No. 15-330

In The Supreme Court of the United States

CALIFORNIA BUILDING INDUSTRY ASS'N,

Petitioner,

v.

CITY OF SAN JOSE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF *AMICI CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JUNE BABIRACKI BARLOW, ESQ.
Vice President and General Counsel
Counsel of Record
NEIL D. KALIN, ESQ.
Assistant General Counsel
CALIFORNIA ASSOCIATION OF REALTORS®
525 South Virgil Avenue
Los Angeles, California 90020-1403
Telephone: (213) 739-8200
juneb@car.org
Counsel for Amici Curiae
California Association of REALTORS®
and National Association of REALTORS®

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

BRIEF OF *AMICI CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, *Amici Curiae*, the California Association of REALTORS® (hereafter, "C.A.R.") and National Association of REALTORS® (hereafter, "NAR") (collectively, hereafter, "*Amici*"),[1] submit this brief in support of the petitioner, California Building Industry Association (hereafter, "Builders").

IDENTITY AND INTEREST OF *AMICI CURIAE*

C.A.R. is a non-profit, voluntary, real estate trade association incorporated in California whose members consist of local Boards and Associations of REALTORS®, and approximately 180,000 persons licensed as real estate brokers and salespersons by the State of California. Members of C.A.R. assist the public in

[1] *Amici* have informed the parties of the intent to file this *amicus* brief at least 10 days before filing. The parties have consented to the filing of this brief. Petitioner's blanket consent is on file with the Clerk of the U.S. Supreme Court. Respondent's and Intervenor's consent are attached hereto.

This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

buying, selling, and managing residential real estate. As it has for 110 years, C.A.R. is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and licensed real estate activity.

"The purpose of the CALIFORNIA ASSOCIATION OF REALTORS® is to serve its membership in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses successfully with integrity and competency, *and through collective action, to promote real property ownership and the preservation of real property rights.*"[2] Far from being a single-minded organization, C.A.R. has long been involved in promoting housing options for all elements of society.[3] C.A.R. agrees that housing affordability is a serious problem that requires serious and creative solutions, so long as the solutions are consistent with constitutional principles.

---

[2] C.A.R. Mission Statement, at http://www.car.org/aboutus/mission/ (emphasis added).

[3] "C.A.R. State Legislative Issues Report" (2015); see Chapter Two, "Housing Issues, Housing Affordability," pp. 43-49, at http://www.car.org/governmentaffairs/stategovernmentaffairs/SLIR2015. In addition to working in the policy/legislative arena, C.A.R. also established a Housing Affordability Fund in 2002 to support employer assisted housing programs, programs that provide payment and closing cost assistance, and for other housing affordability solutions that fit the needs of a particular community. C.A.R. Housing Affordability Fund, "About H.A.F.," at http://www.car.org/members/haf/faq/.

NAR is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,200 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR-ASSOCIATE® members.

The California Supreme Court issued an opinion, *California Building Industry Association v. City of San Jose*, 61 Cal. 4th 435, 351 P.3d 974 (2015) (hereafter, "*CBIA v. San Jose*"), that not only interpreted California law but also misapplied federal law in the process. Petitioner has already addressed the conflicts among different lower courts that make it appropriate for this Court to accept the Writ. *Amici* fully support the arguments and reasoning expressed in the Petition and will not waste the Justices' time by simply restating those arguments here. In addition to the arguments made by Petitioner, a further compelling reason for this Court to accept the Writ is that other, possibly agenda-driven, jurisdictions located both within and outside of California now can look to this California precedent as a way to deny additional property owners throughout the United

States of their constitutional rights. Intervention from this Court is necessary to clarify that constitutional principles prevail over even well-meaning, but unlawful, government actions.

As the Builders are making a facial challenge to the San Jose ordinance, *Amici* believe that it would be enlightening to describe some of the likely effects of compliance with this ordinance, given the brick and mortar "real world" in which builders exist. Developer-specific facts and figures will not be addressed, as those arguments are more directed toward an as-applied challenge to the ordinance made on a case-by-case basis in the local courts. Instead, *Amici* uses aggregated data (median sales prices for land, for example) to speak to the ordinance itself and its overall likely impact.

The California Supreme Court was inundated with data about the dire straits of the affordable housing market in California. Undoubtedly those same voices will flood this Court with similar grim reports. *Amici* support homeownership and recognize the difficulty of finding and supplying affordable housing in California. Accordingly, *Amici* have no disagreement with bringing attention to the problem. The point of disagreement lies in obligating certain developers to provide such housing and shifting the burden to those builders, through an ordinance that is constitutionally invalid. *Amici* believe that they can provide the Court with valuable insights that can

be useful in demonstrating how the issue in this case has nationwide policy implications.

CASE SUMMARY

The facts in this case are largely undisputed and well-documented in the Petition for Writ of Certiorari. The City of San Jose ("City" or "San Jose") enacted an ordinance (Ordinance No. 28689, San Jose Municipal Code §§ 5.08.020-5.08.720, Petitioner's Appendix D) (hereafter, "Ordinance" or "SJMC") that required developers of projects with 20 or more units to set aside at least 15% of those units for sale to selected buyers whose incomes are considered moderate, low, very low, or extremely low ("Income Challenged Buyers" or "Targeted Income Buyers") at designated prices. In the alternative, among other things, the developer could construct off-site housing for Income Challenged Buyers, pay an in-lieu monetary fee that would go into a City housing affordability fund, or dedicate land for affordable housing. (SJMC §§ 5.08.510, 5.08.520, 5.08.530, 5.08.550, Petitioner's Appendix, at D-2-21). Notably, and critically, among the Ordinance's provisions is the following: "The ordinance requires that such units have the same quality of exterior design and comparable square footage and bedroom count as market rate units (SJMC § 5.08.470B, F), but permits some different 'unit types' of affordable units (for example, in developments with detached single-family market rate units, the affordable units may be attached single-family units or may be placed

on smaller lots than the market rate units) (SJMC § 5.08.470E), and also allows the affordable units to have different, but functionally equivalent, interior finishes, features, and amenities, compared with the market rate units. (SJMC § 5.08.470C)." (*CBIA v. San Jose*, *supra*, at 451).

Before enacting the Ordinance, San Jose expended considerable time, effort and money conducting studies, acquiring input and reaching out to various interested parties and their representatives who were likely to be impacted by the Ordinance. (*CBIA v. San Jose*, *supra*, at 442, 448). Presumably, the reason for the extensive outreach and information gathering was to create a law that would be amenable to a broad segment of the affected developers and purchasing public, and their respective advocacy groups. While laudable, the considerable amount of time and effort expended, and attempt to draft a law that has widespread appeal, does not mean that the end result is constitutionally permissible.

ARGUMENT

I. THE SAN JOSE ORDINANCE IS AN EXACTION

A. The Ordinance Requires That A Government Responsibility, and Burden, is Shouldered by a Selected Few in the Community but Not All

The City and the California Supreme Court both emphasize how the need to provide affordable housing is a societal problem. (SJMC § 5.08.020, Petitioner's Appendix, at D-1-3) (*CBIA v. San Jose*, *supra*, at 441-446). Overwhelmed by the apparent magnitude of the problem, and wanting desperately to find a solution, both confuse what is expedient with what is constitutional and both are content to force a few to bear the burden of what belongs to the many; i.e., the government. Demanding that some give up their property to satisfy what is essentially, and truly, a government responsibility is the essence of an exaction. (*Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)).

Developers of 20 or more units are being asked, nay, being coerced into providing affordable housing to Targeted Income Buyers while others who, according to the Ordinance itself, contribute to the problem,[4]

[4] If it is true that market rate housing deprives the community of affordable rate housing (*CBIA v. San Jose*, at 48-49, citing to SJMC § 5.08.010), then a developer who builds 19 units

(Continued on following page)

bear no burden.[5] Meanwhile, the true benefactor of the Ordinance, society at large, shoulders none of the responsibility whatsoever.

And should there be any doubt that there is value attached to the requirement of setting aside affordable housing for Targeted Income Buyers, one need look no further than the Ordinance itself, which calculates a specific dollar amount, in cash or in kind, that is being taken from the developer of 20 or more units. (SJMC § 5.08.520, Petitioner's Appendix, at D-14). Such a direct equivalency openly contradicts the holding of this Court in *Koontz v. St. Johns River Water Management District*, 570 U.S. ___, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013). To be direct, the Ordinance requires developers to give a portion of their property toward satisfying a government goal; or, they may give money to the government instead. In

---

is 95% as responsible as a developer who builds 20 units. Although both deprive the marketplace of affordable housing, only the former must bear the financial consequences of the "offending" behavior.

[5] If one draws a logical inference from the findings of the Ordinance, as quoted by the California Supreme Court (*CBIA v. San Jose*, *supra* at 449), then even the creation of less expensive housing units can contribute to the affordable housing crisis due to the impact upon governmental resources. After all, if those who purchase market rate dwellings will cause an increased demand for public services and government resources, then surely the same can be said about those who purchase affordable housing. It is the increase in population that drives the need, and not the relative wealth of the homebuyer; unless the City can show that Income Challenged Buyers have fewer needs for public services compared to market rate buyers.

short, San Jose is making the affected developers pay for what the City has neither the political will nor the resources to do itself – provide housing to those who can least afford it.

To this, opponents of the Petition may argue that developers of 20 or more units should be the ones to solve the affordable housing shortage because they can afford to do so. But that is not a constitutional argument and instead is an open admission that covered developers are being forced to subsidize the supply of affordable housing in San Jose, to the exclusion of all others.

B. The Ordinance is Much More Than a Mere Price Control

In the opinion of the California Supreme Court, the Ordinance's exaction is not an exaction but instead a lawful price control. (*Amici* will provide additional discussion regarding this issue, in the following section of this brief.) Time and again, the California court refers to the Ordinance as a mere price control that only places restrictions on the way a property can be used (*CBIA v. San Jose*, *supra* at 441-446), but such a limited description does not take the Ordinance's workings and effect into full account. Developers who fall within its purview are not only told how much to charge for a housing unit, but also to whom they must sell their product. The affected buildings are not government-subsidized projects, or

developments that are created through the use of government redevelopment acquisitions or funds; they are private developments.

Rights in real property "have been described as the rights to possess, use and dispose of it." (*Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (internal quotes omitted)). Whether or not it is wise, or effective, it is settled that without running afoul of the Constitution the government may take away some of those rights, or "sticks in the bundle," most particularly those having to do with the ability to charge what one wants for the property in question. But here, how and to whom one can dispose of a property is also being taken away. The developer is deprived of the valuable core of what a property owner owns – the right to set a price and the right to select a buyer. In this case, too much is taken away and an exaction has occurred.

This difference makes the Ordinance unlike most other approved price controls. A wealthy person who becomes a tenant in a rent controlled apartment is entitled to the same protections as an extremely low income or moderate income person who rents that same apartment. A person who can afford to pay above market rates to the seller of a mobile home located on a pad in a mobile home park is entitled to the same rent control protections for that space as a low or moderate income resident who has been residing in the same mobile home in the park for years.

But even in the case of rent control, assuming compliance with anti-discrimination laws, the apartment or park owner retains the ability to choose to whom to sell (or rent, as the case may be) his product, or property. Not so under the San Jose ordinance. The right to choose the buyer has been taken away. The Ordinance is not just a lawful price control; it is also a purchaser control – the affected developer *must sell* to a Targeted Income Buyer. Stacking purchaser control on top of price control turns what might otherwise be a lawful ordinance into an unlawful exaction.

C. A Rose By Any Other Name . . .

The City will do whatever it thinks is allowable in order to achieve its goal, namely, selecting a few whom the City perceives to have "deep pockets" to shoulder a societal responsibility. Here, it should suffice to say that San Jose, like Shylock, will not be satisfied until it extracts its "pound of flesh"[6] from developers of 20 or more units, even if such action is to the exclusion of any other person or entity that may contribute to the societal problem of lack of affordable housing. The City may respond that it is only a pound, and that 20+ unit developers are too fat anyway. Of course, that is easy to say when it is not your flesh, or property. To *Amici*, this extraction

[6] Shakespeare, William, *The Merchant of Venice*, Act IV, Scene I.

should be called what it is: in real property constitutional parlance, an exaction.

II. EVEN IF THE ORDINANCE IS NOT AN EXACTION, IT NONETHELESS IS STILL INVALID BECAUSE IT DENIES THE PROPERTY OWNER A REASONABLE RATE OF RETURN

The California Supreme Court equates the Ordinance with rent control in order to justify applying a different standard of review other than that which would apply to an exaction. In the previous section, *Amici* argued why the Ordinance is an exaction. But, the Ordinance fails even if it were not an exaction.

As has been stated, the California Supreme Court equates the Ordinance with rent control. The essence of rent control is price control. A property owner whose property is subject to rent control is restricted in how much the property owner can charge for use of the property. Whether apartment rent control or mobile home park rent control, property owners have made, and lost, numerous challenges to such enactments. As recently as September of this year, the United States Court of Appeals for the Ninth Circuit quoted the recently departed Yogi Berra when it deemed another creative challenge to rent control as "deja vu all over again." (*Rancho De Calistoga v. City of Calistoga*, ___ F.3d ___, 2015 WL 5158703 (2015)). But both federal and State courts have consistently

held that rent control is permissible as long as it allows the property owner a reasonable rate of return, even though such a return is not as great as the property owner would like. (*Rancho De Calistoga*, *supra*, and *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 771-777 (1997)). The San Jose Ordinance does not pass even such a minimal standard, as described below.

A. The Ordinance Obligates an Affected Property Owner to Sell to a Targeted Income Buyer at a Loss

The Ordinance requires that 15% of units be made available for purchase at an Affordable Housing Cost for those households earning no more than one hundred ten percent (110%) of the Area Median Income (SJMC § 5.08.400A(a), Petitioner Appendix, at D-5). Area Median Income means the annual median income for Santa Clara County as published in the California Code of Regulations. (SJMC § 5.08.130, Petitioner Appendix, at D-3). According to the California Code of Regulations (25 CA ADC § 6932), the Area Median Income for Santa Clara County is $106,300. (Amount is based on a household size of 4 persons. Smaller households would generate a lower income level and larger households a higher one. It is unclear from the Ordinance whether the affected developer could, is required to, or must not inquire about "size of household" information from Targeted Income Buyers. Accordingly, *Amici* will base its analysis on the median figure cited in the Code of Regulations).

110% of the median income amount is $116,930. California Code of Regulations § 6932 refers to the California Health and Safety Code, § 50052.5, to determine the Affordable Housing Cost that a Targeted Income Buyer can afford. Interpreting this language, the California Supreme Court determined that the maximum amount that a Targeted Income Buyer could spend on housing under the Ordinance would be 30% of the area median income, or $31,890 yearly. *CBIA v. San Jose*, *supra* at 450. When looking at the language of § 50052.5, it is possible to calculate a maximum annual housing cost of $40,736 (35% of 110% of the area median income). Based on the higher figure, *Amici* have calculated that the maximum purchase price a Targeted Income Buyer can afford is approximately $680,000, assuming that the buyer has a 20% cash down payment to contribute to the purchase price. If the buyer does not have any down payment at all, and is somehow able to obtain 100% financing to purchase from the affected developer, the maximum purchase price for the property is only about $570,000.[7, 8]

---

[7] The calculation is based on the expectation that the purchaser's house payments include the mortgage principal and interest, and taxes and insurances, and a 30-year fixed rate mortgage at 4% interest.

[8] Would the affected developer be required to sell a unit at the 100% financing price or the 80% financing price? The Ordinance does not resolve such questions or confusion. Moreover, the information used in the above example does not even take into account potential sales to those who have much lower affordability rates, and at least theoretically are also supposed

(Continued on following page)

The previous lengthy paragraph takes the long road to conclude that an affected developer must sell 15% of units in a covered development at a price that, at most, would likely be no more than $680,000. But depending on the assumptions made and the particular household size and income, the price could be substantially less. How does this high-end sales price compare to the price charged to market rate buyers? To keep the analogy consistent, consider home prices in Santa Clara County. The median size square footage for homes in California is about 1,700 square feet, and the median home price for existing homes in Santa Clara County is $865,000.[9] Land values in San Jose are 75% of a home's value and construction costs about another 20%.[10]

Therefore, it can be expected that the developer's land cost alone for such a median size home is nearly $650,000 and construction costs another $173,000. Thus, generically speaking, and based on aggregated

---

to benefit from the Ordinance, because they belong to low, very low, and extremely low income households.

[9] "Median Home Price" represents the median home price of August 2015 obtained from MLSListings. MLSListings is a multiple listing service ("MLS") for Northern California.

[10] See Lincoln Institute of Land Policy, "Land and Property Values in the U.S.," at http://www.lincolninst.edu/subcenters/land-values/metro-area-land-prices.asp, particularly the chart for MSA-level price indexes, looking at the rows for San Jose. See also FIXr's "Build Single-Family House Cost," at http://www.fixr.com/costs/build-single-family-house for building cost ratios.

data, under the Ordinance a typical developer would incur a $143,000 loss on the highest sales price ($680,000) that could be achieved by a forced sale to a Targeted Income Buyer. And that is before other costs such as overhead, marketing and broker fees are taken into account. If the calculation is based on the California Supreme Court equation for affordable housing costs, the buyer/borrower would have about $10,000 less a year to spend than the figure used in this example, so the loss would be even greater. And if the calculation were based on the income level for low, very low or extremely low income buyers, the loss would amount to hundreds of thousands of dollars for each unit sold. A developer of a median sized home in Santa Clara County, forced to sell a home to a Targeted Income Buyer at an Ordinance-defined affordable housing price, would necessarily have a loss on each one of those units. *Amici* are not saying that the law should guarantee developers a profit on their private endeavors. However, the law should not be written in such a way to all but guarantee that those same developers incur a loss.

B. Requiring a Builder to Subsidize Housing for a Targeted Income Buyer Amounts to an Unconstitutional Taking

Justice Chin, in writing a concurrence in the case (*CBIA v. San Jose*, *supra*, at 486-488) correctly stated that a private party, in this case a developer, should not be required to subsidize another private party so

that the City can achieve a public policy objective. But even Justice Chin's concurrence does not convey the true gravity of the Ordinance. Justice Chin recognizes that the Ordinance allows for a certain amount of cost cutting. For example, Affordable Housing Units may have different finishes and features, as long as such finishes and features are functionally equivalent to the Market Rate Units. (SJMC § 5.08.470C, Petitioner's Appendix, at D-11).

Although an affected developer arguably does not have to provide a Targeted Income Buyer with top-of-the-line appliances,[11] would a developer who provides a "Maytag Front Control Dishwasher in Monochromatic Stainless Steel with Stainless Steel Tub and Steam Cleaning" (retailing at $589.00) in market rate units be complying with the Ordinance's "functionally equivalent" requirement, if the developer substituted a "Hotpoint Front Control Dishwasher in White" (retailing at $299.00) in units offered to Targeted Income Buyers?[12]

While the Ordinance does permit developers to build on smaller lot sizes for Affordable Rate Units, (SJMC § 5.08.470E, Petitioner's Appendix, at D-11)

---

[11] Anyone who has ever gone shopping for a new home is aware that quite often top-of-the-line furnishings are not even offered to market rate buyers at the base purchase price but instead are offered at an extra cost as options or upgrades.

[12] See The Home Depot's website, results shown by searching for "dishwasher," at http://www.homedepot.com/b/Appliances-Dishwashers/N-5yc1vZc3po/Ntk-SemanticSearch/Ntt-dishwasher?Ntx=mode+matchall&NCNI-5.

given the huge disparity between median home prices for market rate buyers and allowable home sale prices for Targeted Income Buyers, it is ludicrous to believe that these types of allowances for some of the property's features and functions will make any significant difference between a developer's profit or loss, given the high cost of land and the fact that the Affordable Housing Units "shall have a comparable square footage and the same bedroom count and same bedroom count ratio as the Market Rate Units" (SJMC § 5.08.470F, Petitioner's Appendix, at D-11) and the "exterior design and quality of construction shall meet all site, design and construction standards and have functionally equivalent parking spaces." (SJMC § 5.08.470B, Petitioner's Appendix, at D-10).

C. The Failure to Allow For a Reasonable Rate of Return is Fatal to the Fate of the Ordinance

The aggregated financial information and extrapolations contained in this *Amicus* brief will not be applicable to every new real estate development. There are bound to be differences, either positively or negatively, when applied to specific developers and development projects. But that is the point. Looking at the estimates from equations provided by the Ordinance itself, and from information obtained in the field, the dollar figures are so far out of balance that even taking variances into account, it is reasonable to conclude that for each separate parcel of real estate that an affected developer is required to sell to

a Targeted Income Buyer at an Ordinance-mandated price, San Jose is forcing affected developers to take a loss on that particular unit in order to subsidize a particular Targeted Income Buyer.[13, 14]

By providing these examples, *Amici* respectfully ask this Court, as it reviews the decision below, to consider the practical and severe business realities and outcomes related to this Ordinance. Laws have practical implications that must be carefully considered, rather than just being viewed through a theoretical vacuum.

As Justice Chin opined in his concurrence, a forced subsidy would appear to be an exaction and it is questionable whether it could be upheld as a form of price control. (*CBIA v. San Jose*, *supra*, at 487). Even if not an exaction, under no circumstances can a loss be considered a reasonable rate of return, and

---

[13] If San Jose believed the forced sale at the Affordable Housing Price, or in-lieu fee, truly allowed any builder a reasonable rate of return, then why restrict its impact to those building 20 or more units? Why not 19, or 9, or 1, for that matter? The fact that the Ordinance only targets large scale builders bolsters the fact that its purpose is for some to subsidize others.

[14] If San Jose wants to argue instead that the development as a whole, even though comprised of separate parcels, can operate at a profit, even taking the Affordable Housing Units' values or in-lieu fees into account, that is just another way of acknowledging that 20+ developers are being forced to subsidize housing for income challenged buyers. Accordingly, the Ordinance itself is an unlawful exaction imposed on the few as opposed to being shared by the many.

therefore the Ordinance is constitutionally deficient and, accordingly, unenforceable, on its face.

CONCLUSION

Builders, having gone as far as they could in the courts of California, have no other choice but to seek relief in this United States Supreme Court. While presumably well-intentioned, the Ordinance at issue creates a roadmap for other jurisdictions to follow, whether within or outside of California, should governments in those jurisdictions desire to supplant constitutionality with expediency. The opinion of the California Supreme Court grants them permission to do so. Only this Court can right this wrong and therefore it is incumbent on this Court to accept the Writ of Certiorari.

In conclusion, *Amici* believe they cannot improve upon the closing words of Justice Chin's concurring opinion:

> Providing affordable housing is a strong, perhaps even compelling, governmental interest. But it is an interest of the *government*. Or, as the majority puts it, it is an interest "of the general public and the community at large." (Maj. opn., *ante*, 189 Cal.Rptr.3d at p. 495; 351 P.3d at p. 991.) The community as a whole should bear the burden of furthering this interest, not merely some segment of the community. "All of us must bear our fair share of the public costs of

> maintaining and improving the communities in which we live and work. But the United States Constitution, through the takings clause of the Fifth Amendment, protects us all from being arbitrarily singled out and subjected to bearing a disproportionate share of these costs." (*Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854, 912 (conc. & dis. opn. of Kennard, J.).)

CBIA v. San Jose, *supra*, at 487 (Chin, J., concurring).

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JUNE BABIRACKI BARLOW, ESQ.
Vice President and General Counsel
Counsel of Record
NEIL D. KALIN, ESQ.
Assistant General Counsel
CALIFORNIA ASSOCIATION OF REALTORS®
525 South Virgil Avenue
Los Angeles, California 90020-1403
Telephone: (213) 739-8200
juneb@car.org
Counsel for Amici Curiae
California Association of REALTORS®
and National Association of REALTORS®