narrow View of *Nollan* and *Dolan*

This brings us to the Ninth Circuit's final, and perhaps most troubling, conclusion about the *Nollan* and *Dolan* tests: that they are inapplicable when, as here, a condition on property rights is not part of a formal "permit," but instead imposed as a general regulatory requirement. App. A-23.

Again, the City asserts that this Court's decisions compel such a ruling. Opp. at 13-14. That is incorrect. Unconstitutional conditions case law does not hold that scrutiny hinges on whether a challenged condition is part of a formal "permit" or "license." It instead shows that what is necessary is imposition of a condition on a regulated *private right or interest*. *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-20 (1972) (applying test similar to that in *Nollan/Dolan* to a requirement that citizens pay a user fee for airline travel); *Boddie v. Connecticut*, 401 U.S. 371, 373, 381 (1971) (a statute imposing a high fee "as a condition precedent to obtaining court relief" invalidated because "there [is] no necessary connection between a litigant's assets" and a non-frivolous suit).

This is particularly true in the context of real property interests, where private rights "cannot remotely be described as a '*governmental benefit*.'" *Nollan*, 483 U.S. at 833 n.2 (emphasis added). While a decision on a formal "permit" to use property can certainly qualify as regulation of real property rights sufficient to trigger the *Nollan/Dolan* tests, that is not the extent of regulatory action subject to the analysis.

Again, ultimately, for unconstitutional conditions review, the issue is whether power is being exerted to impose a condition on the exercise of a protected private right; whether that is done through formal "permitting" or by regulatory rule-making is not important. *See Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 1867 WL 11151, at *1 (1867) (invalidating a statutory fee condition on the right to travel outside the state by any "vehicle engaged or employed in the business of transporting passengers"); *Nollan*, 483 U.S. at 841 (noting that the subject "condition" was ultimately on "the lifting of a *land-use restriction*") (emphasis added); *id.* at 837 (the connection required by unconstitutional conditions tests is between "the [challenged] condition and . . . *the building restriction*") (emphasis added); *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922) (invalidating a condition requiring businesses to forego the right to sue in federal court).[4]

For example, in *Nollan* and *Koontz*, unconstitutional conditions tests were ultimately applied to conditions on a property owners "right to build on one's own property," 483 U.S. at 833 n.2; *Koontz*, 570 U.S. at 611. Here, the regulated right is the right to repossess and occupy real property when a lease ends. There is no material difference for unconstitutional conditions doctrine purposes. If the

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[4] *See generally*, Scott Woodward, *The Remedy for a "*Nollan/Dolan *Unconstitutional Conditions Violation*," 38 Vt. L. Rev. 701, 717 (2014) ("[T]he unconstitutional conditions doctrine has been applied to invalidate the kind of improper leveraging of government power described by *Nollan* in a number of circumstances, vindicating a variety of constitutionally protected rights.").

doctrine applied in *Nollan* and *Koontz* to the right to develop, it should apply as well to a condition on the Ballingers' right to exclusively possess and occupy their home.[5]

The unconstitutional conditions doctrine prevents "the government from coercing people into giving" up constitutional rights. *Koontz*, 570 U.S. at 604. Why should it matter if the "coercion" comes through a condition on a formal permit or (as here) through a regulatory predicate to the lawful exercise of a real property right? *See, e.g.*, *Baltic Min. Co. v. Mass.*, 231 U.S. 68, 83 (1913) ("[A] state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law[.]").

The Ninth Circuit and the City believe it does matter. Opp. at 14. The Court should grant the Petition to correct the misconception.

C. The City Has Failed To Negate the Conflicts

The City denies the existence of conflict on the scope of *Nollan* and *Dolan*, despite the contrary view

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[5] Though some unconstitutional conditions property cases refer to conditions on "benefits," the term is used in a general sense to describe a valuable right or interest, not in the formal sense of an adjudicated "entitlement." Woodward, *supra*, at 720 ("the majority of cases involve denial of benefits or rights").

of Justices of this Court,[6] lower courts,[7] and commentators.[8] With respect to whether *Nollan/Dolan* apply to conditions imposed by general regulatory requirements as well as to those imposed in formal permitting contexts, there can be no doubt that conflict exists.

Some courts, including the court below, hold that *Nollan* and *Dolan* apply to conditions on the exercise of property rights only when imposed as part of a formal permit process. *See* App. A-23; *Dabbs v. Anne Arundel County*, 182 A.3d 798, 813 (Md. 2018) ("Impact fees imposed by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny."); *Knight v. Metro. Gov't of Nashville & Davidson Cty.*, — F. Supp. 3d —, 2021 WL 5356616, at *1 (M.D. Tenn. 2021) (refusing to apply *Nollan* and *Dolan* to an ordinance provision requiring "any property owner who wants to construct a new residence on property within the area covered by the Sidewalk Ordinance . . . to construct a city sidewalk on the owner's property frontage").

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[6] *California Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring).

[7] *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*).

[8] Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 Harv. J.L. & Pub. Pol'y 233, 283 (1999) ("Even in the states, where a unified interpretation [of *Nollan*] might be expected to center around a leading state supreme court case, there are often multiple contradictory decisions; at the level of federal circuits, this inconsistency becomes chronic.").

Other courts take a broader view: that *Nollan* and *Dolan* apply whenever government acts (whether by formal permitting, regulation, or legislation) to condition the exercise of a property right on the concession of a property interest. *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014) (applying *Nollan/Dolan* to an ordinance requiring a payment as a condition of removing an apartment from the rental market); *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *AFT Michigan v. Mich.*, 866 N.W.2d 782, 798 (Mich. 2015) (applying the nexus/proportionality tests to a statutory provision that compelled public school employees to contribute to a retiree benefits program). The Court should grant the case to hold that courts adhering to the latter, broader view are correct.[9]

II.

THE STATE ACTION ISSUE IS POSTURED FOR REVIEW

With respect to the second issue presented, whether "state action" exists when a law directs the transfer of property from one private citizen to another, the City raises no procedural objection to review, but defends the Ninth Circuit's "no state action" ruling on the merits. Opp. at 22-24. Indeed, the City attempts to spin this Court's state action

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[9] The City tries to rewrite the question presented to limit it to the issue of whether legislated conditions are subject to *Nollan* and *Dolan*. While granting the Petition would potentially allow the Court to address that issue, the question presented is broader.

precedent into a complicated multifactor test that would allow governments to pass laws forcing citizens to give property to others without triggering constitutional scrutiny. Like the court below, the City believes that finding "state action" depends mostly on whether the primary actor in the wrong is a state agent or private citizen. Opp. at 23 ("a state actor must participate in the actual deprivation"). The City and court below believe that, if a law requires one to hand over property to a private person, rather than to a state agent, the law does create justiciable "state action." *Id.*; App. A-25.

This extreme understanding of the state action requirement should not stand. First, the danger is obvious. If enactment of a coercive law, complete with penalties for noncompliance, is not state action, the door is wide open for governments to legislate the taking of property by favored private citizens free of constitutional scrutiny.

Second, this Court's precedent is plainly antithetical to the ruling below. While nuanced inquiry into the character of the actors causing an alleged constitutional wrong may matter where the role of the law in directing the wrong is weak or unclear, it is of little import when a state has "exercised coercive power or has provided [] significant encouragement, either overt or covert" for the wrong. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). The Court has repeatedly made clear that a law directly compelling the challenged wrong is "coercive power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) (state

action existed where a property deprivation resulted from a "procedural scheme created by the statute").

Perhaps the Court said it best in *Peterson*, 373 U.S. 244 (1963), a case involving a challenge to an ordinance that required restaurant owners to racially discriminate. There, the Court stated:

> [T]he City of Greenville, an agency of the State, has provided by its ordinance that the decision as to whether a restaurant facility is to be operated on a desegregated basis is to be reserved to [the City]. When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice. . . . The [restaurant] management, in deciding to exclude [ ], did precisely what the city law required. . . . When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination [a constitutional action exists].

Id. at 247-48.

The Court should grant the Petition to hold, whether with full argument or in a per curium opinion, that "state action" exists when a law

commands the transfer of property from one to another, with penalties for noncompliance.

DATED: May 2022.

Respectfully submitted,

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