

No. 21-1181

In the
Supreme Court of the United States

LYNDSEY BALLINGER, ET AL.,
Petitioners,

v.

CITY OF OAKLAND, CALIFORNIA,
Respondent.

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

**BRIEF OF *AMICUS CURIAE* THE
CLAREMONT INSTITUTE'S CENTER FOR
CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right to ownership and use of private property. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

SUMMARY OF ARGUMENT

Central to the individual rights the Founders sought to protect in the Constitution is the right to own *and use* property. Indeed, the Founders viewed the principal object of government as protecting such a right. Thus, when government imposes a monetary demand as a condition for exercising the right to use property, the courts should examine the action under the unconstitutional conditions doctrine. The Ninth Circuit, however, ruled that the Constitution had nothing to say about a monetary demand directly linked to a specific parcel of real property in apparent

¹ All parties consented to the filing of this amicus brief. Amicus gave notice of this brief more than 10 days prior to filing. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

contrast to this Court's ruling in *Koontz*. See *Koontz*, 570 U.S. at 614.

The Constitution protects the right to use property. That right includes the right to exclude others. Thus, a government command to allow others to occupy the property until those third parties choose to leave, absent payment of a monetary exaction, interferes with a right at the core of liberty that the Constitution protects. This Court should grant review to clarify these principles.

REASONS WHY REVIEW SHOULD BE GRANTED

I. Individual Rights in Property Are at the Foundation of Individual Liberty.

At issue in this case is whether the City of Oakland can require a property owner to pay a “relocation fee” to a tenant, at the end of a tenancy, before the owner will be allowed to occupy his own property. The Court below started from the premise that a property owner has no right to occupy his own property. This betrays a fundamental misconception of the individual right to own and use property that is protected by the Constitution.

One of the founding principles of this nation was the view that liberty and individual rights in property are inextricably intertwined. *Cedar Point Nursery*, 141 S.Ct. at 2071; St. George Tucker, *On the Several Forms of Government*, in *View of the Constitution and Selected Writings*, at 41 (Liberty Fund (1999)). In 1768, the editor of the *Boston Gazette* wrote: “Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we

cannot be said to possess the one without the enjoyment of the other.” Editor, Boston Gazette, Feb. 22, 1768, at 1. This widespread association of liberty and property, particularly fueled by the availability of land, grew from the background and influence of English law and philosophy.

In his 1765 Commentaries on English Law, William Blackstone explained the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the “absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution.” William Blackstone, 1 Commentaries on the Laws of England 135 (Univ. of Chicago Press 1979) (1765).

John Locke, who influenced the framers of our Constitution, taught that the right to own private property was a natural right that preceded the state’s political authority. Locke’s 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights 17 (1997). “The great and chief end therefore, of Men’s uniting into Commonwealths, and putting themselves under Government, is the preservation of Property.” John Locke, *Two Treatises of Government* 380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). Property ownership is linked with the preservation of political liberty.

This view of property and liberty was at the root of the revolution and, later, the Constitution. As Arthur Lee of Virginia declared in his revolutionary 1775 publication, “The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.” Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in Present Dispute with America* 14 (4th ed. 1775).

In 1776, the Declaration of Independence solidified this tie between political liberty and private property. In drafting the Declaration, Thomas Jefferson did not distinguish property from other natural rights, borrowing heavily from John Locke. Ely, *Property Rights*, *supra*, at 17. Locke described the natural rights that government was formed to protect as “life, liberty, and estates.” Jefferson substituted “pursuit of happiness” for “estates,” but this should not be misunderstood as any de-emphasis of property rights. Instead, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one sufficient to invoke both. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 193 (1980).

“Liberty and Property” became the first motto of the revolutionary movement. Ely, *Property Rights*, *supra*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in formation of the constitutional limits on governmental authority. *Id.* at 26. As English pol-

icies continued to threaten colonial economic interests, those policies strengthened the philosophical link between property ownership and the enjoyment of political liberty in American's eyes. Adams, *supra*, at 193.

The widespread availability of land did not alter the view that rights in property could not be overcome by a simple public desire. Instead, it strengthened the view that property was central to the new American social and political order. *Id.* Early State constitutions explicitly reflected this fundamental principle in their language. New Hampshire's 1783 Constitution was one of four to declare that "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and, in a word, of seeking and obtaining happiness." N.H. Const. pt. 1, art. 2.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote: "Adieu to the security of property adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, in 19 *The Papers of Alexander Hamilton* 47 (Harold C. Syrett ed., 1973). When the delegates to the Philadelphia convention gathered in 1787, they echoed this philosophy. Delegate John Rutledge of South Carolina, for instance, argued that "Property was certainly the principal object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling – property came unapologetically first: “I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety.” James Wilson, 2 *Collected Works of James Wilson* ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007). Also in 1790, John Adams proclaimed “Property must be secured, or liberty cannot exist.” John Adams, *Discourses on Davila*, in 6 *The Works of John Adams* 280 (Charles Francis Adams ed., 1851).

The founding generation believed that all which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: “Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges.” Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* 58-61 (Oct. 10, 1787).

But the rights in property considered essential to liberty were not simply ownership or the ability to sell land to a neighbor. The right to put the property to use was seen as the key to liberty. See John Locke, *Second Treatise* §§ 31-45, *supra*. Blackstone also noted that rights in property were rooted in its use. William Blackstone, *Commentaries*, *supra*, 1:134. This Court echoed those sentiments, noting that the Constitution’s protection of the individual right to own and use property “empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.” *Murr*, 137 S.Ct. at 1943 (2017).

This was the view of the founding generation. Gouverneur Morris argued that a free society must recognize in “every Citizen ... the Right freely to use his Property.” Gouverneur Morris, *Political Inquiries*, in 1 *The Founders’ Constitution* 588 (Philip B. Kurland and Ralph Lerner, eds. 1987). James Madison insisted that the United States could not allow even indirect interference with these vital individual rights to own and use property. James Madison, *Property*, in 1 *The Founders’ Constitution* 598.

The conception of the individual rights in private property held by the founding generation (and protected by the Takings Clause) did not include a state power to oust an owner from his own property. Review should be granted in this case to hold that the Constitution’s protection of property still includes the right to use that property and the Constitution does not permit local government to condition that right on the payment of a “relocation fee” to a renter after the expiration of the tenancy.

II. The Court Should Grant Review to Clarify its Unconstitutional Conditions Jurisprudence In Addition to Clarifying the Scope of the Property Right Protected by the Constitution.

A. Exercise of constitutional rights cannot be conditioned on waiving rights or paying money.

This Court has long recognized that state benefits (in that case, a tax deduction) cannot be conditioned on waiver of constitutional rights. *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958). This ruling was echoed in *Keyishian v. Board of Regents*, where the Court

noted that public employment could not be subjected to a condition that the employee give up his First Amendment rights. 385 U.S. 589, 606 (1967). This Court has remained steadfast in rejecting the idea that government may condition a benefit – even one that the government has no obligation to provide – on the surrender of constitutional rights. See, e.g., *Agency for Intern. Development v. Alliance for Open Society*, 570 U.S. 205, 213 (2013); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 78 (1990); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256 (1974). The issue is not whether an individual has a right to the particular government benefit. But the government may not deny that benefit “on a basis that infringes his constitutionally protected interests. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

This principle applies with equal force to individual rights in property. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005). In applying these precedents to local government demands for exactions in exchange for a permit, this Court noted that individual rights in property could not be “relegated to the status of a poor relation” to other constitutionally protected individual liberties. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Thus, a property owner could not be required to give property to the government in exchange for permission to build on his property. Any such condition, this Court ruled, must be “roughly proportional” to some adverse impact created by the property use at issue. *Id.* at 391.

This principle applies even when the government may lawfully deny the permit (which, as shown below, it may not do here). *Koontz*, 570 U.S. at 607-08. When “someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a government benefit is a constitutionally cognizable injury.” *Id.* at 607.

In this case, the city is demanding a payment to a third party as a condition for the owner to have the right to reclaim his own property. This, however, violates the property owner’s right to exclude others from his property and requires forfeiture of money – itself a species of property – that is linked to a specific parcel of land. The Court should grant review to clarify that such an invasion of property rights is not permitted under the Constitution.

B. There is a constitutional right to exclude others from property and to use that property.

The court below ruled that this situation is one of petitioner’s own making: “the Ballingers voluntarily chose to lease their property and to ‘evict’ under the Ordinance.” Appendix to Petition for Writ of Certiorari at A-10. The lower court does note, however, that the Ballingers leased the property for one year in 2016. Appendix at A-4. The requirement to pay the tenant of an expired tenancy in order to recover possession of the property was not enacted until 2018. Thus, once having agreed to rent their property for a fixed term, the Oakland ordinance provided that petitioners could not regain possession of their own property – even after the conclusion of the tenancy – unless and until the owner paid this relocation fee to the tenant. Without payment of the fee, the tenant is entitled

to remain in possession. The tenant decides when the owner will be allowed back on his own property.

This case is quite different from *Yee v. City of Escondido*, 503 U.S. 519 (1992) on which the Ninth Circuit relied. In *Yee*, the law did not require the owner to suffer a permanent invasion of his property, but rather only suffer an extended notice period to evict a particular tenant. *Id.* at 528. This Court acknowledged it would have been a different case had the local ordinance compelled the property owner to suffer on ongoing invasion. *Id.* at 532.

But this is not a case about evicting one particular tenant – one among many – in order to rent to a different tenant. This case instead asks whether the local government can oust the owner from his own land unless and until he pays the tenant of the expired tenancy the government-mandated exaction. The exaction is imposed on the exercise of the right to exclude.

Property, as understood under our Constitution, denotes “the group of rights inhering in the citizen’s relation to the physical thing” or land. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). The right to exclude others from the land is one of the essential sticks in the bundle of rights that make up what we protect as “property.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-80 (1979). To emphasize the centrality of the right to exclude to the constitutional notion of protected property rights, this Court quoted Blackstone that “the very idea of property entails ‘that sole and despotic dominion which one man claims and exer-

cises over the external things of the world, in total exclusion of the right of any other individual in the universe.” *Cedar Point Nursery*, 141 S.Ct. at 2072. Indeed, depriving an individual of the right to exclude amounts to a physical appropriation. *See Id.* at 2074.

Just as the access regulation at issue in *Cedar Point Nursery* deprived the right of the property owner to exclude union organizers from the property, the municipal ordinance here prevents petitioners from excluding the lease-expired tenant from the property unless and until the owner pays the tenant the relocation fee. Until that time, the owner has no right, under this ordinance, to occupy and use his own property. The right to exclude is not an “empty formality.” *Id.* 2077. It lies at the core of individual rights in property. *Kaiser Aetna*, 444 U.S. at 179-80. The exaction scheme here – the relocation fee – cannot be imposed as a condition on the exercise of this fundamental right. This Court should grant review to clarify this point.

C. Under *Koontz*, monetary exactions tied to the use of a particular parcel are analyzed under the test for unconstitutional conditions.

Finally, the court below was confused about how to apply *Koontz* to these facts. That confusion argues in favor of granting review to clarify how the unconstitutional conditions doctrine applies when a government agency demands money rather than property.

The Ninth Circuit’s confusion stemmed from its finding that the money the City demanded petitioner pay was not “property” since it was not from an identifiable source (like a particular bank deposit), and its

conclusion that the restriction on the owner's decision to reoccupy his property also did not concern a constitutional issue. True, this is not the typical case where government is threatening to deny a benefit because of the exercise of a constitutional right. *See Koontz*, 570 U.S. at 604. Rather, satisfaction of the condition is a precondition to exercise of the constitutional right. The ordinance at issue demands a payment of money (the relocation fee) as a condition to the right to occupy one's own property and exclude others.

As this Court noted in *Koontz*, the demand that a property owner pay money rather than give up an interest in land does not cure an otherwise unconstitutional condition. When the demand for money operates on "an identified property interest," that obligation unconstitutionally burdens the ownership of land unless it meets the rough proportionality test of *Dolan*. *Koontz*, 570 U.S. at 613. Where there is a direct connection between the demanded payment and a specific parcel of land, *Dolan* applies, and the government must prove both an essential nexus and rough proportionality between the use of the property and condition imposed. *Id.*

In this case, the demand for payment of a relocation fee is directly linked to the owner's residential property, and the desire of the owner to occupy that property for his own use. This Court should grant review to clarify that *Koontz* thus requires the city to prove an essential nexus and rough proportionality between the monetary condition and the proposed use of the property.

CONCLUSION

After the Ballingers rented their property for a fixed term, the City of Oakland enacted a new law that conditioned the owners' right to reoccupy their property at the end of the tenancy on the payment of a relocation fee to the tenant. Petitioners' right to exclude and use their own property was conditioned on the payment of a monetary exaction directly linked to a specific parcel. The Court should grant the Petition for Writ of Certiorari to rule that this is an unconstitutional condition.

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