No. 21-1181

In The Supreme Court of the United States

LYNDSEY BALLINGER; SHARON BALLINGER,

Petitioners,

v.

CITY OF OAKLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the unconstitutional conditions test developed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) applies to legislation requiring a payment that is not a taking and placing no condition on any government benefit.

II. Whether "state action" sufficient to support a Fourth Amendment unlawful seizure claim exists when a law directs one private citizen to pay money to another private citizen.

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INTRODUCTION

Petitioners Lyndsey and Sharon Ballinger rented out their home, then evicted their tenants in order to move back in. Oakland's Uniform Residential Tenant Relocation Ordinance requires landlords to pay a relocation payment to mitigate their tenants' unexpected relocation costs when tenants are evicted due to no fault of their own.

The Ballingers paid their tenants, then sued the City on a host of constitutional theories. Having lost their claims below, the Ballingers now ask this Court to grant their petition for a writ of certiorari to decide whether legislation like Oakland's Ordinance is susceptible to the exaction analysis developed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and whether the Ordinance's payment provision constitutes state action for purposes of a Fourth Amendment seizure claim.

A writ of certiorari on the first Question Presented is unwarranted. The petition focuses on whether the exaction analysis that applies to individually imposed conditions on government benefits also applies to generally applicable legislative conditions. That question made no difference to the outcome below. The Ninth Circuit agreed with the Ballingers on that issue. The Ballingers lost below because the Ninth Circuit found two other, independent reasons no exaction analysis applies.

First, the panel observed that the starting point to an exaction analysis is whether the government is attempting to unlawfully commit a taking by

conditioning a benefit. It followed that the Oakland Ordinance is not an exaction because the court had already held, in ruling on the Ballingers' separate physical takings claim, that the relocation payment is not a taking. The Ballingers do not challenge that portion of the Ninth Circuit's holding, much less assert any division among lower courts on the issue. Because the determination that the relocation payment is not a taking was an independent basis for the court's decision that the Ordinance is not an exaction, any opinion from this Court on the legislative conditions question could not affect the outcome.

Second, the Ninth Circuit concluded that an exaction analysis does not apply because the Ordinance does not condition any government benefit or permit. The Ballingers only obliquely address that issue, offer no real explanation why it was wrong, and cite to no division among lower courts on the question. This second ground for the Ninth Circuit's holding, which is also unconnected to the legislative conditions question, further obviates this Court's review.

When the Ninth Circuit did discuss the question whether an exaction analysis applies to legislative conditions, the court agreed with the Ballingers that this Court's decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), answers that question in the affirmative. Assuming the Ballingers are correct on that point, there is no error to correct and no reason to grant review.

The Ballingers point to no disagreement among the federal courts of appeal on the legislative conditions question or any other element of the Ninth Circuit's exaction analysis. The Sixth Circuit decision

they claim takes a conflicting approach did not address the legislative conditions issue and, unlike this case, involved a condition on a permit. The allegedly conflicting state court decisions also involved a condition on a government benefit, and those courts either *agreed* that legislative conditions are subject to an exaction analysis or did not address the issue at all. Meanwhile, the state court decisions the Ballingers say disagree about whether to apply an exaction analysis to legislative conditions all predate *Cedar Point Nursery*. The Ballingers do not point to any disagreement following this Court's guidance in *Cedar Point Nursery*.

The Second Question Presented – whether the Ballingers' relocation payment to their tenants is a Fourth Amendment "seizure" by the City – is equally unworthy of review. The Ninth Circuit's decision is consistent with a long line of this Court's cases confirming that a statutory obligation to make a payment to a private party is not state action. The Ballingers cite no division among lower courts over that well-settled question.

The petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

1. Lyndsey and Sharon Ballinger owned a three-bedroom, single-family home located at 1685 MacArthur Boulevard in Oakland, California. Excerpts of Record on Appeal (ER) at 29. In September 2016, they leased their property to another couple, at a monthly rent of $3,395, and with an additional $3,395 security deposit. ER 60, 65.

2. In January 2018, the Oakland City Council adopted the Uniform Residential Tenant Relocation Ordinance. Oakland Municipal Code Ch. 8.22, arts. VII-VIII; *see* App. C. The Ordinance extended relocation payments to tenants evicted due to no fault of their own as a result of certain owner move-in evictions and condominium conversions, and established a uniform schedule of relocation payments for all no-fault evictions. ER 42-43. In enacting the Ordinance, the City Council expressly found that 1) all other major California rent-controlled jurisdictions require relocation payments for no-fault evictions, such as those due to owner move-ins and condominium conversions; 2) "tenants evicted in Oakland are forced to incur substantial costs related to new housing including, but not limited to, move-in costs to a new home, moving costs, new utility hook-ups, payments for temporary housing, and lost work time seeking housing;" and 3) "the proposed expansion in coverage of the relocation payments for no-fault evictions is justified and necessary for impacted Tenants to find new housing and avoid displacement[.]" *Id.*

Based on public information regarding average monthly rental prices and moving costs, the City established relocation payment amounts of $6,500 for studios and one-bedroom units, $8,000 for two-bedroom units, and $9,875 for units with three bedrooms or more. App. B-3-4, C-3; ER 87, 92. These amounts adjust for inflation annually on July 1. Tenants are eligible for relocation payments on a vesting schedule such that they qualify for one-third of the total payment upon taking possession of the rental unit; two-thirds of the payment after one year

of occupancy; and the full amount of the payment after two years of occupancy. App. C-5.

3. In March 2018, the Ballingers gave their tenants notice to vacate the property within 60 days. The Ballingers provided their tenants with one half of a $6,582.40 relocation payment with the notice to vacate. The Ballingers paid the remaining half when their former tenants vacated the property. App. B-5.

B. Procedural Background

1. The Ballingers filed suit in district court on November 28, 2018. Their operative First Amended Complaint asserted, as relevant here, multiple claims for violation of the Fifth Amendment's Takings Clause: a facial claim that the relocation payment is a taking for a private purpose; facial and as-applied claims that the relocation payment is an unconstitutional exaction; and an as-applied claim that the relocation payment is a physical taking of the Ballingers' money without just compensation. *See* U.S. Const. amend. V. The First Amended Complaint also asserted facial and as-applied claims that the Ordinance effects an unreasonable seizure in violation of the Fourth Amendment. *See* U.S. Const. amend. IV.

2. The City filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which the district court granted without leave to amend.

The court dismissed the claim that the relocation payment was a taking for a private purpose because the court "conclude[d] that there was no taking." App. B-11. The court held the Ordinance was not an unconstitutional exaction "because it was generally applicable legislation." App. B-19. The court held the

physical takings claim was not cognizable because the obligation to pay "fungible" money, and not "specific, identifiable property," is not a taking. App. B-21-22 (quoting *United States v. Sperry*, 493 U.S. 52, 62 n.9 (1989)). The court rejected the Fourth Amendment seizure claim due to lack of state action because the City merely authorized, and did not encourage or participate in, any alleged seizure of the Ballingers' property. App. B-23-24.

Because each claim failed as a matter of law, the court held that leave to amend would be futile, as acknowledged by the Ballingers' counsel. App. B-30. The court ordered the entry of judgment and the Ballingers timely filed a notice of appeal.

3. The Ballingers appealed the dismissal of the First Amended Complaint, challenging only the dismissal of their physical takings claim, the unconstitutional exaction claim, the "private purpose" takings claim, and the Fourth Amendment "seizure" claim. Following oral argument and supplemental briefing, the Ninth Circuit entered its order on February 1, 2022, affirming dismissal.

With respect to the physical takings claim, the Ninth Circuit explained that the relocation payment is not a physical taking. App. A-7-18. The court relied on this Court's precedents "consistently affirm[ing] that States have broad power to regulate … the landlord-tenant relationship," App. A-8 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)), including through measures that "transfer[] wealth from landlords to tenants," App. A-8 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992)). The court further noted that a taking requires

an unwilling deprivation of property, and that the Ballingers invited their tenants to lease their property and then voluntarily chose to evict their tenants. App. A-9-10. The court concluded that the Ordinance was not a physical taking, but "merely regulates the Ballingers' *use* of their land." App. A-9 (quoting *Yee*, 503 U.S. at 528 (brackets omitted)).

The court further held that the relocation payment requirement is not a taking because it merely imposes "a general obligation to pay money and does not identify any specific fund of money" or require payment of money in connection with a specific parcel of land. App. A-11-18. The court contrasted the exaction in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), which demanded a payment in exchange for a benefit to a specific parcel of land, with the relocation payment required by the Ordinance, which the court determined is more akin to a tax or government services fee (which do not burden specific property interests and are not takings). App. A-15-17.

Having concluded that the relocation payment is not a taking, the court affirmed dismissal of the Ballingers' separate claim that the payment is a taking for an impermissible private purpose. App. A-7.

The court then turned to the claim that the Ordinance imposes an unconstitutional condition – an exaction – on the Ballingers' preferred use of their home. App. A-18. The court held that the relocation payment is not an unconstitutional condition because the payment is not a taking. *Id.* Because the foundation of the unconstitutional conditions doctrine

is the idea that the Constitution prohibits the government from "'denying a benefit to a person because he exercises a constitutional right' or 'coercing people into giving those rights up,'" App. A-18-19 (quoting *Koontz*, 570 U.S. at 604 (brackets omitted)), the court held that the "starting point" to the unconstitutional conditions analysis is whether the condition lawfully could be imposed without any coercive element. App. A-23. Since the court held the relocation payment is not a taking, and could be imposed outside of any condition, it could not be an exaction. Moreover, the court reasoned, 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. A-22-23.

The court accepted the Ballingers' view that, "in light of" this Court's opinion in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), a government action to condition a benefit on the dedication of property for public use must pass the "nexus" and "rough proportionality" test developed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), regardless of whether the government action is legislative or adjudicative (i.e., individualized) in nature. App. A-21-22. However, the court noted that *Cedar Point Nursery* did not disturb the principle that an exaction analysis only applies where a government has conditioned the grant of a benefit "'such as a permit, license, or registration' on giving up a property right" – and the Ordinance does no such thing. App. A-21-23 (quoting *Cedar Point Nursery*, 141 S. Ct. at 2079). The court also reiterated that, in any event, the Ballingers' claim

failed at the gates because the relocation payment is not a taking. App. A-23.

With respect to the Fourth Amendment "seizure" claim, the Ninth Circuit affirmed the district court's determination that there was no state action, and therefore no seizure by the City of the Ballingers' money. App. A-23-25. The court opined that (1) the mere creation or modification of a legal remedy is not state action, and (2) an action of a private party pursuant to a law – "without something more" – is not state action. App. A-24 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)). Applying those principles, it concluded that the City's adoption of the Ordinance was akin to the creation of any legal remedy and was "not enough" to constitute state action. App. A-25. That the Ballingers paid their tenants was also not state action because the City "did not participate in the monetary exchange" and did not "actively encourage, endorse, or participate in" the tenants' action. App. A-24.

REASONS FOR DENYING THE PETITION

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW.

The Ballingers ask this Court to grant certiorari primarily to address whether the exaction analysis that applies to individually imposed conditions on government benefits also applies to generally applicable legislative conditions. This case offers no basis for deciding that question. First, the Ninth Circuit identified two independent reasons why an exaction analysis does not apply that obviated any need to address the question whether an exaction analysis applies to legislative conditions. Those

reasons – that the relocation payment is not a taking, and that the Ordinance does not condition any government benefit – follow directly from this Court's precedent. The Ballingers do not challenge the first of those reasons and barely mention the second. But those grounds fully and independently support the outcome below, and so any ruling from this Court as to whether an exaction analysis applies to legislative conditions would not affect the disposition of the case.

Second, when the Ninth Circuit did opine on the legislative conditions question, it *agreed* with the Ballingers that, in light of this Court's decision in *Cedar Point Nursery*, legislative conditions are susceptible to an exaction analysis. If the Ballingers and the Ninth Circuit are correct on that point, there is no error to correct.

Third, there is no division among lower courts. The only conflict the Ballingers claim is on the legislative conditions issue, but the cases they cite do not show any live split. The only federal case they cite expressly did not address whether an exaction analysis applies to legislative conditions, and, unlike this case, the legislation at issue there conditioned a government benefit. The three purportedly conflicting state court decisions the Ballingers cite also involved a condition on a government benefit, and none disagreed with the Ninth Circuit on the legislative conditions issue. The additional state court cases the Ballingers hold out as wrong or confused on the legislative conditions question all predate this Court's decision in *Cedar Point Nursery*. The Ballingers have not pointed to any division or confusion on that question since *Cedar Point Nursery*, which the Ninth Circuit deemed controlling.

Fourth, this case is a poor vehicle to address the first Question Presented for several reasons, including that the City would prevail even if an exaction analysis applied.

For any and all of these reasons, the Court should deny the petition.

A. The Ninth Circuit Correctly Found Two Independent Reasons An Exaction Analysis Does Not Apply, Irrespective Of The Legislative Conditions Question.

1. At the very outset of its exaction analysis, the Ninth Circuit held that the Ordinance is not an unconstitutional exaction for one simple reason: The relocation payment is not the kind of property demand that qualifies as a taking independent of a condition. Pet. A-18-19. As the court explained, "the 'predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.'" App. A-19 (quoting *Koontz*, 570 U.S. at 612). Because the panel had already determined that the relocation payment is not a taking, it could not have been an unconstitutional exaction, and the court needed no further reason to deny the exaction claim. App. A-19.

That holding is consistent with this Court's precedent, from *Nollan* to *Cedar Point Nursery*. App. A-23; *see Cedar Point Nursery*, 141 S. Ct. at 2073 (the "starting point" to the exaction analysis in *Nollan* was that, if the Commission "simply required the Nollans to grant the public an easement," there "would have been a taking"); *Koontz*, 570 U.S. at 612; *Dolan*, 512

U.S. at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred"); *Nollan*, 483 U.S. at 831. In *Nollan* and *Dolan*, "the Court began with the premise that, had the government simply appropriated the [property right] in question, this would have been a *per se* physical taking." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005).

The Ballingers apparently agree. They describe the purpose of the exaction doctrine as "ferret[ing] out" conditions that are "vehicles for taking property for a public good." Pet. 15. They recognize that the doctrine is a tool for enforcing the Takings Clause and claim it protects against "extract[ing] property interests." Pet. 4. And they never dispute that whether the condition would otherwise be a taking is a threshold question in the exaction analysis.

As to the Ninth Circuit's determination of that threshold question, i.e., that the relocation payment is not a taking: the Ballingers do not challenge that, either. The Ballingers do not contest the Ninth Circuit's holding on their physical takings claim or argue that the relocation payment would be a physical taking absent any conditioning of eviction.[1] Because

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[1] The Ballingers include two sentences claiming that "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*." Pet. 19. This misstates the Ninth Circuit's analysis, *see* App. A-19, and, in any event, the Ballingers

the Ballingers do not challenge the resolution of the threshold question, there is no reason for this Court to grant certiorari to opine on other, nonessential portions of the exaction analysis.

2. After explaining that the Ordinance could not be an exaction because the relocation payment was not a taking, the panel offered a second reason why the Ordinance was not subject to an exaction analysis: because "the Ordinance does not conditionally grant or regulate the grant of a government benefit, such as a permit," it "does not fall under the unconstitutional conditions umbrella." App. A-23.

That holding was required by this Court's precedent. It is the particular considerations attending the exchange of a benefit for the concession of a right that animate the unconstitutional conditions doctrine. The foundation of the unconstitutional conditions doctrine is that "the government may not deny a *benefit* to a person because he exercises a constitutional right." *Koontz*, 570 U.S. at 604 (emphasis added). The doctrine addresses the concern that the government may use its control over gratuitous benefits to make "extortionate demands." *Id.* at 607.

Koontz explained how this concern takes shape in the land-use context. On the one hand, "land-use permit applicants are especially vulnerable to the type

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never assert that the relocation payment would be a physical taking absent the condition on certain types of evictions. Whatever argument the Ballingers intend to make in those two hazy sentences, it is insufficient to bring before this Court the Ninth Circuit's lengthy physical takings analysis. App. A-7-10; *see Yee*, 503 U.S. at 534-38.

of coercion that the unconstitutional conditions doctrine prohibits," because the government is in a position to withhold a benefit that is far more valuable than the property right demanded in exchange. *Koontz*, 570 U.S. at 605. The "second reality" is that permits and licenses often allow landowners to develop or use property in a manner that confers costs on others, and the government has a legitimate interest in conditioning discretionary benefits on measures to defray those costs. *Id.* The *Nollan* and *Dolan* framework attempts to balance these two realities by allowing the government to impose some conditions on the issuance of permits so long as the conditions bear a sufficient nexus to a public purpose. *Dolan,* 512 U.S. at 386.

Cases that do not involve conditions on a permit or other benefit do not implicate the same considerations. This Court has accordingly applied the exaction analysis only to those cases involving government benefits. *See, e.g.*, *Nollan*, 483 U.S. at 834-37; *Dolan*, 512 U.S. at 385-86; *Koontz*, 570 U.S. at 604-08. It has repeatedly "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). Most recently, in *Cedar Point Nursery*, the Court reiterated that an exaction analysis applies to property rights demanded "as a condition of receiving certain benefits" such as "a permit, license, or registration[.]" *Cedar Point Nursery*, 141 S. Ct. at 2079. In limiting the exaction analysis to that context, the Ninth Circuit

was simply following an unbroken line of precedent. And that context is indisputably not present here.

The Ballingers only obliquely address this independent reason for the Ninth Circuit's decision, apparently taking the position that no condition on a permit or government benefit is required to trigger an exaction analysis. Pet. 18-19.[2] If that is indeed their position, they are asking this Court to create a new rule that would treat any limitation on the exercise of a traditional property right as an exaction. This proposal would completely untether the exaction analysis from its rationale: the concern is no longer that government may coercively extract the concession of a constitutional right by withholding a benefit, but rather that government may regulate property at all. There is no precedent for such a rule, and the Ballingers cite none. The Court should reject the invitation to obliterate many decades of Takings Clause jurisprudence.

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[2] The Ballingers ignore the government benefit requirement stated in *Nollan*, *Dollan*, *Koontz*, and *Cedar Point Nursery*, and instead cite a 1926 case that offers them no help: that case involved a taking imposed as a "condition precedent to the enjoyment of a *privilege*," which privilege the Court "assume[d]," "without so deciding," that the state could otherwise withhold. *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 592 (1926) (emphasis added); *see* Pet. 17.

B. The Ninth Circuit Agreed With The Ballingers That The *Nollan* And *Dolan* Analysis May Apply To Legislation, But That Question Had No Bearing On The Outcome.

Although the Ninth Circuit correctly found two independent reasons not to apply an exaction analysis – that there was no taking or condition on a benefit – it went on to discuss the Ballingers' argument that generally applicable legislation can be subject to the exaction analysis developed in *Nollan* and *Dolan*, even though *Nollan* and *Dolan* dealt with individual, adjudicative decisions. The court explained that it had recently expressed the contrary view – that "a general requirement imposed through legislation, rather than an individualized requirement," is not an exaction, App. A-21 (quoting *Pakdel v. City & County of San Francisco*, 952 F.3d 1157, 1162 n.4 (9th Cir. 2020), *vacated*, 5 F.4th 1099 (9th Cir. 2021)) – but that this Court invited it to reconsider that decision in light of *Cedar Point Nursery*, *see* App. A-21 (quoting *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226, 2229 n.1 (2021)). Noting *Cedar Point Nursery*'s admonishment that "'[t]he essential question is not . . . whether the government action at issue comes garbed as regulation[,]'" App. A-21 (quoting *Cedar Point Nursery*, 141 S. Ct. at 2072), the court ultimately "agree[d] with the Ballingers that '[w]hat matters for purposes of *Nollan* and *Dolan* is not *who* imposes an exaction, but *what* the exaction does.'" App. A-22. The fact a requirement "comes from a [c]ity ordinance is irrelevant." App. A-22.

But the court went on to stress that its opinion on that question did not matter to the case before it. It

reiterated that the "starting point" to the exaction analysis is whether the relocation payment "would be a taking independent of … [any] conditioned benefit." App. A-23. Since the court determined the relocation payment was not a taking, it could not have been an exaction, whether imposed by legislation or individualized decision. And, "[w]hatever the government action is" – legislative or otherwise – "it must condition the grant of a benefit" to become an exaction. App. A-22. Because there was no condition on a benefit, there was no exaction.

The Ballingers maintain that, despite the independent reasons for the court's decision and the court's agreement with the Ballingers about generally applicable legislative conditions, the Ninth Circuit was *really* holding in a "subtle way" that an exaction analysis is "inapplicable to legislative demands[.]" Pet. 19. That is the opposite of what the opinion says. To get there, the Ballingers expressly conflate the Ninth Circuit's view that generally applicable laws are susceptible to an exaction analysis with its determination that the exaction analysis applies only to government action that conditions a government benefit. Pet. 18-19. Those are entirely different questions. There are legislative actions that impose conditions on benefits such as building permits (*see*, *e.g.*, *Commercial Builders of N. Cal. v. City of Sacramento,* 941 F.2d 872, 874 (9th Cir. 1991) (applying *Nollan*)), and there are legislative actions that do not impose a condition on a permit or other benefit, like the Ordinance here. Under the Ninth Circuit's analysis, land-use laws that condition a benefit are subject to an exaction analysis if the condition imposed would otherwise be a taking, but

laws that do not condition a government benefit are not. That determination was a direct application of this Court's precedent and made the panel's statements on legislative versus adjudicatory action wholly unnecessary to the outcome. This Court should not take up a question that could not change the result.

C. There Is No Conflict Among Lower Courts.

The Ballingers do not claim there is any division among lower courts as to the two independent reasons for the Ninth Circuit's determination that no exaction analysis applies. The only purported disagreement the Ballingers assert is on the question whether an exaction analysis applies to generally applicable legislative conditions. Pet. 20-25. Any past disagreement among lower courts on that question does not merit the Court's intervention in this case because the Ballingers point to no conflict or confusion among lower courts following this Court's decision in *Cedar Point Nursery*. At minimum, further percolation is warranted.

The Ballingers claim the opinion below conflicts with the Sixth Circuit's opinion in *F.P. Development, LLC v. Charter Township of Canton,* 16 F.4th 198 (6th Cir. 2021), which held that an ordinance conditioning tree-removal permits on certain mitigation measures was a compensable taking. *F.P. Development* creates no conflict because the Sixth Circuit expressly declined to address whether to apply an exaction analysis to the ordinance. The Sixth Circuit noted that the question whether an exaction analysis applied was an "interesting question" – but, because "the parties

d[id] not raise it," the court "decline[d] to do so of [its] own accord" and went on, "as the parties request[ed]," to apply "the essential nexus and rough proportionality test" from *Nollan* and *Dolan*. *F.P. Dev.*, 16 F.4th at 206.

Moreover, the Sixth Circuit's decision is entirely consistent with the decision below. The Sixth Circuit applied an exaction analysis to a legislative condition, as the Ninth Circuit agreed can be appropriate. But unlike Oakland's Ordinance, the ordinance at issue in *F.P. Development* imposed a condition on the grant of a land-use permit. *Id.* at 201-02. So the question whether an exaction analysis applies in the absence of a condition on a permit or other benefit – a central component of the Ninth Circuit's analysis – was simply not present in the Sixth Circuit case.

The only other purportedly conflicting decisions the Ballingers cite are three state court decisions, two of which are not from courts of final resort. None of the three actually conflicts with the Ninth Circuit's holding. Each case analyzes conditions imposed as a condition of development approvals. *See Puce v. City of Burnsville*, 971 N.W.2d 285, 294-95 (Minn. Ct. App. 2022); *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 82, 95 (Tex. App. 2013); *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349, 353 (Ohio 2000).[3] The Texas Court of Appeal, for instance, defines an exaction as occurring

[3] There are other differences as well. For example, the Minnesota Court of Appeals applied an essential nexus requirement imposed by state statute. *Puce*, 971 N.W.2d at 294-95.

"when the government requires an owner to give up his right to just compensation for property taken in exchange for a *discretionary benefit* conferred by the government." *Mira Mar Dev. Corp.*, 421 S.W.3d at 82 n.2 (emphasis added) (quoting *City of Houston v. Maguire Oil Co.*, 342 S.W.3d 726, 736 (Tex. App. 2011)). In the decision below, the Ninth Circuit agreed that conditions on a permit or other benefit are potentially subject to a *Nollan* and *Dolan* analysis, so there is no conflict. *See* App. A-20-23; *see also Commercial Builders of N. Cal.*, 941 F.2d at 874-75 (applying *Nollan* to a legislative impact fee imposed as a condition of a development approval).

The state court decisions the Ballingers accuse of being wrong or "confused" on the issue of "whether *Nollan* and *Dolan* extend to generalized regulatory conditions," Pet. 23-24, predate this Court's opinion in *Cedar Point Nursery*. As the opinion below recognizes, *Cedar Point Nursery* suggests that whether an exaction analysis applies should depend not on who imposes the condition, but what the condition does. App. A-22. The Ballingers point to no conflict in the interpretation or application of *Cedar Point Nursery* among any lower courts. At a minimum, the question what types of government conditions are subject to an exaction analysis should percolate among lower courts after *Cedar Point Nursery* to determine whether any of the purported confusion persists.[4]

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[4] The Ballingers claim that Justices of this Court have "expressed a desire to address" the first Question Presented. Pet. 5. Justice Scalia's dissent from denial of certiorari in *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000) expressed

D. This Case Is A Poor Vehicle For Addressing The Question Presented.

Even if the Court were inclined to take up the first Question Presented, this case is a poor vehicle. First, as the City argued below, even if the Ordinance were ultimately subject to an exaction analysis under *Nollan* and *Dolan*, the Ordinance satisfies that test. The relocation payment is triggered by the tenant's unanticipated need to relocate, and the costs of relocation that the payment offsets are inherent in relocating to a new unit. The amount of the payment is proportional to the costs of relocation, as found by the City Council based on public data. ER 87, 92. In other words, a determination whether the Ordinance is subject to an exaction analysis will not likely impact the ultimate outcome of this case.

Second, the Ballingers have moved from Oakland and no longer seek injunctive relief, so the opportunity to address whether they are entitled to permanently enjoin the Ordinance is no longer present. *See* App. B-29.

Third, Oakland's Ordinance allows landlords like the Ballingers, who previously lived in the rental unit as their principal residence, to move in without making the relocation payment if the lease includes a clause reserving the landlord's right to recover

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interest in the entirely different question whether an exaction analysis applies when a developer refuses to accede to a fee demand rather than pay under protest – a question this Court subsequently answered in *Koontz*, 570 U.S. at 606. The remaining dissents and concurrences express interest in the legislative versus adjudicative conditions issue but predate this Court's opinion in *Cedar Point Nursery*.

possession for his or her occupancy as a principal residence. Supplemental Excerpts of Record on Appeal at 2. While the Ballingers did not have such a provision in their lease, landlords who enter into new leases have incentive to negotiate such terms, and the number of landlords who are required to make the relocation payment will presumably shrink over time.

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW.

A. The Ninth Circuit's Holding That There Was No State Action Is Correct.

In support of their Fourth Amendment seizure claim, the Ballingers propose that the Court's longstanding two-part state action test really only has one part. The result would turn all legislation into "state action" and has no stopping point.

The Court's test is this: "First, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* The Ballingers disregard the second part of this inquiry, arguing that if the City creates a law that allows the Ballingers' tenants to "seize" their money, then the City itself seized the money.

The first part of the test is that the alleged deprivation of a right must be caused by some enactment of the government. Undoubtedly, the City enacted the Ordinance. But that act is the creation of a legal remedy, and no more. This alone cannot

amount to state action. *Lugar*, 457 U.S. at 937; *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999).

The second part of the test must also be met: a state actor must participate in the actual deprivation of rights. The focus must be on "the specific conduct of which the plaintiff complains." *Sullivan*, 526 U.S. at 51. Here, the Ballingers complain that they paid $6,582.40 to their tenants. This is the purported "seizure" of the Ballingers' money. The City was not involved in this specific transaction. The tenants acted no more in concert with the City than anyone who acts pursuant to a law.

Attempting to address the second part of the state action test, the Ballingers alleged below that their tenants were "willful participant[s] in joint activity with the State or its agents[.]" App. A-23. But as the Ninth Circuit held, the City did not participate in the payment from the Ballingers to their tenants, or coerce or encourage the tenants in any way. App. A-24. There simply was no joint activity between the City and the tenants.

Now, the Ballingers no longer claim there was some joint activity or involvement by the City in the relocation payment. Instead, they claim that the "coercion" or compulsion of the Ordinance is *by itself* a type of involvement by the City. This is baseless. The City only enacted an ordinance, and that alone is not state action.

This is not a case where "something more" converts a private party into a state actor. There is no delegation to the tenants of a traditionally exclusively public function. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 161 (1978). The City has not "insinuated itself

into a position of interdependence" with the Ballingers or their tenants, such that the lease arrangement is a joint enterprise. *See, e.g., Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357-58 (1974). Nor did the Ordinance "compel" their tenants to violate the Ballingers' rights. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970). The tenants were not commanded to do anything. The Ordinance simply creates a legal remedy, and to find state action in this context would destroy the "essential dichotomy" between public and private acts. *Sullivan*, 526 U.S. at 53.

B. There Is No Conflict Among Circuit Courts.

The Ballingers claim that some circuit courts give "heavy weight to the role of law" in determining whether there is state action, while others give "less weight." This vague question of degree is not a conflict, and it is without evidence of any live dispute between the circuits.

The cases supposedly giving "heavy weight" to the role of law are inapposite. *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir. 1982) found state action where a private towing company towed and held a camper for the state, an example of joint participation with the state not present here. *Hollis v. Itawamba County Loans*, 657 F.2d 746 (5th Cir. 1981) did not meaningfully address the state action issue; it found the plaintiffs could challenge the due process afforded by pre-judgment seizure statutes, in a case where a county constable enforced a writ of replevin issued by a judge. Neither case has any bearing here: the City

was not a joint participant in any action taken by the tenants.

Two of the "heavy weight" cases are no longer good law. *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.*, 554 F.2d 356 (8th Cir. 1977) and *Parks v. "Mr. Ford"*, 556 F.2d 132 (3d Cir. 1977) found statutes authorizing lien satisfaction sales constituted state action. But in *Flagg Bros*. this Court held that a similar lien satisfaction sale, authorized by statute, is not state action unless it is the delegation of what is traditionally an exclusively public function. The Third Circuit subsequently recognized that this holding in *Parks* does not survive *Flagg Bros. Chrysler Corp. v. Fedders Corp*., 670 F.2d 1316, 1327 (3d Cir. 1982). The Ballingers do not suggest that "ordering relationships in the commercial world" – here the landlord-tenant relationship – is "traditionally an exclusive public function." *Flagg Bros*., 436 U.S. at 160-61. Nor could they.

The final case claimed to give "heavy weight" to the role of law in finding state action is *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006). In *Presley*, a city published a trail map that depicted a portion of the trail traversing private property. The city knew the map was erroneous, knew that it would encourage the public to use the trail, and knew that it would indicate it was acceptable to use this portion of the trail – and consequently the public used the trail in trespass on the plaintiff's property. As the Ninth Circuit noted below, the issue was that government encouraged, endorsed, and effectively participated in trespasses by the public onto private property. App. A-24. State action was founded on the city's actions, not the mere enactment of a law. Nothing of the sort

happened here; a requirement to pay money was enacted, no more.

The issue is not the "weight" to be accorded to a law – it is what a law does. If the law delegates what is traditionally an exclusively public function, creates a joint public-private activity, or compels one private person to violate the rights of another, then the act of a private person pursuant to the law may constitute state action. But if a law merely creates a legal right or remedy, then an act pursuant to that law cannot be state action. There is no circuit split regarding these established principles.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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