

No. 24-6505

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANITA ADAMS,
Plaintiff-Appellant,

v.

CITY OF SEATTLE, Washington
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:22-cv-01767
Honorable Thomas S. Zilly

**BRIEF OF *AMICI CURIAE* CHARLES GARDNER AND EMILY
HAMILTON OF THE MERCATUS CENTER AT GEORGE MASON
UNIVERSITY IN SUPPORT OF APPELLANT ANITA ADAMS**

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RULE 29 STATEMENTS

Pursuant to Fed. R. App. P. 29(a)(3), *amici curiae* submit this proposed brief with an accompanying motion requesting leave of the Court to file it in support of Plaintiff-Appellant Anita Adams and reversal of the district court's decision.

Pursuant to Ninth Cir. R. 29-3, *amici* certify that they endeavored to obtain the consent of all parties to the filing of this brief before moving the Court for permission to file it. Plaintiff-Appellant Anita Adams consents to the filing; Defendant-Appellee City of Seattle does not.

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party or counsel for any party in the pending appeal has authored this brief, in whole or in part, and no entity or person, aside from *amici curiae*, the Mercatus Center, and their counsel, made any monetary contribution intended to fund the preparation or submittal of this brief.

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Tom Means and Edward P. Stringham, *Unintended or Intended Consequences? The Effect of Below-Market Housing Mandates on Housing Markets in California*, 30 Journal of Public Finance and Public Choice, no. 1-3 (2015) at 39-64.12

Urban Institute. *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties*. Washington, DC: U.S. Department of Housing and Urban Development (2012)16

IDENTITY AND INTEREST OF AMICI CURIAE

Charles Gardner is a Research Fellow at the Mercatus Center at George Mason University. His research focuses on planning law and housing affordability. Mr. Gardner submits this brief as part of his work as a Mercatus scholar.

Emily Hamilton is a Senior Research Fellow at the Mercatus Center at George Mason University. Her research focuses on urban economics. Dr. Hamilton submits this brief as part of her work as a Mercatus scholar.

The Mercatus Center, as an organization, takes no position on the arguments in this brief or the issues in the case.

No party or counsel for any party in the pending appeal has authored this brief, in whole or in part, and no entity or person, aside from *amici curiae*, the Mercatus Center, and their counsel, made any monetary contribution intended to fund the preparation of this brief.

This case is important to *amici* because it involves government authority to exploit the land-use permitting process to extract exactions from landowners. These exactions have important implications at a national level for the supply of new housing and housing affordability, issues which are of foremost concern to the *amici* and the research they perform.

Amici seek to assist the Court by “supplementing the efforts of counsel” for the parties and “drawing the court’s attention” to facts and “law that might

otherwise escape consideration.” *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986). Specifically, this amicus brief places the legal issues in this case in a national economic context, demonstrating that when, as here, excessive permit conditions curtail housing supply, there can be no “essential nexus” between the government’s permit program and its stated goal: housing affordability.

INTRODUCTION AND SUMMARY OF ARGUMENT

Among the questions before this Court are (1) whether the *Nollan* and *Dolan* tests set out by the Supreme Court under its unconstitutional conditions doctrine are applicable to determine the constitutionality of permit conditions on a facial challenge; and (2) whether under *Nollan*, the permit conditions required by the City of Seattle’s Mandatory Housing Affordability residential permitting program (“MHA”) lack an “essential nexus” with the program’s stated objective of mitigating rising housing costs.¹ As discussed herein, basic economics—including the law of supply and demand—demonstrate that there can be no “essential nexus” between the MHA’s mandated fees and restrictions on housing development, which prevent housing growth, and the program’s stated policy objective of lowering housing costs. Indeed, inclusionary zoning policies like the MHA program can

¹ This brief does not address Ms. Adams’ as-applied challenge to Seattle’s MHA program or the district court’s conclusions on administrative exhaustion.

exacerbate the twin problems of insufficient housing construction and high housing costs.

ARGUMENT

I. The Nollan/Dolan Test Applies to Ms. Adams' Facial Takings Claim.

Ms. Adams seeks to build a new residence on her own property, at her own expense, to house her own family members. Under Seattle's MHA program, however, she cannot receive a building permit unless she agrees to construct two additional units and provide them as public housing rentals for 75 years or pays approximately \$92,000 into the City's affordable-housing fund.² The City offers a procedure for obtaining a modification or waiver from these mandates,³ but this procedure ignores whether the mandates are constitutionally permissible in the first place. Ms. Adams challenged the MHA's permit conditions under the *Nollan/Dolan* test, facially and as-applied, as unconstitutional takings without compensation.

Under *Nollan/Dolan*, an exaction on property in the form of a permit condition is unconstitutional unless it (1) bears an "essential nexus" to the government's stated land-use interest, and (2) has a "rough proportionality" to the property's impact on that interest. *Sheetz v. County of El Dorado*, 601 U.S. 267,

² See Appellant's Opening Brief, fn. 1 and 8, explaining the updated calculation of Ms. Adams' fee based on the City's current MHA payment schedule.

³ See Seattle Municipal Code ("SMC") 23.58C.035(C).

268 (2024).⁴ Unconstitutional exactions violative of *Nollan/Dolan* include both physical intrusions as well as monetary fees; they can be imposed administratively or legislatively. *Id.* at 267.

The United States District Court for the Western District of Washington granted the City’s motion for summary judgment on Ms. Adams’ facial challenge and dismissed her as-applied challenge as unripe. In doing so, the court held that it need not consider Ms. Adams’ facial *Nollan/Dolan* constitutional challenge because “[t]he fact-specific inquiry contemplated by *Nollan* and *Dolan*... does not lend itself to a facial challenge, which is why the Ninth Circuit does not recognize facial takings claims relating to land-use exactions.” Order at 9.

In support of this statement, the court cited *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998). However, the fractured majority in *Garneau* addressed only the *Dolan* prong of the test, stating that “we conclude that *Dolan* applies only to as-applied takings challenges, not to facial takings challenges.” *Id.* The majority never evaluated whether the City of Seattle ordinance in that case—the Tenant Relocation Assistance Ordinance—satisfied *Nollan*’s essential nexus test. Judge Brunetti simply did not address the point raised in Judge O’Scannlian’s concurrence that “[w]hen the harm is zero, an exaction can *never* be roughly

⁴ Citing *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

proportional to, or even have a nexus with, the harm.” *Id.* at 813 (emphasis in original). The point being that there is no need to reach the *Dolan* prong when *Nollan* is unsatisfied.

In fact, the *Nollan* case itself culminated in the Supreme Court making a facial determination that the California Coastal Commission’s easement requirement failed the essential nexus test—not merely as-applied in plaintiff’s case, but for all coastal residents. *See Nollan*, 483 U.S. at 841 (the Commission failed to “establish that the Nollans (*and other coastal residents*)” could be constitutionally required to surrender easements) (emphasis added). As the Supreme Court later stated in *Dolan*, the *Nollan* court had no occasion to consider the need for what would become the “rough proportionality” test at that time precisely because the program challenged in *Nollan* failed to satisfy the “essential nexus” test and therefore there was no need to carry the analysis any further. *See Dolan*, 512 U.S. at 386 (“we were not required to reach this question [of rough proportionality] in *Nollan*, because we concluded that the connection did not meet even the loosest standard.”)

Subsequently, and contrary to the district court’s holding below, courts have considered *Nollan/Dolan* facial challenges to city ordinances quite similar to the MHA program challenged here by Ms. Adams. *See, e.g., Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014), *appeal dismissed and*

remanded, 680 F. App'x 610 (9th Cir. 2017). And contrary to the district court's holding here, the mere fact that the City of Seattle provides for a potential modification or waiver of the ordinance does not make it constitutional. If an ordinance is facially unconstitutional, the remedy is repealing the ordinance, not providing a waiver process, any more than a city government could salvage an ordinance outlawing criticism of the mayor by providing a process through which individuals could obtain exemptions. In *Nollan*, the court noted that “even though, in a sense, requiring a \$100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.” *Nollan*, 483 U.S. at 837. Likewise, it would be absurd to claim the hypothetical \$100 tax on free speech could be saved from a facial challenge by establishing an administrative process to obtain a modification or waiver. The same reasoning applies to an exaction program that—as in this case—lacks a constitutionally required nexus in all applications.

Furthermore, the essential nexus question here—whether adding more homes to a city worsens affordability such that imposing affordable housing mitigation fees on new homes is justified—does not involve a “fact-specific inquiry.” The relevant facts proving the lack of any nexus between the City's means and stated ends have already been gathered by economists over the course of decades, as discussed in Parts II and III of this brief. There is no genuine

dispute that adding housing supply is essential to keeping housing costs under control in a region that faces increased demand for housing.

As in *Nollan*, where the underlying premise for a land-use exaction is flatly erroneous and thereby lacks an essential nexus, the inquiry is at an end and a court need not proceed to the second prong of the *Nollan/Dolan* test. The district court's exclusion of *Nollan/Dolan* from facial application misapplies this Court's precedent and *Nollan* itself. Furthermore, the district court's rationale is inapplicable to the circumstances of this case and should not bar consideration of Ms. Adams' facial challenge to the constitutionality of Seattle's MHA program.

II. New Housing Construction Improves Housing Affordability by Putting Downward Pressure on Rents for Existing Dwellings.

The recognition of the essential relationship between new housing development and housing affordability is so widespread that it has received judicial notice. As a California court recently observed:

“[T]here is a direct link between the affordability of housing and the supply of housing. Under basic economic principles, prices go up when demand exceeds supply. Thus, the rise in housing prices at every income level in California is logically linked to the insufficient supply of housing at all of those income levels.”

AIDS Healthcare Found. v. Bonta, 101 Cal. App. 5th 73, 84–85 (2024).

This judicial recognition reflects the widespread conclusions of economists who have found that when new housing becomes available for occupancy in a metropolitan area, and owners or tenants move in, a filtering process starts that

leads to lower housing costs for residents across the city relative to an alternative without construction. “Filtering” refers to the chain of moves that occurs when people find new housing within a regional housing market. Most households that move into newly constructed housing are freeing up other units locally.⁵ Generally these units are less expensive than the newly constructed units.⁶ As Robert Ellickson wrote in a classic paper on inclusionary zoning, “the infusion of new housing units into a regional market sets off a chain of moves that eventually tends to increase vacancy rates (or reduce prices) in the housing stock within the means of low-and moderate-income families.”⁷

Recent empirical research bolsters Ellickson’s claim. One study of the filtering phenomenon finds that 100 units of new market-rate multifamily units lead people to move out of between 45 and 70 units in below-median-income neighborhoods in the region, opening those units up for lower-income residents.⁸ A similar study of filtering in the Helsinki metro area finds that 100 new market rate units open up 66 units in neighborhoods where the median income is below

⁵ Evan Mast, *JUE Insight: The effect of new market-rate housing construction on the low-income housing market*, 133 *Journal of Urban Economics* (January 2023).

⁶ Bernard Siegan, *Land Use Without Zoning*, Rowman & Littlefield Publishers (2020).

⁷ Robert C. Ellickson, *The Irony of Inclusionary Zoning*, 54 *S. Cal. L. Rev.* 1185 (1981).

⁸ Mast, *supra*.

the region's median income.⁹ Through the filtering process, older housing units tend to become affordable to those with lower household incomes. One study finds that the real incomes of residents living in fixed housing decline by 1.9 percent per year on average, as new construction leads to moving chains.¹⁰

How much the filtering process improves affordability depends on local market conditions and land use policy—such as the MHA ordinance challenged by Ms. Adams. For example, one study finds that in Topeka, where land use regulations do not severely limit housing supply, the real income of new residents of owner-occupied houses is 1.61 percent lower per year on average relative to the previous residents' income.¹¹ In contrast, in highly supply-constrained San Francisco, housing filters in reverse—the real income of new residents of owner-occupied housing is 0.71% higher per year on average relative to the housing's previous residents—as increasing demand for housing results in bidding up the price of a relatively fixed supply of housing over time.¹²

⁹ Bratu, Harjunen, & Saarimaa, *City-wide effects of new housing supply: Evidence from moving chains*, 133 *Journal of Urban Economics* (2023).

¹⁰ Stuart Rosenthal, *Are Private Markets and Filtering a Viable Source of Low-Income Housing? Estimates from a 'Repeat Income' Model*, 104 *American Economic Review*, no. 2 (February 2014): 687-706.

¹¹ Liu, McManus, & Yannopoulos, *Geographic and temporal variation in housing filtering rates*, 93 *Regional Science and Urban Economics*, no.1 (2022).

¹² *Ibid.*

In regions, such as San Francisco and Seattle, where reverse filtering is taking place, it may appear as if new housing supply does not improve affordability. But this is because what little construction is permitted often occurs at the same time higher-income residents are replacing lower-income residents in the older housing stock. In fact, new housing construction in such severely supply-constrained markets *is the only thing* that can slow or reverse the current pattern of people bidding up the price of existing housing as demand for housing increases. In a thorough review of the literature on the effect of housing construction on housing affordability, a group of scholars conclude that “significant new evidence shows that new construction in a variety of settings decreases, or slows increases in, rents, not only for the city as a whole, but generally also for apartments located close to the new construction.”¹³

Although this brief does not address Ms. Adams’ as-applied challenge to the MHA program, it bears mention that Ms. Adams’ intended use of her property serves as a clear illustration of these economic principles. Ms. Adams intends to use the second home she plans to construct on her property to house her two children, her in-laws, and potentially other family members. *See* Plaintiff’s Motion for Summary Judgment, ECF 34, at pp. 1-2. If she is successful in building the

¹³ Been, Gould Ellen, & O’Regan, *Supply Skepticism Revisited*, NYU Law and Economics Research Paper, No. 24-12 (November 10, 2023), <https://ssrn.com/abstract=4629628> or <http://dx.doi.org/10.2139/ssrn.4629628>

new house, her family members will vacate their existing dwellings which will then become available to other buyers or tenants. Of course, Ms. Adams' family members will presumably see their own cost of living decrease as they free up more affordable housing for others. Thus, Ms. Adams' construction of a second home on her property would mitigate, not aggravate, the housing unaffordability crisis in the City of Seattle.

In contrast, as discussed in Part III, “inclusionary” zoning programs sometimes reverse or clog up the filtering process—exacerbating an area’s insufficient housing supply, high housing costs, and lack of affordable housing.

III. Inclusionary Zoning Programs Can Restrict New Housing Supply and Worsen Affordability.

The term “inclusionary zoning” is applied to programs like Seattle’s MHA which are intended to remedy the problems of traditional exclusionary zoning: the restrictive policies which created and continue to perpetuate housing undersupply and housing unaffordability. The costs of exclusionary zoning fall hardest on low-income renters who are disproportionately racial minorities.¹⁴ But the design of many inclusionary zoning programs frustrates the remedial intent.

¹⁴ Ikeda & Washington, *How Land-Use Regulation Undermines Affordable Housing*, Mercatus Research, Mercatus Center at George Mason University (November 4, 2015) at 5, <https://www.mercatus.org/students/research/research-papers/how-land-use-regulation-undermines-affordable-housing>.

A. Inclusionary Zoning Can Restrict New Housing Supply.

Studies have found that so-called “inclusionary zoning” programs can reduce total housing construction and thereby worsen housing affordability across the market. Like Seattle’s MHA, inclusionary zoning requirements across the country are generally paired with upzoning or more targeted density bonuses intended to offset the cost to the landowner and developer of providing the program’s mandated income-restricted units. These density bonuses allow for more units to be built per plot. However, even with density bonuses, empirical evidence indicates that in some cases, inclusionary zoning reduces housing supply overall because below-market mandates act as a “tax” that disincentivizes new construction.¹⁵ Researchers who studied the effects of inclusionary zoning in California, for example, found that these programs reduced the number of single-family home starts and size of newly constructed housing units.¹⁶ Similarly, a study of inclusionary zoning in the Boston region found that these programs reduce new housing supply during periods of rising house prices, but only during periods

¹⁵ Tom Means and Edward P. Stringham, *Unintended or Intended Consequences? The Effect of Below-Market Housing Mandates on Housing Markets in California*, 30 *Journal of Public Finance and Public Choice*, no. 1-3 (2015) at 39-64.

¹⁶ Antonio Bento et al., *Housing Market Effects of Inclusionary Zoning*, 11 *Cityscape*, no. 2 (2009) at 7-26. (The authors find no effect on multifamily starts.)

of rising house prices.¹⁷ In fact, *amici* are not aware of any published research demonstrating that inclusionary zoning programs ever *increase* housing construction, even when factoring in density bonuses.

In instances where inclusionary zoning programs do not immediately reduce total housing construction, they may change where housing is built. Seattle’s MHA, for example, applies only to select neighborhoods in the city where policymakers both upzoned land and imposed new requirements on landowners to include income-restricted housing as a part of any new residential development. In this context of geographically-limited inclusionary zoning requirements, developers have responded to the mandate by pursuing construction outside of the MHA’s boundaries. Data show that while total permitting in Seattle has not decreased as a result of the MHA’s requirements, permitting has shifted from the MHA zones to areas just outside these zones.¹⁸ Based on this analysis, the MHA program is shifting construction from the areas where Seattle policymakers wanted to see new housing—in “pedestrian and transit-oriented communities” where “the provision of services and infrastructure [is] targeted to support that growth”—to

¹⁷ Schuetz, Meltzer, & Been, *Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets in the United States*, 48 *Urban Studies*, no. 2 (2011) at 297-329.

¹⁸ Jacob Krimmel and Betty Wang, *Upzoning with Strings Attached: Evidence from Seattle’s Affordable Housing Mandate*, NYU Furman Center (2023).

less desirable places.¹⁹ Furthermore, the program may eventually cause a reduction in overall construction as lower-zoned areas outside the MHA's boundaries no longer present redevelopment opportunities.

B. Inclusionary Zoning Can Worsen Market-Rate Housing Affordability.

Consistent with the basic supply and demand theory discussed above, studies of the effects of inclusionary zoning on market-rate house prices find that these programs can worsen market-rate affordability if they decrease new construction or change the location and type of housing that is feasible to build. One of the *amici* has estimated the effects of these programs on house prices in the Baltimore-Washington region and found that mandatory inclusionary zoning increases median house prices by about one percent per year while the program is in place.²⁰ Two studies on the effects of these programs in California likewise found that inclusionary zoning increases market-rate house prices.²¹ As the authors of one of these studies explain, “[t]he results are fully consistent with economic theory and

¹⁹ MHA applies to Seattle's Urban Village Element and nearby zones where policymakers have sought to accommodate growth based on transit service and pedestrian and bicycle infrastructure. For a description of the Urban Village Element, see City of Seattle, Urban Village Element (January 2005), <https://www.seattle.gov/documents/departments/opcd/ongoinginitiatives/seattlescomprehensiveplan/urbanvillageelement.pdf>.

²⁰ Emily Hamilton *Inclusionary Zoning and Housing Market Outcomes*, 23 *Cityscape*, no. 1 (2021) at 183.

²¹ Bento, *supra*; Means and Stringham, *supra*.

demonstrate that inclusionary zoning policies do not come without costs.”²² Using data on inclusionary zoning in the Boston and San Francisco Bay Area regions, some scholars find that the effects of inclusionary zoning on house prices are sensitive to market conditions.²³ In the Boston region, they found that inclusionary zoning increased house prices, but only during periods of rising house prices.²⁴ In the Bay Area, they found that inclusionary zoning caused increased prices during strong markets but caused further price declines during times of broadly falling rents for the jurisdictions that adopted it.²⁵

Comparing inclusionary zoning programs across jurisdictions is complicated by the fact that the effects of any inclusionary zoning program will vary depending on market conditions and the factors that affect redevelopment calculations on a parcel-by-parcel basis. One study uses parcel-level simulations to estimate the likelihood of housing redevelopment under different inclusionary requirements. The author finds that higher requirements for income-restricted housing in market-rate development projects reduce the total amount of expected housing construction.²⁶ Specifically, the study finds that at least four market-rate units are

²² Bento, *supra*.

²³ Schuetz et al, *supra*.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ Shane Phillips, *Modeling Inclusionary Zoning’s Impact on Housing Production*

lost for each extremely-low-income unit produced.²⁷ While this inclusionary housing mandate would undoubtedly benefit the households who win the lottery for deed-restricted units, it comes at the expense of housing supply for the market as a whole, including the majority of low-income people who do not receive deed-restricted units.

Even the “best” inclusionary zoning programs fail to produce affordable units for more than a tiny fraction of the households who qualify for them on the basis of their income. For example, Montgomery County, Maryland’s Moderately Priced Dwelling Unit program is the nation’s longest-running inclusionary zoning program and is often held up as one of the most successful.²⁸ Nonetheless, the income-restricted units produced by the 50-year-old program amount to only one percent of the county’s total housing stock.²⁹

in Los Angeles: Tradeoffs and Policy Implications, A Turner Center Report (April 2024).

²⁷ *Ibid.* at 10.

²⁸ The Urban Institute. *Expanding Housing Opportunities Through Inclusionary Zoning: Lessons from Two Counties*. Washington, DC: U.S. Department of Housing and Urban Development (2012).

²⁹ Department of Housing and Community Affairs, Montgomery County, Maryland, <https://www.montgomerycountymd.gov/DHCA/housing/singlefamily/mpdu/produced.html>

C. Inclusionary Zoning Can Have Exclusionary Effects.

When localities rely on inclusionary zoning programs to create income-restricted housing, these programs can actually contribute to cementing the exclusionary zoning rules that are the root cause of housing affordability problems. Parking requirements are one type of these exclusionary zoning rules because, particularly in places where land is expensive, these requirements drive up the cost to build housing, especially multifamily housing.³⁰ In 2021, a California legislator introduced a bill that would have capped local parking requirements in areas served by transit, opening up opportunities for lower-cost housing construction. However, the California Chapter of the American Planning Association opposed the bill on the grounds that it would reduce local policymakers' leverage for extracting income-restricted housing as a condition of building permits.³¹ As this example demonstrates, inclusionary zoning requirements can have exclusionary impacts that limit housing supply and exacerbate unaffordability.

Some local governments have attempted to make the case for the constitutionality of their inclusionary zoning programs, or linkage fees³² between

³⁰ Donald C. Shoup, *The High Cost of Free Parking*, Chicago: American Planning Association (2011) at 90.

³¹ Henry Grabar, *Everyone Agrees California's Parking Laws Are Bad for Cities. So Why Do Planners Like Them?* Slate, (May 13, 2021). The 2021 bill failed, but a similar bill ultimately passed in 2022.

³² "Linkage fees" are fees that local governments sometimes impose on new

market-rate housing and subsidized housing, using “nexus studies” intended to demonstrate that new housing construction creates a need for more income-restricted housing. However, these studies fail to consider the effect of new housing construction on the regional housing market. The City of Los Angeles, for example, commissioned a nexus study intended to make the case that there is a nexus for its linkage fee which new market-rate housing developments must pay to subsidize income-restricted housing in the city.³³ However, rather than examining the evidence about what happens to house prices and rents when new housing is delivered, the authors relied on estimates of the “relationship between the occupants of a market-rate unit’s spending in the economy, and the portion of this spending that generates workers’ low income households needing affordable units.”³⁴ While new housing does facilitate some population growth, including of low-wage workers, the nexus study approach ignores the far greater effect that housing supply has on affordability at all price points through the filtering process described above.

housing construction to fund income-restricted housing developments.

³³ BAE Urban Economics in association with PlaceWorks, *Los Angeles Affordable Housing Linkage Fee Nexus Study*, Prepared for City of Los Angeles, (September 21, 2016).

³⁴ *Ibid.* at 41.

IV. Because New Housing Construction Improves Housing Affordability, the MHA Program Cannot Satisfy *Nollan*'s Essential Nexus Requirement.

The *Nollan* prong of the *Nollan/Dolan* test requires a court to “determine whether [an] ‘essential nexus’ exists between the ‘legitimate state interest’ and the permit condition exacted by the city.” *Dolan*, 512 U.S. at 386. Otherwise, “unless the permit condition serves the [stated] governmental purpose, [it] is not a valid regulation of land use but ‘an out-and-out plan of extortion.’” *Nollan*, 483 U.S. at 837. The underlying reasoning for the *Nollan/Dolan* test is that the “Takings Clause is designed to bar 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.” *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012).

With economic theory and empirical evidence demonstrating that adding new homes improves affordability, a costly fee or onerous condition imposed on new housing in the name of mitigating the impact of that housing on affordability not only lacks a nexus, but runs counter to the stated goal. If creating an affordable housing fund or building housing with below-market rents are valid governmental objectives for the City of Seattle to pursue, they are objectives that should be paid for by the public as a whole, not through the extortion of that small minority of persons who attempt to add to the housing stock at their own expense.

In fact, the inherent structure of the MHA program—on its face—has an “anti-nexus” with its stated goal of mitigating housing unaffordability because basic principles of economics and careful empirical study of housing markets demonstrate that housing construction *improves* housing affordability. Inclusionary zoning policies like the MHA can exacerbate the twin problems of insufficient housing construction and high house prices. Under these circumstances, the City’s exaction lacks the required nexus to its land-use interest.

Therefore, *amici* respectfully join Ms. Adams in requesting this Court conclude (1) that *Nollan/Dolan* review is proper in the context of Ms. Adams’ facial challenge to the MHA program, and (2) that, under the *Nollan/Dolan* standard, Seattle’s MHA permit conditions lack an essential nexus with the program’s stated objective.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for trial.

Dated: January 9, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(a)(4)(G) and (5), this brief contains 4,671 words and is in compliance with the format, typeface, type style, and length requirements of Fed. R. App. P. 32 and Cir. R. 32-1.

Dated: January 9, 2025

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CERTIFICATE OF SERVICE

I certify that on January 9, 2024, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other parties in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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