No. 15-330

In The
Supreme Court of the United States

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE, CALIFORNIA, ET AL.

Respondents.

On Petition For A Writ of Certiorari To
The Supreme Court of California

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's missions is to provide and expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 140,000 members are home builders or remodelers and its builder members construct about 80 percent of the new homes each year in the United States.

Amicus and its members work for the American dream of home ownership, as well as for the development of housing that creates vibrant and affordable communities. NAHB is a vigilant advocate in the Nation's courts, and frequently participates as a party or *amicus curiae* to safeguard the property rights of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife,* 551 U.S. 644 (2007) and *amicus curiae* in *Nollan v. California Coastal Comm'n,* 482 U.S 825, 841 (1987) and *Koontz v. St. Johns River Water Management Dist.,* 133 S.Ct. 2586 (2013).

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1 Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Central to this case is that mandatory inclusionary zoning ordinances are exactions subject to the standards of *Nollan, Dolan v. City of Tigard,* 512 U.S. 374 (1994), and *Koontz*. This Court should grant certiorari to clarify the appropriate legal standard to be applied in this case, as hundreds of localities across the country have enacted mandatory inclusionary zoning ordinances. Home builders operate in difficult and constantly fluctuating economic conditions, and require this Court to clarify the limits on a government's ability to force a private citizen or business to give up property as part of the development approval process.

SUMMARY OF ARGUMENT

Providing affordable housing is a legitimate priority of the highest order and a matter of national importance. At the same time, placing the burden of providing affordable housing on housing producers under a mandatory inclusionary zoning ordinance is invalid under the Fifth Amendment and the unconstitutional conditions doctrine. And while "[t]he [government] may well be right that it is a good idea, . . . that does not establish that [property owners] alone can be compelled to contribute to its realization." *Nollan* at 841. The Fifth Amendment was designed to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

The vast majority of home builders are not multi-national corporations, but rather, small- to medium-sized businesses that operate in difficult and constantly fluctuating economic conditions. In an era of increasing government regulation, imposing mandatory inclusionary zoning may be the straw that breaks the back of the housing industry. The lower court's decision virtually ignores not only the magnitude and character of the burden placed upon development community, but also ignores the dictates of this Court which provide protection under the Fifth Amendment and the unconstitutional conditions doctrine.

ARGUMENT

I. THE ERA OF INCREASING GOVERNMENT BURDENS ON BUILDERS HAS NATIONWIDE IMPLICATIONS ON THE VIABILITY OF HOME BUILDING BUSINESSES.

A. The Home Building Industry Contributes to the U.S. Economy and is Not the Cause of the Affordability Crisis.

The home building industry[2] significantly benefits the U.S. economy. During the peak of the housing boom in 2005, home building contributed more than $768 billion to the U.S. economy. Natalia S. Sinlavskaia, *The Effect of the Home Building Contraction on State Economics,* Special Studies

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2 The vast majority of home builders are not multi-national corporations, but rather, small- to medium-sized business that operate in difficult and constantly fluctuating economic conditions. To qualify as a small business, the U.S. Small Business Administration (SBA) has established ceilings of $36.5 million for all types of builders (including residential remodelers) and $15.0 million for specialty trade contractors. U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (July 14, 2014), *available at* https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf. At least 96 percent of builders, 94 percent of land developers, and 98 percent of trade contractor establishments are small by SBA standards. Stephen Melman, *Structure of the Home Building Industry* at 3, Special Studies, (Dec. 1, 2010), *available at* http://www.nahbclassic.org/generic.aspx?genericContentID=148743. Even using a smaller cap than utilized by the SBA, home builders are still small business owners. 65 percent of all home building establishments had annual receipts of under $1 million. *Id.* at 1-2.

(Aug. 1, 2008), *available at* https://www.nahb.org/en/research/housing-economics/special-studies/effect-of-home-building-contraction-on-state-economics-2008.aspx.

From a labor perspective, the number of workers who work in housing industry extends much farther than just the workers hired to construct a home. Jobs are generated in the industries where lumber, concrete, lighting fixtures, heating equipment, and other products that go into a home are produced. Even more jobs are created when real estate agents, lawyers, brokers, and lenders provide services to home builders and home buyers.

As the cost of business increases through regulation, the home building and supporting industries are all affected. Already, regulations imposed by government at all levels account for 25 percent of the final price of a new single family home built for sale. Paul Emrath, *How Government Regulation Affects the Price of a New Home* at 1-2, Special Studies (July 5, 2011), *available at* https://www.nahb.org/en/research/~/media/ABF9E4DE53084D5F8242CF6BA4EF075F.ashx (last visited Oct. 15, 2015). Every time the government raises construction costs by increasing the price of construction permits or impact fees, the cost of building a house rises. For example, permit, hook-up, impact, and other fees paid by the builder during the construction phase adds, on average, about 3.6 percent to the final price of a new home. *Id.* at 7. Thus, the home building industry is not the cause of higher home prices, but a victim of government regulation. San Jose's Inclusionary Housing Ordinance ("Ordinance") is similar to countless

mandatory inclusionary zoning programs around the country and places an extraordinary demand upon builders.

B. The Burden of Providing Mandatory Inclusionary Zoning Causes Builders to Change Their Market Behavior, and Some Builders Leave the Market Altogether.

Under a mandatory inclusionary zoning ordinance, the burden of planning, constructing, and funding affordable housing units falls primarily on home builders. This has major implications. Mandatory inclusionary zoning ordinances "are assumed to be cost effective from the perspective of the public sector. The public sector bears administrative costs, but construction and financing costs are borne entirely by the private sector." The Urban Institute, *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties* (Dec. 2012) at 1, *available at* http://www.huduser.org/Publications/pdf/HUD-496_new.pdf.

Undoubtedly, the financial pressure due to mandatory inclusionary zoning changes the behavior of housing producers because "[b]uilders must constantly decide whether each additional project pencils out, and if policies change marginal revenue or marginal costs, builders will alter their choices". Benjamin Powell, et al., *The Economics of Inclusionary Zoning Reclaimed: How Effective Are Price Controls?,* 33 Fla. St. U. L. Rev. 471, 484 (2005).

Furthermore,

> "[wishful thinking nothwithstanding, the builders will not passively respond and build the same quantity as before. The simplest option for builders would be to move to jurisdictions free from price controls. This is not to say that all builders will move, but some of them will; they will exit the market until the rate of return in the market after the [government regulation] return[s] to the level before the [regulation]. Even if the policy were national and builders had no option to move, this would still decrease the quantity of development because investment in housing would decrease. The building industry, like all industries, faces financing constraints so that people will not invest in housing if it has lower profit margins." *Id.* at 484.

Certainly, some builders will leave the business altogether.[3] For example, home builders in Madison, WI, produced 3,257 units in the two years immediately prior to enacting an inclusionary zoning ordinance in 2004. From 2004-2006, at the

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3 With a baseline of 161,650 establishments in the residential construction industry, 30,697 firms entered the industry and 29,095 business failed in 2007. Melman, *Structure of the Home Building Industry* at 5. This means that, in just one year, almost 20 percent of the total number of residential construction business either entered and/or failed in the market. *Id.* In contrast, the entire manufacturing industry has a more stable percentage change where approximately 8 percent of manufacturing businesses enter and/or exit the market. *Id.* Those in the residential construction industry face a difficult road to survive.

height of the housing boom, builders produced only 1,954 units, a 40 percent decrease. Terrence Wall, *How Inclusionary Zoning Backfired on Madison,* Madison Isthmus, (March 15, 2007), *available at* http://www.isthmus.com/opinion/how-inclusionary-zoning-backfires-on-madison/ (last visited Oct. 13, 2015). The downturn in new construction caused vacancy rates to decline in existing units and net rents to increase, thereby achieving the opposite effect of what the city intended, and overall increased housing costs for everyone. The program was discontinued in 2009. Certainly, "[t]he idea that the cost of affordable housing will be absorbed by builders without decreasing the amount of construction is highly questionable." *Powell* at 485.

More inclusionary requirements are surfacing across the country. Most recently, the City of Chicago amended its inclusionary housing requirement by creating a three-tier in-lieu fee schedule, and raised the inclusionary in-lieu fee from $100,000 to $175,000 for any developments located in Chicago's downtown. Chicago Municipal Code 2-45-110. Without this Court's intervention, home builders should expect inclusionary mandates to continue to rise, as there will be little to stop a locality from imposing higher requirements upon builders.

II. INCLUSIONARY ZONING PLACES UPWARD PRESSURE ON MARKET RATE HOMES, THUS PRICING-OUT MANY POTENTIAL HOME BUYERS.

By placing responsibility of providing affordable housing on home builders under a mandatory

inclusionary zoning ordinance, home builders are forced to absorb most of the costs, while the remainder could be passed on to the end home buyer of a market rate home. In turn, this creates a net loss of people who can afford a home by pricing-out more home buyers at the entry-level market price compared to purchasers of inclusionary units.

Nationally, a $1,000 increase in home price leads to about 206,269 households priced-out of the market for a median-priced new home. Natalia S. Sinlavskaia, *State and Metro Area House Prices: The "Priced Out" Effect*, (Aug. 1, 2014), *available at* http://www.nahb.org/en/research/housing-economics/special-studies/state-and-metro-area-house-prices-the-priced-out-effect-2014.aspx .

A California-specific study estimates that inclusionary housing programs by themselves inflate the market price of new homes by approximately 2.2 percent, and greater in higher priced housing markets. Nat'l Ctr. for Smart Growth Research and Education, *Housing Market Impacts of Inclusionary Zoning* at 12 (February 2008), *available at* https://www.nahb.org/en/research/~/media/B8731D2A9B0D4DF1A74D9D97CAD145BE.ashx. When taking into account the median price of a home in the San Jose area, a 2.2 percent increase of the median home sales price due to the exactions and fees mandated by inclusionary housing will price at least 7175 potential homebuyers out of the market in San Jose alone. Sinlavskaia, *State and Metro Area House Prices: The "Priced Out" Effect* at Table 1.

The emerging picture when comparing the number of priced-out home buyers with the number of affordable units produced per year under a mandatory inclusionary scheme is depressing. The Association of Bay Area of Governments estimated the need for very low-, low-, and moderate-priced units to be 133,195 units, or 24,217 per year during a period between 2001-2006, but in "the thirty-plus years that inclusionary zoning has been implemented in the San Francisco Bay Area, inclusionary zoning has resulted in the production of only 6836 affordable units, or 228 units per year." 33 Fla. St. U. L. Rev. 471 at 476. Nobody disputes that a mandatory inclusionary housing program produces some units, but the fact remains that far more numbers of people lose the ability to become home owners as a result. This results in a net loss of home buyers that will be able to purchase and build equity in a home.

Even when disregarding the fact that inclusionary housing creates a net loss of potential home buyers, inclusionary housing still fails in terms of actually achieving the production of units with respect to need. This is particularly true in comparison to other affordable housing strategies. During a control period of 24 years (1979-2003), only 9,154 units were produced through inclusionary housing in the San Francisco Bay area, an average of just 381 units a year. On the other hand, 29,636 affordable housing units were produced though the federal Low Income Housing Tax Credit (LIHTC) program. Jenny Schuetz, Rachel Meltzer, and Vicki Been, *Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets* at

31, Furman Center, New York University (Oct. 2, 2009), *available at* http://furmancenter.org/files/publications/IZ_impacts_10-19-09_1.pdf. This certainty suggests that "more flexible programs may produce more affordable units." *Id.* at 32.

Even worse, production of affordable housing through inclusionary housing laws drops during downturns of the economy, or when private residential development activity is curtailed by any of the multitude of other factors (e.g., interest rates, materials costs, etc.) that influence housing construction. Yet, downturns in the economy are when additional units are most needed. For example, in Montgomery County, Maryland, only 77 inclusionary housing units were produced in 2007. *Id.* at 17. Similarly, in 2010, Fairfax County, Virginia, produced just 18 units, falling from a high of 375 in 2000. *Id.* at 37. The imposition of mandatory inclusionary zoning has nationwide consequences.

III. THE MAGNITUDE AND CHARACTER OF THE BURDEN PLACED ON DEVELOPERS TO FINANCE AND CONSTRUCT INCLUSIONARY UNITS AS A CONDITION FOR PERMIT APPROVAL REQUIRES THE PROTECTION OF THE FIFTH AMENDMENT AND THE UNCONDITIONAL CONDITIONS DOCTRINE.

The lower court held that San Jose's Ordinance "does not effect an exaction" deserving of heightened scrutiny under *Nollan* and *Dolan*. The court reasoned in part that the ordinance: 1) "does not

require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process"; and 2) "imposes price controls rather than other use restrictions in order to accomplish its legitimate purposes." Pet'rs App. A-35-36; Pet'rs App. A-40, *California Building Industry Association v. City of San Jose,* 61 Cal. 4th 435, 351 P.3d 974 (2015). Instead, the lower court applied a deferential standard, ruling that the Ordinance "falls within what we have already described as municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large." Pet'rs App. A-36.

There are a number of problems with the lower court's ruling requiring this Court's intervention. First, the lower court essentially ignores the protections of the Fifth Amendment and the unconstitutional conditions doctrine by substituting due process standards that are not at issue in this case. Second, the lower court ignores the magnitude and character of the burden placed on developers by likening the inclusionary mandate as simply a form of price control. A closer look reveals no such thing.

A. *Lingle v. Chevron* Clarifies that Claims Under the Fifth Amendment and the Unconstitutional Conditions Doctrine Must Account for the Magnitude and Character of the Burden Placed on the Property Owner.

The issue in this case is not whether the government can enact regulations providing for the

provision of affordable housing; rather, it is whether the government can demand that a private entity provide it regardless of the cost to the builder and as part of the development approval process. *See, e.g., Nollan v. California Coastal Comm'n,* 483 U.S. 825, 841-842 (1987) ("The Commission may well be right that [the easement condition] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program' if it wishes, by using [the] power of eminent domain for this 'public purpose' . . . but if it wants an easement across the Nollans' property, it must pay for it."); *see also Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922)("We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we would assume that an exigency exists that would warrant the exercise of the power of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall."); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1009 (1992)(The petitioner in the case "did not take issue with the validity of the [statute] as a lawful exercise of South Carolina's police power, but contended that the [statute's] complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives.") The lower court simply ignored well-defined takings and unconstitutional conditions analysis by ruling that inclusionary zoning ordinances are subject only to the police power.

For much of the 20th Century, the legal standard for takings claims was muddied by due process concepts. For years, this Court held that a regulation of private property "effects a taking if [it] does not substantially advance [a] legitimate state interest[]." *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). However, this Court expressly invalidated the *Agins* standard for takings analysis in *Lingle v. Chevron,* 544 U.S. 528 (2005).

Lingle dealt with a takings challenge to a state statute which placed a rental price cap on how much oil companies could charge lessee-dealer stations. In *Lingle,* this Court admitted that the *Agins* standard was one that "commingl[ed]" due process and takings inquiries, and that such "reliance on due process precedents" has "no proper place in our takings jurisprudence." *Lingle* at 540-541. The *Agins* "substantially advances" analysis is geared toward the context of a due process challenge, "for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Lingle* at 542.

The Court was particularly concerned that the *Agins* due process-like test "reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights." *Id.* at 542. Instead, the *Agins* inquiry "probes into the underlying validity" of the challenged regulation. This question, the Court admitted, "is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the

government has acted in pursuit of a valid public purpose." *Lingle* at 543.

Lingle further explained the connection to this rationale for exactions, stating "*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings . . . . these cases involve a special application of the doctrine of 'unconstitutional conditions,' which provides that 'the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.' " *Lingle* at 547.

B. The Lower Court's Reliance on Standard Zoning and Price Control Cases Ignores the Character of Burden Placed on Builders Under San Jose's Inclusionary Housing Ordinance.

Unfortunately, the lower court's decision reeks of *Agins*-like rationale, applying zoning and rent control cases decided by this court, and holding that "the fact that San Jose's [Ordinance] imposes price controls rather than other use restrictions does not render such price controls an exaction or support application of a constitutionally based judicial standard of review that is more demanding than that applied to other land use regulations." Pet'rs App. A-40. In supporting this conclusion, the lower court erroneously relied on this Court's decisions of *Nebbia v. People of State of New York,* 291 U.S. 502 (1934), *Yee v. City of Escondido, Cal.,* 503 U.S. 519

(1992), and *Pennell v. City of San Jose,* 485 U.S. 1 (1988).

In *Nebbia*, this Court considered only an equal protection and due process challenge to a state law that gave a state agency the power to "fix minimum and maximum … retail prices [for milk] to be charged by … stores to consumers for consumption off the premises where sold." *Id.* at 515. It is certainly true that *Nebbia* ruled that "the guaranty of due process, . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Id.* at 525. The Petitioner in *Nebbia* did not assert a takings claim or an unconditional conditions claim.

In *Pennell v. City of San Jose*, this Court heard a takings, due process, and equal protection challenge to San Jose's rent control statue, on the basis that a provision that allowed a hearing officer to reduce rents on the basis of tenant hardship trumped other considerations that related to the landlord's burden. This Court did not address the merits of the takings claim, noting that the tenant hardship clause had not been relied on by any hearing officer to reduce a rent. *Id.* at 10.

In *Yee v. City of Escondido,* mobile park owners who would rent their land to mobile home owners, argued in part that a city ordinance which rolled back the rent was a *per se* taking because it "transferred a discrete interest in land – the right to occupy the land indefinitely at a submarket rent – from the park owner to the mobile home owner." 503

U.S. 519, 527 (1992). The ordinance allowed the city council to approve increases in rent at any time, based on nonexclusive factors that *considered the implications to the mobile park owner,* including: 1) changes in the Consumer Price Index, 2) the rent charged for comparable mobile home pads, 3) the length of time since the last rent increase, 4) the cost of any capital improvements related to the pad, 5) changes in property taxes, 5) changes in any rent paid by the park owner for the land, 7) changes in utility charges, 8) changes in operating and maintenance expenses, 9) the need for repairs other than for ordinary wear and tear, 10) the amount and quality of service provided to the affected tenant, and 11) any lawful existing lease. *Id.* at 524-525.

In finding that the Escondido ordinance did not effect a physical taking, this Court made a number of findings. First, the Court found it persuasive that "neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, [the ordinance] provides that a park owner who wishes to *change the use of his land* may evict his tenants [with notice]." *Id.* at 527-528 (emphasis added). Certainly the Court noted "[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." *Id.* at 528 (citations omitted).

That is exactly the "different case" that is presented here. San Jose's Ordinance conditions development approval on any builder that creates twenty (20) or more units for sale or rent to one of the following provision: 1) 15 percent On-site

Inclusionary Units; 2) 20 percent off-site inclusionary units; 3) an in-lieu fee that is no greater than the difference between the median sales price of an attached market rate unit and the government determined Affordable Housing Cost for a household of 2.5 persons earning no more than 110 percent of the Area Median Income; 4) dedication of land; or 5) acquisition and rehabilitation of existing units. Pet'rs App D-12,14, 17-21. In short, each of these conditions is more than just a restriction on the use of builder's property; rather, any of these conditions divest a permit applicant of property interests in either real property or money.

In fact, none of the exactions consider any of the financial and/or other burdens upon the builder. In fact, the in-lieu fee provision allows the city council to increase the fee to account for "the actual estimated costs of administration" and the "estimated costs of increases *in the price* of housing and construction from the time of payment of the in lieu fee to the estimated time of provision of the affordable units by the City." Pet'rs App. D-16. In other words, if the City deems it necessary to demand more money for the *cost of its own services,* it can take it from builders.

Moreover, the conditions must be guaranteed or paid to the City prior to the commencement of construction and well before the city issues an occupancy permit. For example, the dedication of land condition requires transfer of "[m]arketable title to the site" prior to the commencement of construction of the market rate units. Pet'rs App. D-17. The fee in lieu condition states that "[n]o certificate of occupancy shall be issued by the City

for any Market Rate Unit in the Residential Development prior to the payment in full of all in lieu fees to the City." Pet'rs App D-16. Finally, the condition to build on-site or off-site units must be included as part of the submission of a builder's Affordable Housing Plan.

There's more that differentiates San Jose's Ordinance from a price control ordinance such as in *Yee*. In *Yee,* this Court noted that "[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." *Yee* at 528 (citations omitted). Yet that is exactly what is happening here. The Ordinance requires inclusionary units to remain affordable for no less than 45 years, although that period can be extended indefinitely if the residential development "receives a subsidy of any type, including but not limited to loan, grant, mortgage finance, mortgage insurance, or rental subsidy, and the subsidy program requires a longer term of affordability, or as prescribed in the Inclusionary Housing Guidelines." Pet'rs App. D-22.

The lower courts decision completely ignores the burden placed upon the development community by San Jose's Ordinance. However, a concurring opinion by California Supreme Court Judge Chin stated "[b]ut an ordinance that did require the developer to provide subsidized housing, for example, by requiring it to sell some units below cost, would present an *entirely different situation*. Such an ordinance would appear to be an exaction, and I question whether it could be upheld as simply a form of price control." Pet'rs App. A-81. Here, San

Jose's Ordinance makes no exception from inclusionary mandate if the cost of providing inclusionary units are higher than the affordable housing price set by the government.

As illustrated above, this Court's decisions require lower courts to give proper consideration of the magnitude and character of a developer's burden under a mandatory inclusionary requirement. Therefore, *Amicus* requests that the Court should grant certiorari to restore the protections of the Fifth Amendment and the unconstitutional conditions doctrine.

CONCLUSION

Respectfully, this Court should confirm that it "see[s] no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ." *Dolan* at 392. The housing industry is a cornerstone for the economic success of this Nation. The lower court's decision places little restraint on the ability of the government to impose limitless requirements as a condition in order to develop housing. For the foregoing reasons, the petition should be GRANTED.

DATED: October 16, 2015

Respectfully Submitted,

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