No. 18-1538

In The
Supreme Court of the United States

DARTMOND CHERK AND
THE CHERK FAMILY TRUST,

Petitioners,

v.

COUNTY OF MARIN,

Respondent.

**On Petition For Writ Of Certiorari
To The California Court Of Appeal,
First Appellate District**

BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JUNE BABIRACKI BARLOW, ESQ.
Senior Vice President and General Counsel
Counsel of Record
JENNY LI, 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 Amicus Curiae
California Association of REALTORS®

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

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BRIEF OF AMICUS CURIAE CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *Amicus curiae*, the California Association of REALTORS® (hereafter, "C.A.R."), submits this brief in support of petitioners Dartmond Cherk and the Cherk Family Trust (hereafter, "Petitioners").[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

C.A.R. is a nonprofit, voluntary, real estate trade association incorporated in California whose membership consists of approximately 210,000 persons licensed by the State of California as real estate brokers and salespersons, and the associations of REALTORS®[2] to which those members belong. Members of C.A.R. assist the public in buying, selling, leasing, financing, and managing residential and commercial real estate. C.A.R. advocates for the real estate

[1] C.A.R. has informed the parties of the intent to file this *amicus* brief at least 10 days before filing and received their consent. This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *Amicus curiae*, its members, or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] The term REALTOR® is a federally registered collective membership mark which identifies a real estate professional who is a member of a local association of REALTORS®, C.A.R. and the National Association of REALTORS® ("NAR") and subscribes to NAR's Code of Ethics.

industry by bringing the perspective of the industry as a whole, in contrast to the singular perspective of a particular constituent or litigant. C.A.R. policy has long been to promote homeownership as a path to individual, community and economic stability. To that end it strives to increase housing to meet the growing demand and as part of that to advocate for affordable housing through increased supply.

For years, C.A.R. has worked to address the housing affordability crisis within the State of California by actively promoting housing, homeownership, and the growth of housing opportunities statewide. In addition to providing down payment and closing cost assistance to homebuyers through its Housing Affordability Fund, C.A.R. has supported various legislative initiatives aimed at increasing the housing supply in California. The advocacy for affordable housing includes major initiatives through its Center for California Real Estate in the series "Building a California for All – Meeting the State's Demand for Housing."[3] C.A.R. also strongly advocates for increasing construction of accessory dwelling units ("ADUs") and it recently established an affiliated charity called Californians for Homeownership to exert pressure on cities to approve new housing construction in compliance with the California Housing Accountability Act. C.A.R. is an active participant

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[3] http://centerforcaliforniarealestate.org/events/roundtables.html; see also Journal of Case Study Research: A Publication of the Center for California Real Estate, Volume II: Issue 1/Homeownership (2017), http://ccre.us/publications/Journal_Homeownership_2017.pdf.

in housing affordability and seeks to increase affordable housing by its policy positions and other efforts.

However, as an advocate of private property rights as well, policies must be not only effective but also pass constitutional muster. The Marin County's actions in predicating a lot split (which *increases* the ability for more housing) on a significant payment (which *decreases* the likelihood of an eventual affordable structure by increasing costs) do not meet constitutional constraints. For these reasons we support the Petition for Writ of Certiorari.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The California courts upheld the application of Marin County's affordable housing ordinance requiring Petitioners to pay a $39,960 fee to split their 2.79-acre undeveloped residential lot into two single-family residential lots. In deciding the County's in-lieu fee is a land use restriction and not subject to the closer scrutiny applied in the Takings Clause cases of *Nollan, Dolan*, and *Koontz*,[4] the California courts validated an impermissible exaction and provided further evidence of the continued split in caselaw nationwide as to the appropriate test for evaluating permit conditions

[4] *Nollan v. Cal. Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 568 U.S. 936 (2013).

relating to a local government's affordable housing program.

C.A.R. is concerned that the decision below will encourage other local governments to impose similar in-lieu fees on property owners in California and throughout the United States, diminishing landowners' private property rights and creating more barriers to new home construction.

ARGUMENT

I.

DUE TO THE POTENTIAL APPLICATION TO MORE THAN ONE THOUSAND INCLUSIONARY HOUSING PROGRAMS NATIONWIDE, THIS COURT SHOULD RESOLVE THE SPLIT IN AUTHORITY ON LEGISLATIVELY PRESCRIBED EXACTIONS

C.A.R. fully supports the arguments and reasoning expressed in the Petition. Petitioners have described with ample detail the current conflict among different lower courts when deciding Takings Clause disputes arising from land use permit conditions (Petition, Section III, pp. 26-29). Some states, including California, apply a distinction between permit conditions that are legislatively and administratively imposed, in direct contrast to other states that do not recognize such a distinction. As explained by Petitioners, when considering the legal validity of a legislatively mandated requirement, those courts who apply the

"legislative" versus "administrative" distinction have not used the more stringent test for exactions required under the *Nollan*, *Dolan*, and *Koontz* cases. Under the unconstitutional-conditions doctrine set forth in *Nollan*, *Dolan* and *Koontz*, permit conditions must bear an "essential nexus" and "rough proportionality" to the adverse impacts of the proposed development.[5] Because this lawsuit was filed in the California state court, the lower courts closely followed the analysis set forth in *California Building Industry Assn. v. City of San Jose*, 61 Cal.4th 435 (2015), where the California Supreme Court did not apply the *Nollan/Dolan/Koontz* test but instead used a deferential standard of review, requiring only a finding that San Jose's inclusionary housing ordinance had a reasonable relationship to the enhancement of public welfare.[6]

Review by this Court is necessary to resolve the above-described split in authority. There is a strong likelihood this split in authority will expand due to the nationwide housing shortage and the existence of at least 1,379 different affordable housing programs located in 25 states and the District of Columbia.[7] In September 2017, the Lincoln Institute of Land Policy published its comprehensive investigation and study

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[5] *Ibid.*

[6] *CBIA v. City of San Jose*, 61 Cal.4th at 456-459 (2015).

[7] See Emily Thaden and Ruoniu Wang, Lincoln Institute of Land Policy, "Inclusionary Housing in the United States: Prevalence, Impact, and Practices" (September 2017), https://www.lincolninst.edu/publications/working-papers/inclusionary-housing-united-states.

on "inclusionary housing" programs and policies, identifying numerous programs and policies within the United States that require or incentivize the creation of affordable housing when new development occurs. The study identified 886 jurisdictions having inclusionary housing programs, as of the end of 2016, with the majority of such programs found in the states of New Jersey (45%), Massachusetts (27%), and California (17%).[8] In addition, the study revealed that many jurisdictions had implemented more than one inclusionary housing policy (e.g., a city might have a mandatory impact fee program in addition to voluntary programs, or programs addressing residential versus commercial development, or a city might have a separate voluntary rental program in states with laws against rent control). As a result, the study reported a total of 1,379 inclusionary housing policies identified in 791 jurisdictions.[9] Finally, the study showed there was a total of $1.7 billion in impact or in-lieu fees reported by 373 jurisdictions having inclusionary housing programs, and the study noted that due to missing data, these reported numbers substantially underestimate the total amount of fees.[10]

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[8] *Ibid.*

[9] Emily Thaden and Ruoniu Wang, Lincoln Institute of Land Policy, "Inclusionary Housing in the United States: Prevalence, Impact, and Practices" Working Paper WP17ET1 (September 2017) at p. 56, https://www.lincolninst.edu/sites/default/files/pubfiles/thaden_wp17et1_0.pdf.

[10] *Id.* at p. 31.

Further, as recently noted in a publication by the Pew Charitable Trusts, the "United States' housing market is at its least affordable in a decade," and accordingly, "more states are beginning to intervene in what was once a purely local matter" resulting in a "flurry of state legislation to tackle the problem."[11]

State and local governments are actively searching for more ways to combat the affordable housing problem in this country, resulting in the creation of an enormous number of affordable housing programs and large amounts of impact and in-lieu "affordable housing" fees being collected from owners and developers. If this Court resolves the sharp conflict in authority on whether the *Nollan/Dolan/Koontz* test should apply to Takings claims stemming from affordable housing programs, then the decision will be well-timed to have broad, nationwide policy implications. C.A.R. urges this Court to grant the Petition and resolve this important issue potentially affecting thousands of property owners' private property rights.

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[11] Teresa Wiltz, Stateline, "In Shift, States Step in on Affordable Housing" (October 15, 2018) at https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/15/in-shift-states-step-in-on-affordable-housing.

II.

PETITIONERS ARE BEING FORCED TO SHOULDER THE BURDEN OF GOVERNMENT'S AND SOCIETY'S RESPONSIBILITY TO PROVIDE AFFORDABLE HOUSING THROUGH AN ORDINANCE THAT EXACTS NON-POSSESSORY PROPERTY INTERESTS OR MONEY

The Petition clearly states the reasons why each of the options that were presented to Petitioners under Marin County's affordable housing ordinance constitutes an exaction. (Petition, pp. 14-16). C.A.R. simply adds that while Justice Chin concurred with the majority in *CBIA v. City of San Jose*, he recognized that a private party should not be required to subsidize another private party so that the City can achieve a public policy objective:

> 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." (citation omitted). 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.).)

See *CBIA v. City of San Jose*, *supra*, at pp. 486-488.

Whereas *CBIA v. City of San Jose* dealt with a facial challenge brought by developers who objected to an ordinance requiring all new 20+ unit residential projects to include a number of affordable units, in comparison, the $39,960 in-lieu fee in this case is particularly egregious because the property owners are simply splitting their family's undeveloped land into two. Aside from the issue of being highly ineffective, it stretches to breaking that this lot split contributes in any way to the city's affordable housing problem.

The need to provide affordable housing is a societal problem. Demanding that some citizens pay thousands of dollars in fees (or give up their property) to help solve what is essentially a government responsibility is the essence of an exaction. Like the City of San Jose, Marin County is making property owners and developers pay for what it has neither the political will nor resources to do itself. Petitioners are forced to subsidize the supply of affordable housing in Marin County, though if the funds would actually be used in that fashion is outside the scope of this legal proceeding.

III.

DEMANDING THOUSANDS OF DOLLARS FOR A SMALL LOT-SPLIT WHILE CONCEDING THE PROPERTY OWNERS WILL INCREASE AVAILABLE LAND FOR HOUSING IS DISJOINTED AND POOR POLICY

Apart from constitutional concerns, from a policy perspective Petitioners' lot-split immediately increases the number of lots within Marin County that can be used to build new homes. Therefore, Marin County should provide incentives to encourage more property owners to consider splitting their lots, rather than attach a significant financial burden to the act of increasing supply during a shortage. The in-lieu fee charged to Petitioners who are not professional, for-profit real estate developers of large multi-unit dwellings, and who must pay the fee even though they are not engaged in the active development stage of construction (e.g., obtaining design and building plans that indicate the size of a project and its effect on the neighborhood) is a misstep, and poorly considered policy. The practical effects of its ordinance, and here one of the negative consequences, is the ordinance effectively penalizes property owners who choose to increase density by subdividing land that can be used to create more housing supply. Poor policy is not a constitutional issue in and of itself, but when it includes raw confiscation of funds in order to split a lot, it crosses the line and should not be allowed.

CONCLUSION

For the reasons stated in the Petition, and all of the foregoing reasons, C.A.R. respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

JUNE BABIRACKI BARLOW, ESQ.
Senior Vice President and General Counsel
Counsel of Record
JENNY LI, 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 Amicus Curiae
California Association of REALTORS®