

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 10 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAVID KAGAN; et al.,

No. 21-55233

Plaintiffs-Appellants,

D.C. No.

v.

2:20-cv-05515-DMG-ADS

CITY OF LOS ANGELES; CITY OF LOS
ANGELES HOUSING AND COMMUNITY
INVESTMENT DEPARTMENT,

MEMORANDUM*

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted June 15, 2022
Pasadena, California

Before: RAWLINSON and CHRISTEN, Circuit Judges, and BENNETT,** Senior
District Judge.

In this case, the district court dismissed with prejudice constitutional claims
by Plaintiffs-Appellants Frank and Rachel Revere and David and Judith Kagan

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard D. Bennett, United States Senior District Judge
for the District of Maryland, sitting by designation.

(collectively, the “Owners”), private landlords who were prohibited from evicting a “protected status” tenant from one half of a Los Angeles duplex to regain the unit for family use. As the parties are familiar with the facts, we decline to recite them. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Takings Clause: “The Takings Clause of the Fifth Amendment provides that ‘private property’ shall not ‘be taken for public use, without just compensation.’” *Ballinger v. City of Oakland*, 24 F.4th 1287, 1292 (9th Cir. 2022) (quoting U.S. Const., amend. V). The Takings Clause applies to regulations that are “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005). As relevant here, the government effects a *per se* taking whenever a regulation “requires an owner to suffer a permanent physical invasion of her property”—whatever the purpose of the invasion, and however minor its impact. *Id.* at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).¹

The Owners contend that the City of Los Angeles effected a permanent physical occupation when it “granted the Tenant the permanent physical occupation of the Property in perpetuity” by affording him protective status pursuant to the

¹ As the Owners do not argue that a taking has occurred under the three-factor inquiry outlined in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), we do not address this form of taking here.

City's Rent Stabilization Ordinance ("RSO") and prohibiting them from reclaiming the Duplex for personal use. This claim is foreclosed by Supreme Court precedent. *See Yee v. City of Escondido*, 503 U.S. 519, 528–30 (1992) (holding that similar laws "merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant," and "do[] not require petitioners to submit to the physical occupation of their land"). Here, as in *Yee*, the Owners "voluntarily rented their land," and were not required to submit to physical occupation by another. *Id.* at 527. Moreover, the RSO allows at-fault evictions, such as evictions for creating a nuisance, breaking the law, or failing to pay rent, L.A. Mun. Code § 151.09(A), and grants landlords the right to end a protected tenancy by removing the entire property from the rental market with one year's notice, *id.* § 151.23(B). Accordingly, the Owners' claim that the City has compelled them to "refrain in perpetuity from terminating" this tenancy is unavailing, *Yee*, 503 U.S. at 528, and we affirm the dismissal of their takings claim with prejudice.

Substantive Due Process: "Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases." *Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). As appellants cite no authority for their contention that their right "to use and occupy their own property" is a fundamental right, they can only sustain a substantive due process claim if they can allege that the RSO is "arbitrary, irrational, or lacking any

reasonable justification in the service of a legitimate government interest.” *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 962 (9th Cir. 2011). The RSO’s stated purpose is to protect tenants who are “displaced as a result of their inability to pay increased rents” and left “unable to find decent, safe and sanitary housing at affordable rent levels.” L.A. Mun. Code § 151.01. Tenant protection is a legitimate state interest. *See, e.g., Schnuck v. City of Santa Monica*, 935 F.2d 171, 175 (9th Cir. 1991) (upholding legitimate interest in “[c]ontrolling rents to a reasonable level and limiting evictions [to] substantially alleviate hardships to Santa Monica tenants”). Accordingly, we affirm the dismissal of Appellants’ substantive due process claim with prejudice.

Procedural Due Process: “A procedural due process claim has two elements: ‘(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections.’” *Miranda v. City of Casa Grande*, 15 F.4th 1219, 1224 (9th Cir. 2021) (quoting *Franceschi v. Yee*, 887 F.3d 927, 935 (9th Cir. 2018)).² Only the second element is at issue: Appellants claim that they “were

² The City argues that Appellants have waived this claim, as their opening brief refers to their procedural due process claim only in a “ cursory” fashion. However, the district court considered this claim on the merits, and the opening brief highlights the City’s alleged failure to provide a hearing before making a determination as to the tenant’s protected status. Moreover, “[w]e may choose to review an issue notwithstanding waiver,” among other circumstances, where the appellee’s brief addresses the issue. *Freedom from Religious Foundation, Inc. v. Chino Valley Unified Sch. Dist. Bd.*, 896 F.3d 1132, 1152 n.22 (9th Cir. 2018). Such is the case here.

expressly denied a constitutionally adequate hearing on their Application to obtain possession of the Property for family purposes.”

“Notice and [a meaningful] opportunity to be heard are the hallmarks of procedural due process.” *Ludwig v. Astrue*, 681 F.3d 1047, 1053 (9th Cir. 2012) (quoting *Guenther v. C.I.R.*, 889 F.2d 882, 884 (9th Cir. 1989)) (alteration in original). However, a plaintiff alleging a constitutional due process claim must plead the inadequacy of the available state remedies. *See, e.g., Lake Nacimiento Ranch Co. v. Cnty. of San Luis Obispo*, 841 F.2d 872, 878 (9th Cir. 1987). Although Appellants insist on appeal that “there is no basis for contending that the appellants are obligated to pursue either unlawful detainer proceedings or a petition for a writ of mandate,” the procedural due process inquiry turns on whether the City has denied them a constitutionally adequate remedy. Pursuant to the Los Angeles Municipal Code, the RSO is intended to be enforced by way of an unlawful detainer action. *See* L.A. Mun. Code § 151.01 (“In order to assure compliance with the provisions of this chapter violations of any of the provisions of this chapter may be raised as affirmative defenses in unlawful detainer proceedings.”). As the Appellants have not shown that they would be unable to challenge the tenant’s protected status through an unlawful detainer proceeding, we affirm the dismissal of their procedural due process claim with prejudice.

AFFIRMED.