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Amicus Brief on behalf of the Leo T. McCarthy
Center for Public Service and the Common Good
and 44 Housing Scholars to California Supreme
Court in California Building Industry Association
v. City of San Jose (S212072)

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**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

S212072

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,
Petitioner,

v.

CITY OF SAN JOSE AND CITY COUNCIL AND MAYOR OF THE
CITY OF SAN JOSE

Defendant and Respondent

AFFORDABLE HOUSING NETWORK OF SANTA CLARA COUNTY, et al.
Intervenors

After an Opinion by the Court of Appeal,
Sixth Appellate District (Case No. H038563)

On Appeal from the Santa Clara County Superior Court
(Case No. CV167289, Honorable Socrates Manoukian, Judge)

**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND
AMICI CURIAE BRIEF OF LEO T. MCCARTHY CENTER FOR PUBLIC
SERVICE AND THE COMMON GOOD AND FORTY-FIVE HOUSING
SCHOLARS IN SUPPORT OF DEFENDANT AND RESPONDENT
CITY OF SAN JOSE**

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**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF
IN SUPPORT OF CITY OF SAN JOSE**

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE
OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, the Leo T. McCarthy Center for Public Service and the Common Good (“McCarthy Center”) and forty-five housing scholars listed in the Appendix (collectively “Housing Scholars”) respectfully request permission to file the accompanying *amicus curiae* brief in support of Defendant and Respondent City of San Jose.

I. INTERESTS OF *AMICI CURIAE*

The McCarthy Center is part of the University of San Francisco. The McCarthy Center’s mission includes “promoting the common good for all and contributing to the creation of just social and economic structures that respect and incorporate the needs of all, including the poor and disenfranchised.” Inclusionary zoning squarely fits within this mission because producing affordable housing in healthy cities and communities increases the social and economic mobility of low income families. In addition, the McCarthy Center has a history of commitment to affordable housing and the other policy goals promoted by inclusionary zoning. Serving as an amicus is a form of “principled civic engagement” that is at the heart of the McCarthy Center’s work.

Individual housing scholar *amici curiae* are college and university faculty and researchers, social scientists, demographers and other housing scholars who study critical housing issues in the United States, including racial and income segregation in housing, the relationship of housing to economic, social, educational and employment opportunities, and housing policies that address housing problems including inclusionary zoning. Individual *amici*, listed in the Appendix, have published numerous books, articles, and reports on these critical housing issues.

Amici file this brief to acquaint the Court with the history of governmental policies that created racially and economically segregated patterns in our metropolitan regions, the relationship between those policies and the economic, social, educational and employment opportunities available to low-income households, and to illustrate why inclusionary zoning policies are necessary to avoid perpetuating these problems and to promote equal opportunity consistent with the State of California's policy that cities provide housing opportunities for all segments of the population

II. IDENTIFICATION OF AUTHORS AND MONETARY CONTRIBUTIONS

Pursuant to Rule 8.200(c)(3), *amici* affirm that no party in this case, and no person or entity other than *amici*, their members, or their counsel, authored the proposed *amici* brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief.

III. REQUEST FOR PERMISSION TO FILE AMICUS BRIEF

Amici counsel has read the Opinion below and Petitioner's, Respondent's and Intervenor's briefs and is familiar with the issues presented to this Court. For the foregoing reasons, *amici* respectfully request that the Court accept the accompanying *amicus curiae* brief for filing in this case.

DATED: March 24, 2014



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AMICUS CURIAE BRIEF IN SUPPORT OF THE CITY OF SAN JOSE

I. INTRODUCTION

The issue in this case is: What standard of review applies in a facial challenge to a city's inclusionary housing ordinance? *Amici* believe that the answer to this question should be grounded in a sophisticated understanding of these policies in the context of their history, local governments' state and federal responsibilities, and the contemporary land use challenges that local governments face. This is the contribution that *amici* hope to make in this brief.

Inclusionary zoning programs generally have two goals: (1) to increase the supply of affordable housing, and (2) to promote social inclusion and integration. (RAND Corporation, *Is Inclusionary Zoning Inclusionary? A Guide for Practitioners* (2012) ("RAND Report") p. 2). While other parties in this litigation have emphasized inclusionary zoning's goal of increasing the supply of affordable housing, this brief will focus on the goals of inclusionary zoning and the City of San Jose of promoting social inclusion and integration by locating affordable housing in the right location.

The importance of the location of affordable housing stems from recognizing the negative effects on families that racial and economic residential segregation cause. America is committed to providing equality of opportunity to all. But economic and racial segregation deny equality of

opportunity to low and moderate income families because segregation limits their potential for economic and social mobility by restricting access to the primary means of mobility, e.g. employment and education. Inclusionary zoning is an effective remedy to this problem because it provides better access to the means of economic and social mobility.

As a form of land use control, inclusionary zoning determines the spatial relations among different land uses. *Inclusionary zoning*, as its name suggests, is the opposite of *exclusionary zoning* which for decades fostered and maintained racial and economic segregation with attendant negative effects on the public health, safety and welfare. In particular, inclusionary zoning locates affordable housing in high opportunity jurisdictions and neighborhoods with positive relationships to other land uses, such as businesses and schools. Local governments that enact inclusionary zoning ordinances commit themselves to including affordable housing within their borders.

While the City of San Jose's statement of the purpose for its inclusionary housing ordinance (San Jose Mun. Code §5.08.020) and its first finding (San Jose Mun. Code §§5.08.010 A) identify increasing the supply of affordable housing as a basis for its ordinance, the City specifically seeks to promote economic and racial integration of housing in its jurisdiction (Affordable Housing Dispersal Policy, §5.08.110) "to enhance the social and economic well-being of all residents." (Finding B).

Findings B – F repeatedly express the importance of the location of affordable housing (San Jose Mun. Code §§5.08.010 B – F), particularly that it should be “dispersed throughout the city” (Findings B, E and F; Purpose §5.08.020, “Affordable Housing Dispersal Policy, §5.08.110 referencing San Jose 2020 General Plan) and “not concentrated in any particular area or areas” (Finding D).

The State of California has longstanding policies promoting affordable housing and integrated communities. The State has proclaimed that the “availability of housing is of vital statewide importance, and the early attainment of *decent housing and a suitable living environment* for every Californian . . . is a priority of the highest order.” (Gov. Code §65580(a) (emphasis added).) The State identifies not just decent housing alone, but also *a suitable living environment* as an essential part of its goal. This requires attention to the location of housing.

The State has placed the primary burden for implementing these policies on local governments. California’s Housing Element law requires local governments to plan for the availability of housing for all economic segments of the community. (Gov. Code §65583.) California’s Fair Employment and Housing Law (Gov. Code §§12900 – 12996) prohibits local governments from discriminating and promotes racial integration. In addition, federal fair housing law (42 U.S.C. §3601 et seq.) also imposes

duties on cities receiving certain federal grants to not discriminate and to affirmatively further fair housing.

Local governments are the right level of government for carrying out these responsibilities both because of their knowledge and expertise and because local governments are on the front lines of our housing problems. Local governments work with developers and the market to determine the type, quantity, timing and location of new housing construction.

Local governments in California struggle to fulfill their federal and state-mandated responsibilities while addressing the numerous and complex housing problems that their residents face. The challenges include unaffordability and location of housing that creates disadvantages and reduces the opportunities for residents. More than 170 local governments have responded to these challenges by enacting inclusionary zoning ordinances. (NPH/CCRH, *Affordable by Choice: Trends in California Inclusionary Housing Programs* (“NPH Study”) (2007), p. 5.) They do this because among all of the land use regulation strategies available to them, inclusionary zoning ordinances *uniquely* address the complex of housing problems in positive ways. Inclusionary zoning produces needed affordable housing, especially workforce housing, thereby both helping remedy California’s affordable housing crisis and supporting local economic growth. Inclusionary zoning helps remedy racial and economic segregation by directing the location of affordable housing to high opportunity

neighborhoods where low and moderate income families have more economic and social opportunities because of greater access to better education and employment opportunities.

Inclusionary zoning is a critical tool that local governments need to fulfill their duties to provide affordable and fair housing opportunities for Californians of all races and income levels.

The decision in this case will be historic because it will determine whether this unique land use control will continue to serve its important purposes. Not only will the decision in this case affect the 170 inclusionary zoning ordinances that have been enacted in California cities, it is likely that other states' courts will look to the California Supreme Court's disposition of this issue for guidance if they face the question at issue in this case because of California's leadership role in inclusionary zoning.

Part II (A) – (B) provide a brief history of the causes and effects of racial and economic segregation, highlighting the role of exclusionary zoning. Part II (C) places inclusionary zoning in the context of legal and policy responses developed to address racial and economic segregation. Part II (D) explains the contemporary land use challenges local governments face. Part III demonstrates that inclusionary zoning is a unique and effective policy local governments employ to meet their challenges. Part III (A) – (B) explain the “geography of opportunity” approach that maps opportunity in space. Part III (D) explicates the benefits

of inclusionary zoning, i.e. how it expands opportunities for low and moderate income households. When possible each section provides particular application to San Jose and Santa Clara County. Part III (E) explains how inclusionary zoning is fair, especially to developers. Part IV offers a brief conclusion.

II. PLACE MATTERS: SEGREGATION VS. OPPORTUNITY

The crux of understanding inclusionary zoning as a land use control is seeing how it directly and deliberately aims to control the location of affordable housing vis-à-vis other land uses and community assets within a region and within a jurisdiction.

Housing is so much more than just shelter. Where we live matters to so many important values. In particular, it affects residents' opportunities for employment, school, transportation and other important community assets. Housing affordability is important, but simply increasing the supply of affordable housing is not an adequate response because the location of housing matters so much. Housing located in neighborhoods that are racially or economically segregated neighborhoods or where poverty is concentrated is directly associated with reduced opportunities for social and economic advancement.

This section explains how federal, state, and local governments contributed to creating and fostering metropolitan racial and economic segregation (with a focus on California) including through land use

policies. It describes the severe social and economic consequences that racial and economic segregation causes. It summarizes the policy and legal responses to segregation. It shows that substantial racial and economic segregation still exist in California and, in particular, in San Jose and Santa Clara County.

A. History and Causes of Economic and Racial Residential Segregation

The U.S., including California, has a long and tragic history of race discrimination that was expressed and maintained by residential segregation. The institution of chattel slavery and later the imposition of Jim Crow in the south after the Civil War established laws and social expectations that subordinated blacks in all areas of life—both public and private—and buttressed these with the constant threat and reality of legalized and tolerated violence. Blacks were not the only targets of discrimination. Mexican and Chinese immigration fanned racist responses that erupted in riots in San Francisco (against the Chinese) and Los Angeles (against Mexicans) (McClain, C. (1996). *In Search of Equality: The Chinese Struggle Against Discrimination in the 19th Century*. University of California Press: Berkeley, CA p. 30) Deverall, W., *Whitewashed Adobe: The Rise of Los Angeles and the Remaking of its Past*, University of California, Berkeley Press, CA (2004), p. 17 - 25.) Residential segregation—the deliberate location of housing for certain groups in certain

places—along with other elements of social segregation (e.g. employment, public accommodations, etc.) played an important role in creating and preserving white dominance.

Racial segregation was not only the result of individual whites' antipathy towards minorities; it was furthered by government policy. State and local government land use and zoning policies maintained and exacerbated the impacts of segregation. The introduction of districts and zoning in the early 20th century conjoined the concepts of zoning and segregation. Although the Supreme Court struck down outright racial zones in 1917 (*Buchanan v Warley* (1918) 245 US 60.), cities found ways to promulgate land use policies that supported and furthered segregation without mentioning race.

San Francisco established the first zoning district in 1886 calculated to exclude Chinese laundries from white neighborhoods (Wolf, M.A., *The Zoning of America: Euclid v. Ambler*. University Press of Kansas: Lawrence, KS (2008), p. 139.) Los Angeles also restricted Chinese laundries in residential districts—effectively denying residential choice to the Chinese themselves, as they lived at their laundries (Kolnick, K., *Order Before Zoning: Land Use Regulation in Los Angeles: 1880-1915*. Unpublished dissertation. University of Southern California (2008), pp. 132 - 137.) In 1926, the U.S. Supreme Court ruled that comprehensive

zoning to promote the general health, safety and welfare was a legitimate activity of local government under the police power (*Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365.) Euclid codified the insulation of single-family residences from noxious uses (which effectively included apartment houses) along with the perception that the “invasion” of undesirable populations into white neighborhoods was to be opposed.

Racially segregated neighborhoods were created and maintained through restrictive covenants. First promoted by the National Association of Real Estate Brokers in the 1920’s and quite popular in California’s growing cities, these covenants prohibited owners from selling or renting to blacks, Mexicans, Jews, Asians and other groups deemed to be undesirable neighbors. When these restrictions were enforced, owners or renters were evicted or prevented from purchasing the home. They were quite prevalent in California; at least 80% of Los Angeles’ residential sites had covenants on them by the 1930s. (Leavitt, J., *Charlotta A. Bass, the California Eagle and Black Settlement in Los Angeles*, in *URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY*, Sage Publications: Thousand Oaks, CA (1996) pp. 177 – 179.)

During the Great Depression and the decades following, federal, state and local governments instituted policies that maintained, and advanced, patterns of race discrimination. The Federal Housing

Administration (FHA), formed in 1934, insured mortgage loans as a way to expand construction and assist flailing banks. In their capacity as the nation's "mortgage insurer," the FHA bowed to dominant racial attitudes and separated neighborhoods by race and ethnicity (Radford, G. The Federal Government and Housing During the Great Depression, in *From Tenements to the Taylor Homes: In Search of an Urban Housing Policy in Twentieth-Century America*. Pennsylvania State University Press: University Park, PA. (2001), p. 115.) Indeed, the FHA completely revamped the nation's system of home lending, refusing to insure mortgages in undesirable neighborhoods, identified by the grade "D" and color-coded in red on their maps (Avila, E. *Popular Culture in Age of White Flight: Fear and Fantasy in Suburban Los Angeles*. University of California Press: Berkeley, CA. (2008), p. 35 for redlining in Boyle Heights and Watts.)

During the 1940's – 1960's Federal and state policies on housing, taxation, highway construction as well as urban renewal made the suburbs possible. Suburbs were aided by large federal investments in roads and highways. (Dreier, P., Mollenkopf, J., & Swanstrom, T., PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY ("Dreier, Place Matters"), 2nd edition, Chap. 3, p. 14 University Press of Kansas, Lawrence, KS (forthcoming 2014) All citations to PLACE MATTERS are to Chapter 3.). And most suburbs enacted land use policies that contributed

to economic segregation, including minimum lot and building sizes, occupancy requirements by numbers of bedrooms, and bans on multi-family housing and mobile housing (Schuetz, J., No Renters in My Suburban Backyard: Land Use Regulation and Rental Housing, *Journal of Policy Analysis and Management* Vol. 28, No. 2, 296 - 320 (2009); Papke, D., Keeping the Underclass in its Place: Zoning, the Poor, and Residential Segregation, 41 *The Urban Lawyer* 789 – 806 (2009).) Each of these types of local zoning policies are exclusionary because by reducing housing density and increasing housing prices in the jurisdiction (to the benefit of current homeowners in those jurisdictions) they relegate affordable housing to marginalized areas or *de facto* exclude it altogether. Because land is scarce, when local governments do not make land specifically available for affordable housing, they *de facto* exclude it. (So. *Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390, 418 - 422 (N.J. 1983).

With each wave of immigration since the 1950's, cities became more segregated, as the color line hardened "in employment, education and, especially, housing" where the geography of segregation forced the migrants to live in denser, defined neighborhoods. (Massey, D., *Origins of Economic Disparities: The Historical Role of Housing Segregation* in *SEGREGATION: THE RISING COSTS FOR AMERICA*, Carr ("Carr, SEGREGATION"), J.H & N.K. Kutty (Eds). Routledge: New York (2008), p. 50.)

Most cities, including in California, continue to employ zoning policies such as minimum lot and building sizes that have exclusionary effects without any explicit appeal to race or income, and even without any intention to discriminate. However, once different economic classes and races have been segregated into different political communities, the effect of these facially neutral policies is to maintain the status quo, viz. segregated housing patterns. (Dreier, Place Matters, p. 49)

Moreover, the history of spatial discrimination and segregation often results in opposition by neighbors in moderate- and upper-income communities (so called Not-In-My-Back-Yard phenomenon) to the siting of affordable housing within the jurisdiction. (Dear, Michael J., Understanding and Overcoming the NIMBY Syndrome, *Journal of the American Planning Association*, Vol.58, p. 288 (1992).) The struggles to overcome this opposition drain both developers and city resources leading affordable housing developers and cities to site affordable housing developments in communities which already have some or a great deal of affordable housing developments already, thus increasing the concentration of poverty. (McClure, K. (2007) Deconcentrating Poverty with Housing Programs, *Journal of the American Planning Association*, 74(1), 90-99.)

Finally, “planned communities,” a type of common interest community that is currently a popular form of housing development, are associated with both income and racial segregation (Gordon, T., *Planned*

Developments in California: Private Communities and Public Life. Public Policy Institute of California: San Francisco, CA. (2004), p. 30, 32; Blakely, E.J., Snyder, M.G., *Fortress America: Gated Communities in the United States*. The Brookings Institution: Washington, D.C. (1997), pp. 145 - 146; Low, S.M., The Edge and the Center: Gated Communities and the Discourse of Urban Fear, *American Anthropologist*, 103 (1), 45-58 (2001).)

B. Impacts of Economic and Racial Segregation

Social science researchers have identified a multitude of negative effects of residential segregation and spatial isolation on the families who are excluded. The book PLACE MATTERS synthesizes the scholarly evidence on how places affect people's life chances by examining the negative effects of living in spatially-disadvantaged neighborhoods with high poverty rates on jobs and income, health, access to private goods and services, and crime. (Dreier, Place Matters). Individually and cumulatively the effects of residential segregation and spatial isolation reduce economic and social mobility of residents because they reduce access to the means of economic and social mobility, including employment, education and health.

Segregation decreases employment opportunities. Segregated neighborhoods are often far from job centers that offer better wages (Boustan, L.P., Racial Residential Segregation in American Cities in *Oxford Handbook of Urban Economics and Planning*, in Brooks, N &

Knaap, G-J Eds. Oxford University Press (2011), p. 330; Dickerson, N. *Occupational and Residential Segregation: The Confluence of Two Systems of Inequality*. SMLR Research Brief, No. 9. Rutgers School of Management & Labor Relations: Piscataway, NJ. (n.d.), p. 2 - 3.)

Transit systems that could reduce the distance are often inefficient or incomplete (Sanchez, T.W., Stolz, R., Ma, J.S., *Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities*. The Civil Rights Project at Harvard University: Boston (2003), pp. 17 – 19.) Car ownership is expensive and low-income households are less likely to own cars (Dreier, *Place Matters*, p. 8.)

In 1968, Harvard economist John Kain identified the “spatial mismatch” problem demonstrating that “housing segregation prevented Chicago’s blacks from following jobs out to the suburbs” (Dreier, *Place Matters*, p. 5.) “Exclusionary zoning often prevents low-wage workers from moving closer” to “entry level jobs with moderate education and skill requirements.” (*Id.* at 6.) “...Residents of high-poverty neighborhoods are stigmatized by [potential] employers.” (*Id.* at 9) Well-paying jobs are less likely to be offered in lower income neighborhoods, reducing both absolute and relative economic mobility. (Isaacs, J., Sawhill. I. and Haskins, R., *Economic Mobility: Is the American Dream Alive and Well?* The Economic Mobility Project: Washington, D.C. (2007), pp. 4 - 6.)

Segregation also reduces general trust that, in turn, results in less social capital and community engagement (Kleit, R.G., Neighborhood Segregation, Personal Networks, and Access to Social Resources, in Carr, SEGREGATION, pp. 238- 256.) Less social capital in turn hurts job prospects because “neighborhoods provide networks of crucial information about jobs. More than half of all jobs are found through friends and relatives, not through want ads.” (Dreier, Place Matters, p. 9.)

Racial segregation causes disparate access to quality education, undermining the intent of *Brown vs. Board of Education* and resulting in lower academic achievement in urban schools (Rothstein, R., Why Our Schools Are Segregated, In *Faces of Poverty*, 10(8), 50-55 (2013a); Rothstein, R., Misteaching History on Racial Segregation, *School Administrator*, December, 2013, pp. 38 - 40; Orfield, G., Lee, C., *Why Segregation Matters: Poverty and Educational Inequality*, The Civil Rights Project at Harvard University: Boston, MA (2005), pp. 40 - 41; see also Rumberg, R.W. and Willms, D., The Impact of Racial and Ethnic Segregation on the Achievement Gap in California High Schools, *Educational Evaluation and Policy Analysis*, 14(4), 377-396 (1992) (analyzing racial segregation in California high schools).) “Exclusionary zoning increases the likelihood that low-income households are priced out of homes in neighborhoods with high-scoring schools (Rothwell, 2012)” (cited in RAND Report, p. xi.)

Segregation results in disparate health and access to health care (Laveist, T., Gaskin, D., & Trujillo, A.J., *Segregated Spaces, Risky Places: The effects of Racial Segregation on Health Inequalities*. Joint Center for Political and Economic Studies: Washington, DC (2011), p. 22.) “Many aspects of low-income neighborhoods make them unhealthy places to live. Houses tend to be older and more crowded, with many health and safety code violations, resulting in more accidents and fires. Poor neighborhoods often lack parks and recreational facilities.” (Dreier, *Place Matters*, p. 25). “Residents of concentrated-poverty neighborhoods are bombarded by stress. High crime rates, noise, overcrowding, unemployment, shortages of stores, and shoddy public services are some of the stressors they endure. Fear of becoming a violent crime victim is probably the greatest stressor.” (Dreier, *Place Matters*, p. 29.) “Chronic stress causes cardiovascular diseases and premature death.” (*Ibid.*)

Further, residents of spatially-restricted low-income neighborhoods are disproportionately exposed to increased pollution from ambient and stationary sources that are often the result of discriminatory land use and zoning. (Williams, D.R. and Collins, C., *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, *Public Health Reports*, Vol.16, September-October, 2001, pp. 409 - 410.) “Air pollution has been linked to asthma rates, which have reached epidemic proportions in poor, minority neighborhoods.” (Dreier, *Place Matters*, p. 26.) “A study of 282

U.S. metropolitan areas found a high correlation between regional inequality and an elevated death rate, after controlling for the overall level of income.” (*Id.* at 22.)

Housing segregation limits access to important services and community amenities. “Concentrated poverty areas have a well-documented undersupply of retail outlets, while wealthy areas have an oversupply.” (*Id.* at 13.) Payday lenders, check-cashing outlets and other “fringe financial services” which charge exorbitant interest rates “locate predominately in the lowest-income neighborhoods.” (*Id.* at 17.) Economic segregation is one cause of the “Digital Divide”—different access to computers and the Internet which are the source of many economic and social opportunities. A 10 year study of two libraries in Philadelphia neighborhoods documented the dynamics of this and demonstrated that “where you live shapes your access to new information technologies.” (*Id.* at. 1.)

Income segregation exacerbates the economic advantage of higher-income families and the economic disadvantages of lower-income families in important ways such as the quality of public schools, access to social institutions, green space (Wolch, J., Wilson, J.P., Fehrenbach, J., *Parks and Park Funding in Los Angeles: An Equity Mapping Analysis*. Sustainable Cities Program, University of Southern California: Los Angeles (2005), pp. 30 – 32) healthy food (Truehaft, S., & Karpin, A., *The Grocery Gap: Who*

Has Access to Healthy Food and Why It Matters. Policy Link: Oakland, CA (2010), pp. 13 - 18) health care and cultural amenities (Reardon, S. F. and Bischoff, K., *Growth in the Residential Segregation of Families by Income, 1970 – 2009*. U.S. 2010 Project. Palo Alto, CA (2011), p. 4.)

The effects of past discrimination and segregation are still present. “...[F]rom the 1930’s to the 1950’s, the federal government’s massive homeowner insurance programs intentionally discriminated against African American neighborhoods. As a result, black families had fewer assets—including homes—to pass on to the next generation. Even if there was no longer any housing discrimination against African Americans today, those past practices are still being felt today in the lower rates of home ownership, home appreciation, and household wealth formation in black neighborhoods and among black families.” (Dreier, *Place Matters*, p. 57.)

C. Current Problems of Economic and Racial Segregation

The San Francisco Bay Area, and San Jose in particular, is at the epicenter of a national crisis regarding rapidly widening inequality. San Jose’s unique geographic role in the technology economy makes it particularly susceptible to the dynamics of widening inequality and attendant effects that are now evident throughout the U.S.

The City of San Jose’s Inclusionary Zoning policy explicitly recognizes the value of “economic diversity” in housing and seeks to serve this goal (San Jose Mun. Code §§5.08.010 F). The City’s ordinance

explicitly aims at economic residential integration. The City's ordinance provides incentives for affordable housing provided under its ordinance "to provide for integration of very low, lower, and moderate income households in market rate neighborhoods" (San Jose Mun. Code §5.08.020)

Growing inequality and increased concentration of poverty in certain neighborhoods amplify the problems associated with income segregation. "Economic segregation is a cause of rising inequality, and it worsens its effects." (Dreier, *Place Matters*, p. 37.) The concentration of poverty is a particularly insidious form of spatial separation because of its effects and because of its negatively-reinforcing cycle. (Dreier, *Place Matters*, p. 56; Squires, G., and Kubrin, C.E., *Race, Opportunity and Uneven Development in Urban America*, *Shelterforce*, Issue 147 (2006); Cashin, S., *Race, Class, and Real Estate*, *Race, Poverty & the Environment*, Fall, 2008, pp. 56 - 58.) The lack of affordable housing in non-poverty neighborhoods is the greatest impediment to deconcentration of poverty and has hindered the implementation of judicially-won remedies in eight public housing deconcentration lawsuits (Polikoff, A., *Waiting for Gautreaux: A Story of Segregation, Housing and the Black Ghetto*. Northwestern University Press: Evanston, IL (2006), p. 331; Goetz, E., *Clearing the Way: Deconcentration of the Poor in Urban America*. Urban Institute Press: Washington, D.C. Goetz, 2003, p. 177; Goetz, E., *New Deal Ruins: Race, Economic Justice, & Public Housing Policy*. Cornell University Press:

Ithaca, NY. (2013), pp. 175 - 179; Varady, D. P. & Walker, C.C.,
*Neighborhood Choices: Section 8 Housing Vouchers and Residential
Mobility*. Center for Urban Policy Research (Rutgers University): New
Brunswick, NJ. (2005), pp. 29 - 31.)

A large number of studies in recent years find a substantial increase in income segregation over the last forty years. In 2010, the US2010 Project published a major report on the growth of residential segregation by income between 1970 and 2009 (Brown University, US2010 Project.) Comparing income segregation levels among all families in all U.S. metropolitan areas with at least 500,000 residents, as well as income segregation by race (White, Black and Hispanic), the researchers found that income differences by neighborhoods have “grown substantially” since 1970. The proportion of middle-income (including “high middle income, and “low middle income”) families living in middle-income neighborhoods in 1970 was 75%; by 2007 it was 44% (Reardon, S. F. and Bischoff, K., *Growth in the Residential Segregation of Families by Income, 1970 – 2009*; U.S. 2010 Project. Palo Alto, CA., p. 11.) Further, when the researchers looked for the extremes--the highest proportion of poor living in poor neighborhoods (i.e. concentration of poverty) and the highest proportion of affluent families living in affluent neighborhoods--they found that the California metro areas of LA-Long Beach-Glendale, Fresno, Oakland-Fremont-Hayward and San Diego-Carlsbad-San Marcos were in the top 20 of one or

both of the categories in the U.S. (*Id.*)

Additional studies have found the same dispiriting results. The Pew Research Center formulated an income segregation index (the Residential Income Segregation Index or RISI) and analyzed the 30 largest metro areas' segregation changes from 1980 to 2010. (Pew Research Center, *The Rise of Residential Segregation by Income*, Pew Research Center, Washington D.C. (2012), p. 22.) Again, Los Angeles, San Francisco, San Diego, Riverside and Sacramento had the highest indices of increased economic segregation (*Ibid.*; See also Jargowsky, P.A., *Concentration of Poverty in the New Millennium: Changes in Prevalence, Composition, and Location of High Poverty Neighborhoods*. The Century Foundation & Rutgers Center for Urban Research and Education (CURE): New Brunswick, NJ (2013).)

There has been a large increase in the last twenty years in the fraction of national income that accrues to the top 20%, and a more modest increase in that accruing to the middle class. A useful measure of inequality in terms of upward mobility and for its effect on housing costs is *middle class income inequality* defined as the percentage of income accruing to families with income between the 25th and 75th percentiles of income. That gap widened from \$29,478.50 in 2000 to \$45,305.50 in 2012, which is still \$39,303.64 in 2012 dollars. (Chetty, Raj et al., *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility*, NBER Working Paper No. 19844 (January 2014).)

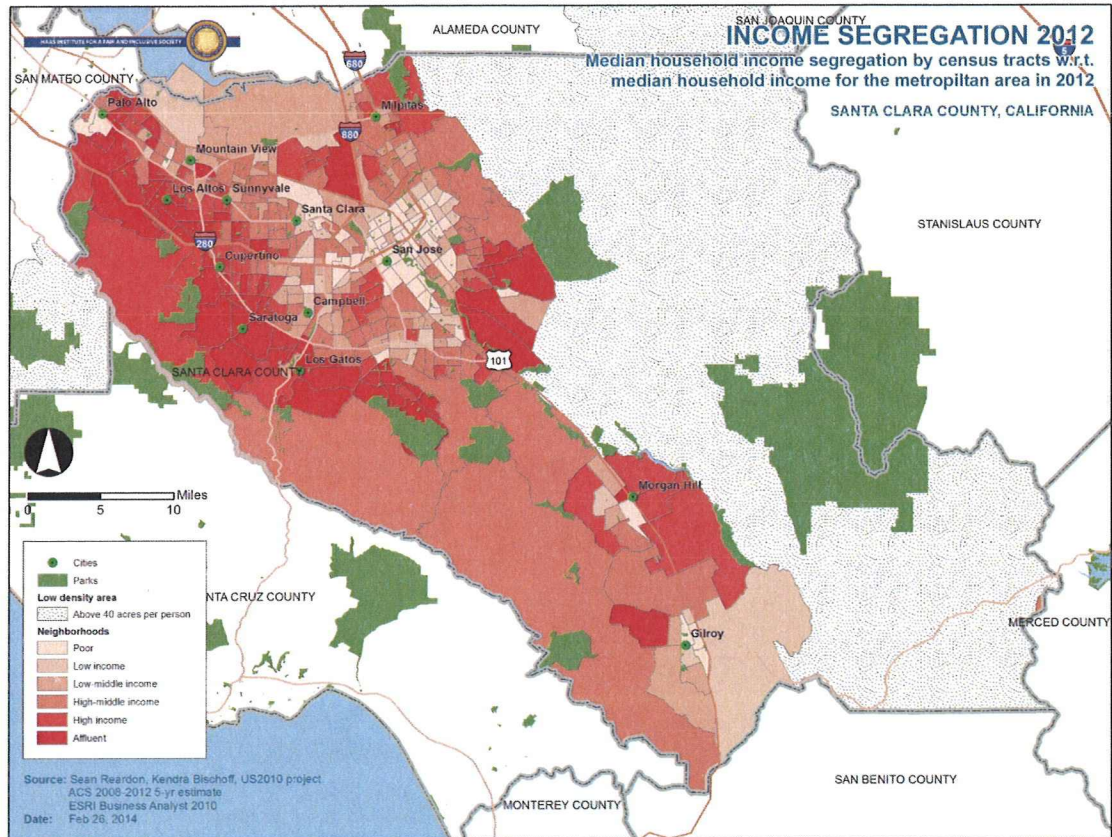
Widening income inequality adds another dimension to the negative effects of income segregation. “In a society characterized by severe economic segregation, the well-intentioned helping acts of affluent people [for each other] can exacerbate economic inequalities” because “...middle-, and upper-income communities have robust social networks that link residents to valuable opportunities.” (Dreier, *Place Matters*, p. 10.) “One study, described as ‘certainly the most comprehensive analysis of intergenerational mobility in the contemporary U.S.,’ found that mobility was lowest in metro areas with high rates of concentrated poverty, sprawl, and weak public transit systems.” (Dreier, *Place Matters*, p. 12.)

Income segregation and the decrease in economic mobility have a variety of sources (Bluestone, B., & Harrison, B., *Deindustrialization of America: Plant Closings, Community Abandonment and the Dismantling of Basic Industry* Basic Books: Boston (1982), pp. 39 - 81; Sassen, S., *Cities in a World Economy*. Pine Forge Press: Thousand Oaks, CA Sassen, 1994, pp. 116 - 117; Sassen, S., *The Global City: Strategic Site/New Frontier*. In *Democracy, Citizenship and the Global City*, E.F. Isin (Ed). London: Routledge (2000), pp. 48 - 59.) Yet common land use policies and zoning are uniquely capable of locking in the detrimental impacts of larger economic trends.

1. Income Inequality and Cost Burdened Families in Santa Clara County

Income inequality is evident in San Jose and Santa Clara County more generally. Between 1970 and 2009, income segregation grew dramatically in the vast majority of metropolitan regions in the U.S. (Reardon, Sean., & Bischoff, Kendra, Growth in the Residential Segregation of Families by Income, 1970 - 2009 (2011), p. 1.) Specifically, the share of the population in large and moderate-sized metropolitan areas who live in the poorest and most affluent neighborhoods has more than doubled since 1970, while the share of families living in middle-income neighborhoods dropped from 65% to 44%. (*Id.* at 11; see also Crowder, Kyle et al., *Neighborhood Diversity, Metropolitan Constraints and Household Migration*, American Sociological Review 77(4) (2012) pp. 325 - 356.)

These patterns are also evident in the San Jose metropolitan region. This map illustrates patterns of widespread income inequality in the San Jose metropolitan region and within the County.



Ever since the emergence of Silicon Valley, regional housing costs have risen faster than incomes. As a result, by 2006 (at the height of the “housing bubble”), the San Jose-Sunnyvale-Santa Clara region had the fifth most unaffordable housing market out of 149 major metropolitan areas.¹ Even though the median sales price of single family homes in the San Jose area plummeted from \$836,800 (the USA’s highest) in 2007 to \$530,000 in

¹ “Affordability” was measured by the relationship between the median sales price of single family homes and Area Median Income (AMI). San-Francisco-Oakland-Fremont CA, Honolulu HI, San Diego-Carlsbad-San Marcos CA, and Anaheim-Santa Ana-Irvine CA were marginally more unaffordable than the San Jose area in 2006.

2009, it rebounded strongly to \$780,000 (once again, the USA's highest) in 2013. Thus, the San Jose-Sunnyvale-Santa Clara region now has the USA's third most unaffordable housing market out of 171 metropolitan areas.²

According to the U.S. Department of Housing and Urban Development "Families who pay more than 30 percent of their (gross) income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care." (U.S. Department of Housing and Urban Development (2014).

Affordable Housing, available at:

http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/) To the extent that residents are already burdened by

housing costs, any increase in these costs will force difficult tradeoffs between basic needs, and an incentive to seek housing that is more affordable (i.e. they are displaced from their community).

With over 50 percent of its residents considered cost-burdened, California ranks in the top three states nationally in terms of the proportion of its families who are cost-burdened. (Joint Center for Housing Studies of Harvard University, America's Rental Housing Evolving Markets and

² "Affordability" in this case was determined by the National Association of Realtors affordability index methodology. Only Honolulu and Anaheim-Santa Ana-Irvine were less affordable.

Needs (2013), p. 29.) Twenty-three percent of all San Jose residents earning \$50,000 per year or less are housing cost burdened, but 78% of low-income residents are housing cost burdened (See Figure 1).

Household Income	Number of Residents Spending >30% on Housing	Percentage of All Residents Spending >30% on Housing	Percent of Low-Income Residents Spending >30% on Housing
Less than \$20,000	26,188	9%	29%
\$20,000 to \$34,999	23,792	8%	26%
\$35,000 to \$49,999	21,013	7%	23%
Total earning less than \$50,000	70,993	23%	78%

Figure 1. Housing Cost Burdened Low Income Residents in San Jose (includes owners and renters).³

2. Racial Segregation in Santa Clara County

San Jose is a diverse region, with many racial and ethnic groups represented. The table below illustrates the population distribution in San Jose and Santa Clara County.

³ American Community Survey (2012). Table B25106. Tenure by Housing Costs.

Race	San Jose Population	Santa Clara County
White	47%	50%
Black	3%	2.6%
Asian	33%	32%
Hispanic	33%	27%

*Figure 2: Racial Diversity in the City of San Jose and Santa Clara County.*⁴

Critically, racial segregation tends to be more pronounced than income segregation in most metropolitan areas, and San Jose is no exception. The table below indicates the levels of racial segregation in the San Jose metropolitan area and California using the dissimilarity index.⁵ While San Jose is more integrated than California as a whole, it still exhibits substantial racial segregation, especially among Hispanics. The White-Hispanics dissimilarity index for the San Jose Metro Area in 2010 was 47.6.

⁴ American Community Survey (2012). Table DP05. ACS Demographic and Housing Estimates. White, Black and Asian are from the One-Race Table and Hispanic is from the Hispanic Race or Latino Race Statistic so they are not mutually exclusive and add to more than 100%

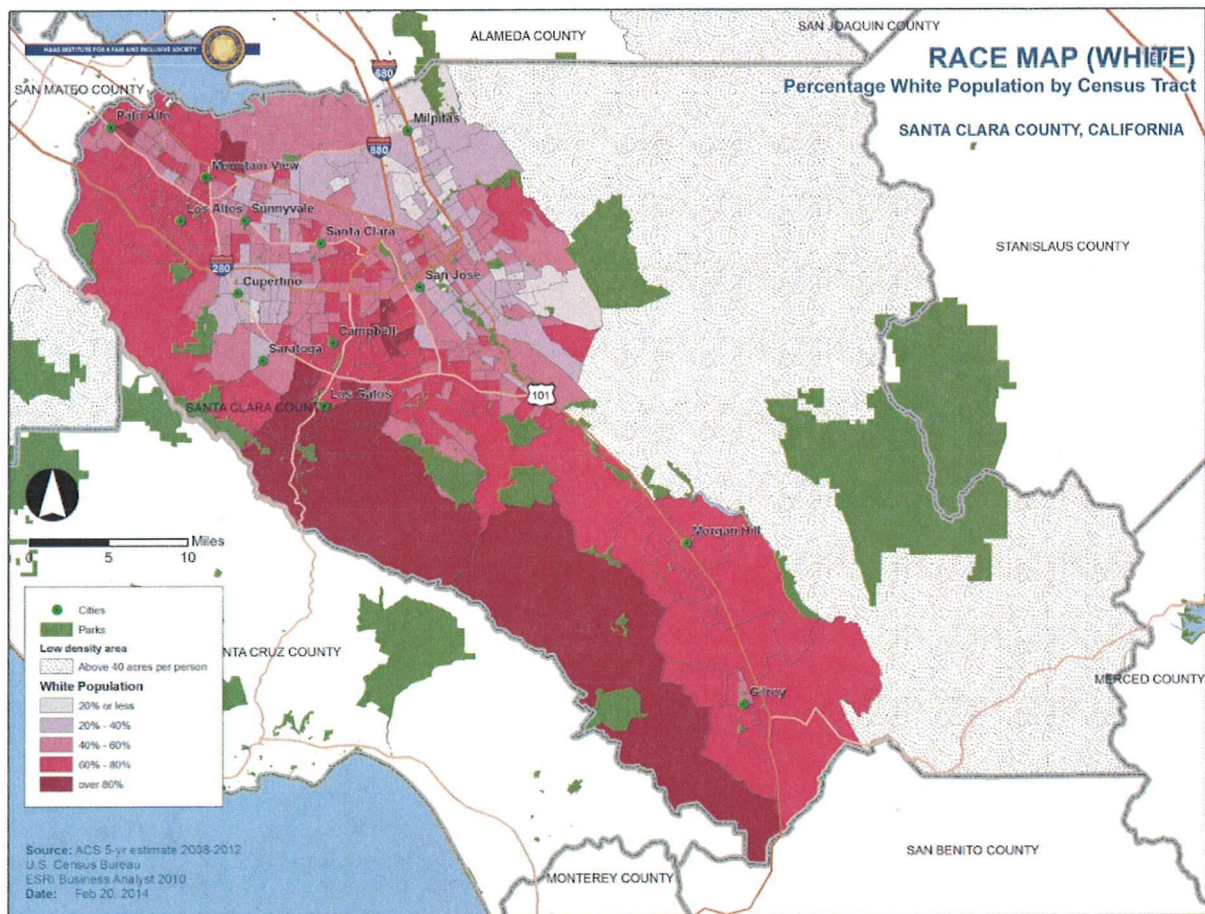
⁵ The dissimilarity index shows how unevenly various racial/ethnic groups are spread across neighborhoods within metropolitan areas. For example, a score of 100 indicates that every neighborhood has residents of only one particular group, i.e. complete segregation; a score of 0 would indicate complete integration. Lower scores indicate more integration.

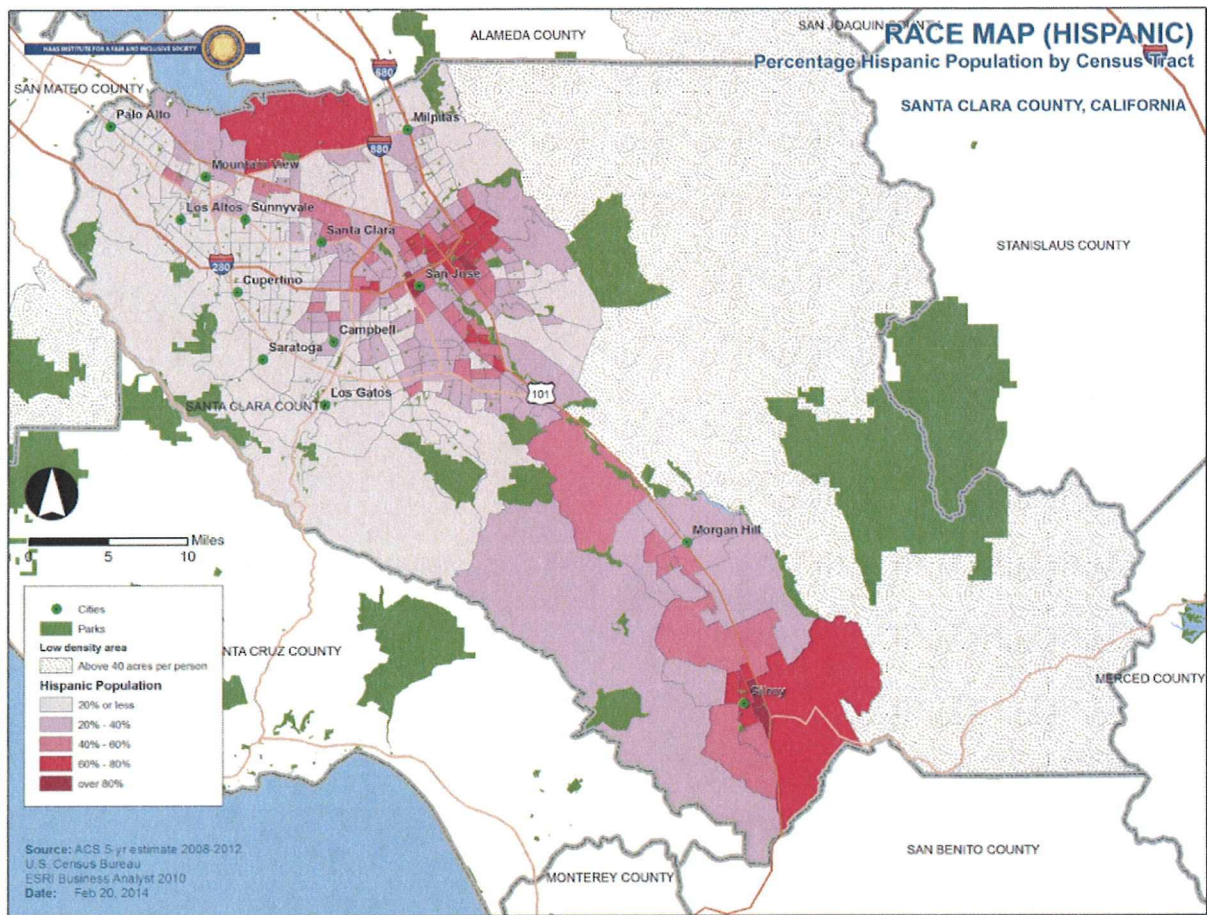
	2000 California Statewide	2000 San Jose Metro Area	2005-2009 ACS California Statewide	2005-2009 ACS San Jose Metro Area	2010 San Jose Metro Area
Whites - African Americans	63	39.8	62	45.2	38.6
Whites - Asians	52	42	52	44.7	43
Whites - Hispanics	56	50.7	55	48.5	47.6

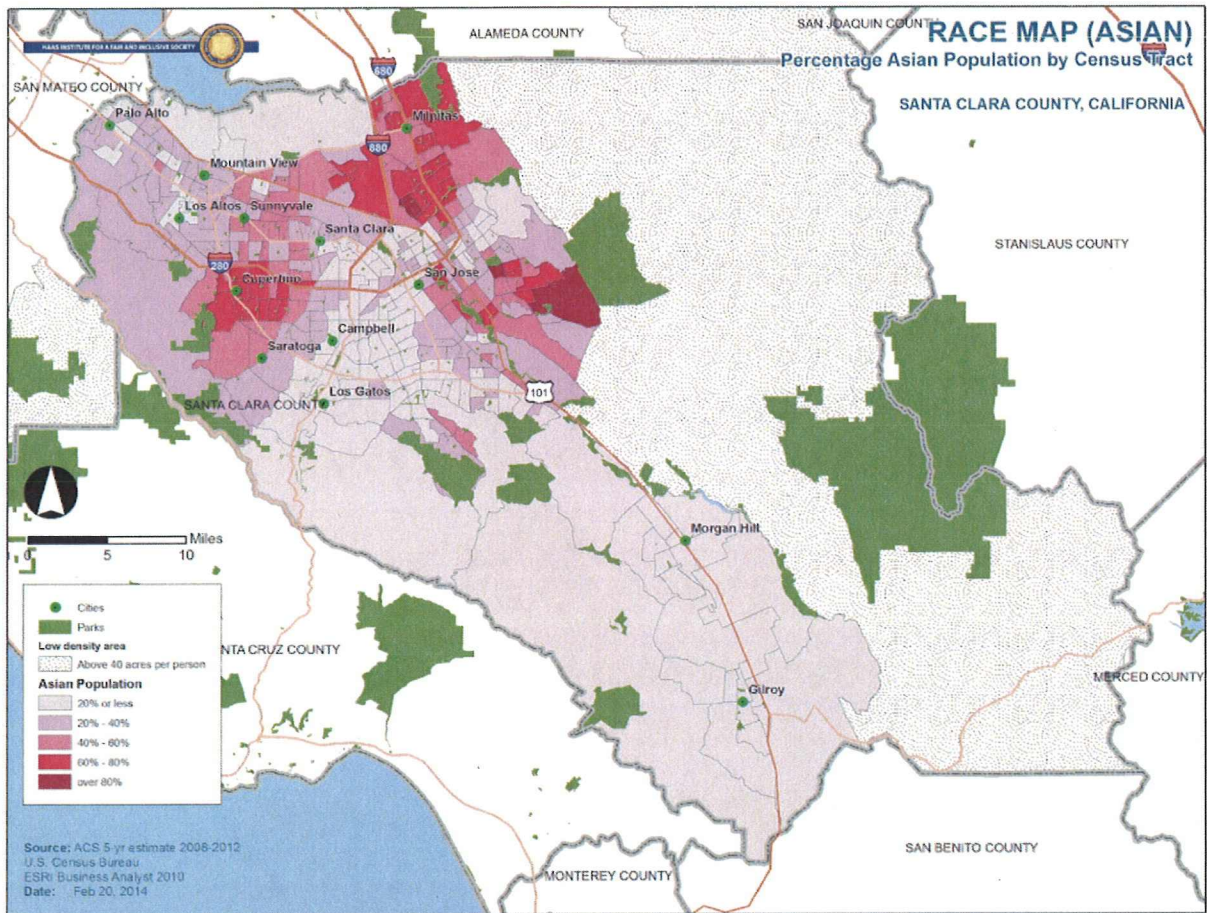
*Figure 3: Racial Dissimilarity Indices for San Jose Metro Area and California.*⁶

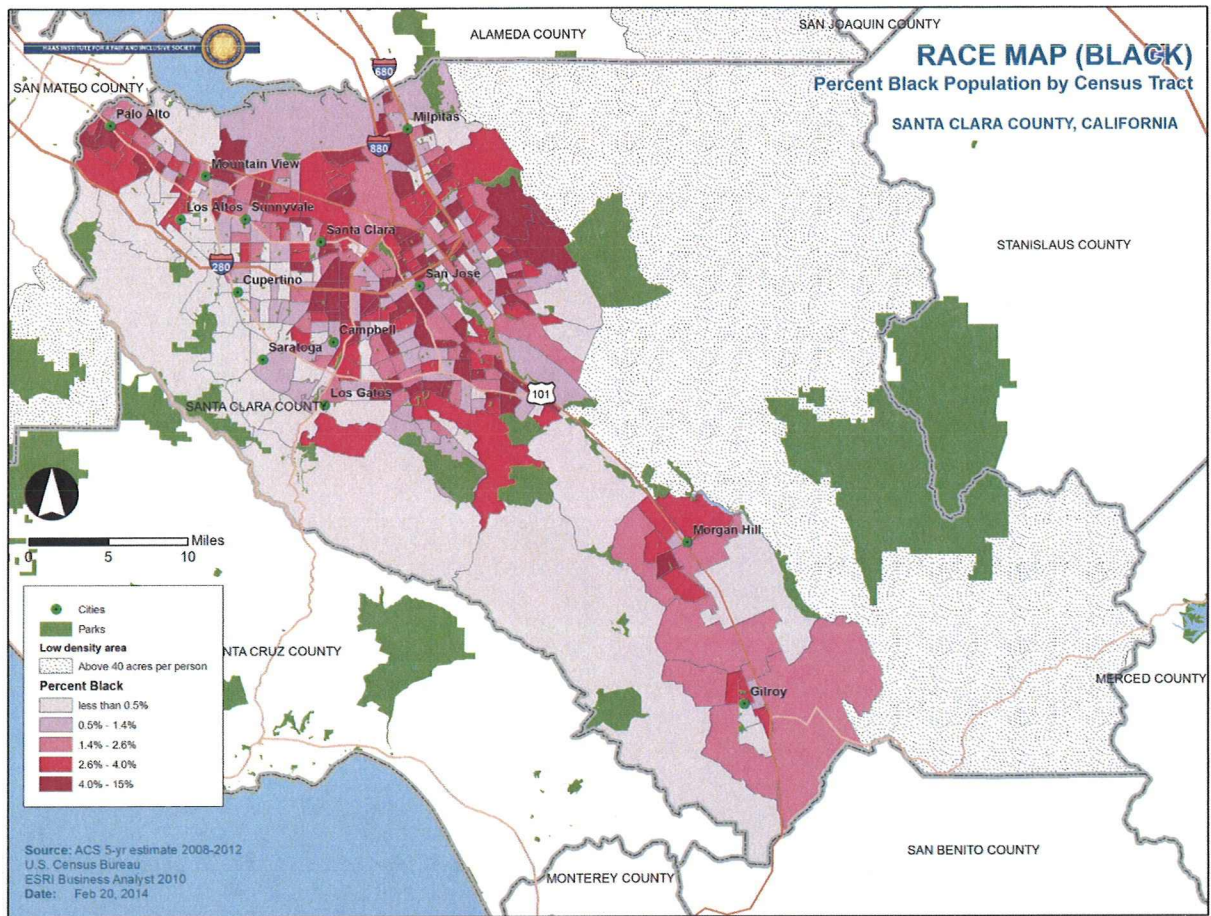
The following maps present the residential patterns in Santa Clara County by race.

⁶ San Jose Metro Area: US2010 Project, Brown University. California Statewide: New Racial Segregation Measures for States and Large Metropolitan Areas, University of Michigan Population Studies Center.









The map above represents the distribution of African-American families in the San Jose metropolitan region. (The black population in Santa Clara County is significantly lower than other racial and ethnic groups and required a different scale to be presented and analyzed.) Despite being a much smaller population relative to other groups, the African-American population is nonetheless unevenly distributed across the region. According to 2006-2009 Census estimates, 75% of African-American families reside in just 16% of census tracts. In residential segregation literature, this extreme pattern of segregation is referred to as “hyper segregation.”

Another measure of this hyper segregation is the fact that 30% of African-Americans live in Census Block Groups that are 75% African-American or more. (Gurian, C., *Mapping and Analysis of New Data Documents Still-Segregated America*, Remapping Debate (Jan. 18, 2011).)

As evidenced by the data presented above, Santa Clara County and the City of San Jose are marked by substantial economic and racial segregation.

D. Legal and Policy Responses to Economic and Racial Segregation

Inclusionary policies evolved from efforts beginning in the civil rights movement to open up segregated communities by dismantling exclusionary zoning barriers. Social movements sought and achieved judicial decisions and legislation aimed at ending segregation and mitigating its pernicious effects.

1. National Responses

The mid-century civil rights movement had numerous litigation victories, including *Brown v. Board of Education*, (1916) 245 U.S. 60, aimed at eradicating segregation in public schools, and *Shelley v. Kraemer* (1948) 334 U.S. 1, which ended the judicial enforcement of restrictive covenants.

This movement also gained important legislation: the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a et seq.) and the Voting Rights Act of

1965 (42 U.S.C. §§ 1973–1973bb-1). In 1968, in the wake of the assassination of Dr. Martin Luther King, Jr., Congress enacted the Fair Housing Act (42 U.S.C. §§3601 - 3619).

California and its local jurisdictions are subject to the federal Fair Housing Act which both prohibits housing discrimination and promotes “integrated living patterns.” (*Trafficante v. Metro. Life. Ins. Co.* (1972) 409 U.S. 205, 209.) Some litigation under the federal constitution and the federal Fair Housing Act was successful in challenging suburban exclusionary policies.⁷ (*Resident Advisory Br. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1972); *Huntington Branch NAACP v.*

⁷ After recognizing that many of the existing efforts have not reached the overall goal of integrating neighborhoods, HUD has proposed a regulation that would clarify the obligations of local jurisdictions that receive federal funds to take proactive steps to “affirmatively further fair housing. (U.S. Department of Housing and Urban Development, Proposed Rule on Affirmatively Furthering Fair Housing, available at: http://www.huduser.org/portal/affht_pt.html.) The final regulation is expected to be adopted in 2014. The proposed regulation employs the “geography of opportunity” methodology used in this brief, *infra* at III(A & B), and would require local governments to analyze and address any impediments to fair housing in their jurisdictions, including “major differences in access to community assets” and “concentrations of race and poverty.” Gramlich, E., *Affirmatively Furthering Fair Housing & the Analysis of Impediments to Fair Housing Choice. 2013 Advocates Guide*, National Low-Income Housing Coalition: Washington D.C. (2013), p. 241; Gramlich, E., *Brief Outline of Proposed Regulations Affirmatively Furthering Fair Housing*. National Low-Income Housing Coalition: Washington, D.C. (2013), pp. 1 – 13.

Town of Huntington, 844 F.2d 926 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988).)

At the same time anti-poverty programs such as welfare, aid to children and families, food stamps were implemented to fight poverty. Combined, these policies and programs reduced poverty levels by both removing racial barriers and providing opportunity for economic mobility access to education, jobs and health care (de Souza Briggs, X., *More Pluribus, Less Unum? The Changing Geography of Race and Opportunity* in *The Geography of Opportunity: Race and Housing Choice in Metropolitan America* (de Souza Briggs, X, Ed). Brookings Institution Press, Washington DC. (2005), pp. 17 - 41; Carr, J., Kutty, N.K., *The New Imperative for Equality*, in Carr, SEGREGATION, pp. 1 - 30.)

2. California Responses

Beginning in the 1960's, some states and localities adopted "fair share housing" and inclusionary zoning policies to address exclusionary zoning and its effects. Fair share housing was aligned with the larger movements for civil rights (Davidoff, P., *Advocacy and Pluralism in Planning*, *Journal of the American Planning Association*, 31(4), (1965), pp. 331-338) in challenging segregation by race and income (Plotkin, S., *Zoned Out: The Struggle for Land Use Control*. University of California Press: Berkeley, CA. (1987), p. 60; Calavita, N. & Mallach, A., *Inclusionary Housing in International Perspective: Affordable Housing, Social Inclusion*

and Land Value Capture (“Calavita, Inclusionary Housing”), Lincoln Land Institute, Cambridge (2010), pp. 21 - 22.) Fair share housing policy focuses on the location of housing, allocating low- and moderate-income housing throughout a region using criteria that may include incomes, jobs, demographics, tax base, schools and housing stock. (Listokin, D., *Land Use Controls: Present Problems and Future Reform* (“Listokin, Land Use Controls”), Center for Urban Policy, Rutgers University: New Brunswick, NJ (1976), pp. 299 - 313.) The guiding idea is that each locality should set its zoning and land use policies to include its regional fair share of housing for all income levels. Fair share housing policy contends that low- and moderate-income housing should not be spatially limited to marginalized areas of a city but should be equitably dispersed throughout the region. Fair share housing has been adopted in more than a dozen states, including California, Connecticut, Florida, New Jersey, New York, Massachusetts, Pennsylvania, and Rhode Island. (Juergensmeyer, J. and Roberts, T., *Land Use Planning and Development Regulation Law*, 2nd ed., Thomson-West (2007), pp. 358 – 362.)

When implemented, fair share allocations mitigate the spatial impacts on low-income populations when their housing options have been constrained by price and availability. For example, the Miami Valley Regional Planning Commission (Ohio) enacted fair share housing in 1970 (Listokin, *Land Use Controls*, pp. 299 - 313.) Before implementation, the

region had only 3,200 affordable housing units, 95% of which were *inside* the city of Dayton. By 1977, 12,000 new units had been built, 73% of them *outside* of Dayton (Meck, S. *Regional Approaches to Affordable Housing*, Hamilton County Planning Commission, PowerPoint presentation (2005).)

California's version of fair share is incorporated into its Housing Element statute (Gov. Code §65580 et seq). In this law, the State of California has defined housing affordability as a land use requirement that all cities must address. The Housing Element statute requires local governments to integrate affordable housing into their zoning and other land use regulation. California has been a fair share state since 1967 when the legislature required local governments to include a Housing Element in their General Plans (Baer, W.C., *California's Fair-Share Housing 1967-2004: The Planning Approach*, *Journal of Planning History*, 7 (1), (2008) pp. 48 – 71.) In the decades since, the legislature has refined the requirements. Today, the Housing Element requires local jurisdictions to adopt a Housing Element that includes three primary parts: (1) an assessment of housing needs by income category as well as an analysis of resources and constraints to achieving these needs in the future; (2) a statement of community goals, quantified objectives, and policies related to affordable housing; and (3) a schedule of actions to implement and achieve the jurisdiction's housing goals. (Cal. Gov't Code §65583).

Inclusionary zoning, including the form of inclusionary zoning at issue in this case, is a tool used to implement fair share housing policy. Approximately 400 local governments in the U.S. have adopted an inclusionary zoning policy. (Hollister et al., National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances, Homebuilders Ass'n of Buck/Montgomery Counties (June 2007).) Thirteen states have statutes enabling localities to enact inclusionary zoning: Connecticut, Florida, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, Virginia and Washington. (Calavita, Inclusionary Housing, p. 30.)

Among the states where fair share and inclusionary housing has been successfully implemented, California has been a leader (Burton, C., *California Legislature Prohibits Exclusionary Zoning, Mandates Fair Share: Inclusionary Housing Programs a Likely Response*, San Fernando Valley Law Review, Vol. 9, pp. 19 - 46 (1981); RAND Report, pp. 7 – 19.) In the last three decades, 170 cities in California have passed inclusionary ordinances. (NPH Study, p. 5.)

California was also an early leader in enacting state fair housing laws which similarly direct local governments to be attentive to the location of affordable housing and to use their land use authority to serve the California's racial integration goals. (Iglesias, T. and Saylor, S., *Fair*

III. INCLUSIONARY ZONING IS A UNIQUELY APPROPRIATE AND EFFECTIVE POLICY RESPONSE TO COMPLEX PROBLEMS

Local governments in California face a tangle of problems related to housing provision and especially the location of affordable housing in their jurisdictions: the lack of affordable housing, the residue of racial and economic segregation caused by past exclusionary zoning, growing inequality of income and the concentration of poverty.

Each of these problems is closely associated with reducing opportunities for social and economic advancement of low and moderate income families. Lack of affordable housing within the jurisdiction limits families' social and economic mobility because it limits their access to employment and opportunities to live in successful school districts, requires long commutes by low wage workers who live outside the jurisdiction and inhibits their ability to participate in community life. In some cases the lack of housing affordable to the workforce in a city also limits employers' willingness to add new jobs in the jurisdiction, putting a drag on local economic growth.

These are serious planning challenges that must be addressed, but there are few tools available to local governments to do so. The challenge of the spatial allocation of affordable housing is best met through fair share

and inclusionary housing policies that provide opportunity and choice to low and moderate income families. Inclusionary zoning policies uniquely respond to the lack of affordable housing, the long history of exclusion and residential segregation, and the concentration of poverty. *Inclusionary zoning addresses all of these problems because it uniquely locates affordable housing in the right places--both spread out and integrated--as well as in high opportunity neighborhoods.* In addition, inclusionary zoning can be easily tailored to serve specific policy goals and local housing market conditions (Schuetz, J., Meltzer, R., and Been, V., 31 Flavors of Inclusionary Zoning: Comparing Policies in San Francisco, Washington, D.C., and Suburban Boston, *Journal of the American Planning Association*, Vol. 75, No. 4, 441 - 456 (2009).)

A. The Geography of Opportunity

Most Americans readily appreciate the importance of growing up in the right neighborhood. Decades of empirical research validate these intuitions, and vividly illustrate a powerful series of relationships between family residence and an individual's projected life chances along a number of scales. The geographically varying set of institutions, systems and markets dramatically influence a person's achieved socioeconomic status. Together, these institutions, systems and markets constitute the "opportunity structure." (Galster, G., "Urban Opportunity Structure and Racial/Ethnic Polarization ("Galster, Urban Opportunity Structure")

[Electronic Version] in *Research on Schools, Neighborhoods and Communities*, Tate, W.F. (Ed). American Educational Research Association: Rowan & Littlefield: New York, NY (2012), pp. 47 - 66;
Galster, G., An Econometric Model of the Urban Opportunity Structure, Knowledgeplex.org. (Fannie Mae Foundation): Washington, DC (1998).)
This structure serves to enhance or diminish an individual's life chances depending on their location within it.

On one level, the opportunity structure operates directly without regard to the decisions made by individuals or parents on behalf of an individual by imparting high level skills through the educational system and providing easy access to quality employment opportunities, viable transportation, quality childcare, and primary health care providers.

The opportunity structure also operates indirectly by influencing the decisions that people make within the structure. The range and quality of opportunities available depending upon one's location within the structure dramatically influences the decisions of individuals within the structure that will in turn affect future socioeconomic possibilities. For example, individuals with limited skills and few economic opportunities confront not simply fewer choices, but reduced incentives and expected benefits from making decisions that correlate with greater achieved socioeconomic status, such as refraining from childbearing until marriage, improving their job skills through additional education or avoiding participation in the criminal

labor market. Consequently, the decisions made within low opportunity contexts often redound to the detriment of individuals located within that space in the form of felony convictions, reduced educational attainment, and fewer developed job skills. (Galster, Urban Opportunity Structure.)

Within the United States, the web of physical, social, and cultural influences that constitute the opportunity structure vary across three spatial domains: metropolitan regions, municipal jurisdictions, and neighborhoods. (s.) Metropolitan regions feature distinct economic conditions that affect all of the markets within the region, regardless of the strength of individual municipal or suburban areas within the region. The quality and range of services and programs, such as the provision of primary education, recreation or safety programs, depend upon the municipality, especially the tax base capacity of the jurisdiction. The tax base capacity of jurisdictions, a function of the property values and commercial business within the municipality, vary within metropolitan areas. (Grant-Thomas, A. and powell, j.a., Structural Racism and Color Lines in the United States in TWENTY FIRST CENTURY COLOR LINES (2009), Temple University Press: Philadelphia, PA , (2009), p. 118.)

Municipal zoning ordinances and land use policies—in particular where affordable housing is located--play important roles in distributing opportunity. (powell, j.a., Race, Poverty, and Urban Sprawl: Access to Opportunities Through Regional Strategies, Forum of Social Economics

(2002), pp. 73 - 188; See also powell, j. a., *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 18 J. Affordable Housing & Community Dev. L. 145, 146 (2009).)

Even within municipal jurisdictions, neighborhood conditions play a powerful role on the quality of life and access to opportunity of individuals. (See *generally* Sampson, R. J., Sharkey, P., et al., "Moving to Inequality: Neighborhood Effects and Experiments Meet Social Structure." *American Journal of Sociology* 114(1): (2008), pp. 189 - 231; Friedrichs, J., Galster, G. and Musterd, S., "Neighborhood Effects on Social Opportunities: The European and American Research and Policy Context," *Housing Studies* Vol. 18, No. 6 (2003), pp. 797-806.) Neighborhoods vary in terms of peer influences, including exposure to non-standard spoken English, safety and amenities, as well as social networks and organizations. (Sampson, R. J., P. Sharkey, et al. "Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children." *Proceedings of the National Academy of Sciences*, Vol. 105, No. 3 (2008) pp. 845-852.) The proximity to parks, sidewalks, and safe playgrounds can have a direct impact on physical and emotional well-being. (California Newsreel, *Unnatural Causes, Backgrounders*, available at: <http://www.unnaturalcauses.org/assets/uploads/file/primers.pdf>, (n.d.)) At the same time, neighborhoods determine exposure to both environmental contaminants as well as physical violence. (*Id.*)

Consistent with the “geography of opportunity” approach, the City of San Jose’s Inclusionary Housing ordinance explicitly recognizes the importance of the location of housing in relationship to other important land uses: “[N]ew homes should be located where adequate transportation, sanitation, water, and other infrastructure is available, and within reasonable proximity of education, recreation, and other amenities.” (San Jose Mun. Code §5.08.010 C.) And, the City’s ordinance recognizes that better opportunities are more likely to be available where market-rate housing is located. For this reason, the City’s ordinance prefers the location of affordable units “to be located upon the same site as market-rate units” by providing incentives (San Jose Mun. Code §5.08.020; §5.08.450).

B. Opportunity Mapping of Santa Clara County

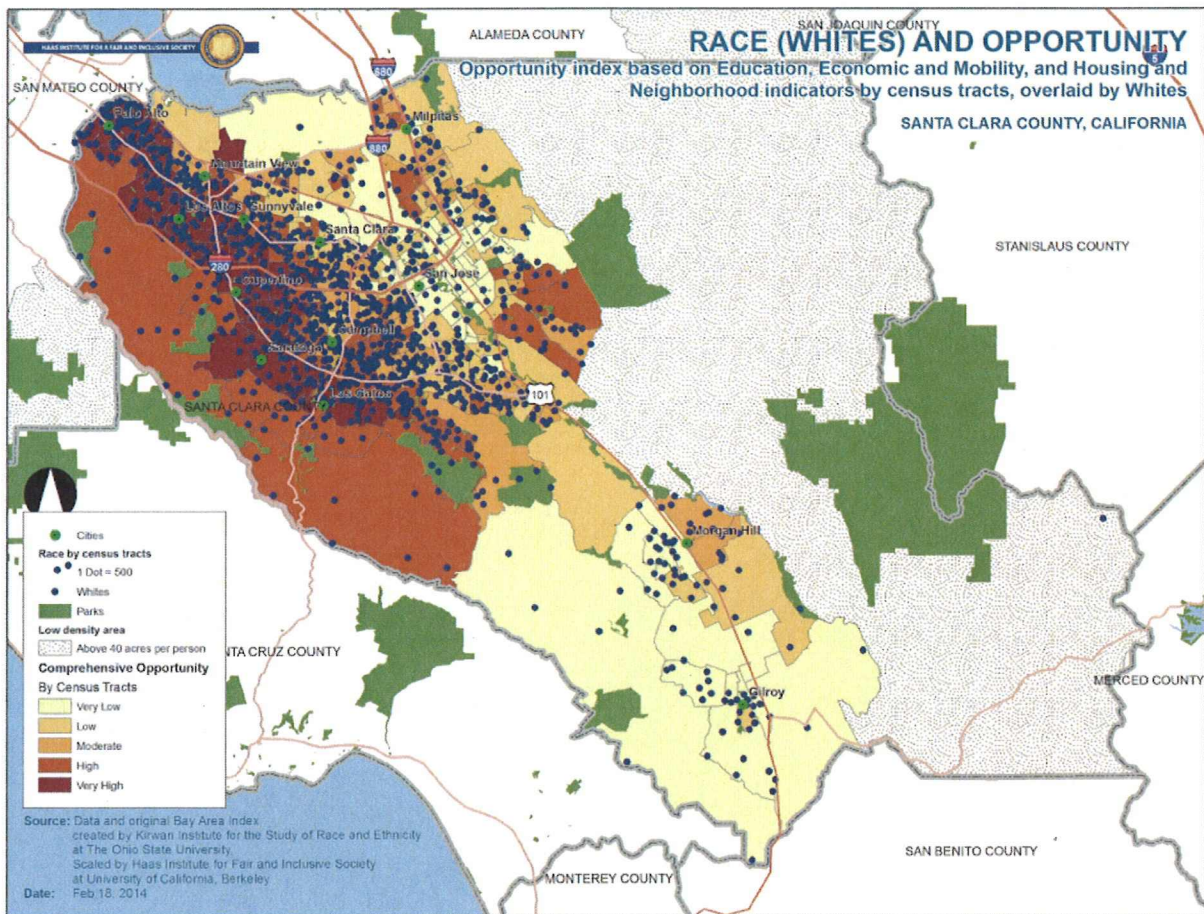
Because the opportunity structure is spatial it can be represented and mapped using geographic information systems technology. Mapping opportunity requires selecting variables that indicate high or low opportunity. The selection process is driven by social science research and empirical evidence that supports the use of such indicators. High opportunity indicators include low unemployment rates, low neighborhood poverty rates, increased proximity to libraries, and a greater number of health clinics in the neighborhood, high performing schools and low crime rates. Low opportunity indicators include low graduation rates, high student teacher ratios, remote access to employment, and unsafe environments.

Using data organized by the Kirwan Institute for the Study of Race and Ethnicity (Ohio State University), the Haas Institute for a Fair and Inclusive Society of the University of California at Berkeley scaled opportunity maps for Santa Clara County. The maps incorporate 27 different opportunity indicators in five different opportunity areas (Education and Child Welfare, Economic Opportunity and Mobility, Housing, Neighborhood and Community Development, Public Health, Public Safety and Criminal Justice). For each indicator, data was gathered and analyzed at the census tract level. The comprehensive map below represents the composite of all of the opportunity indicators. The map geographically represents the County in terms of the quintiles very high, high, moderate, low, or very low opportunity.⁸

Critically, different racial groups are related differently with respect to high opportunity environments. The following Table illustrates the distribution of families by race and opportunity.

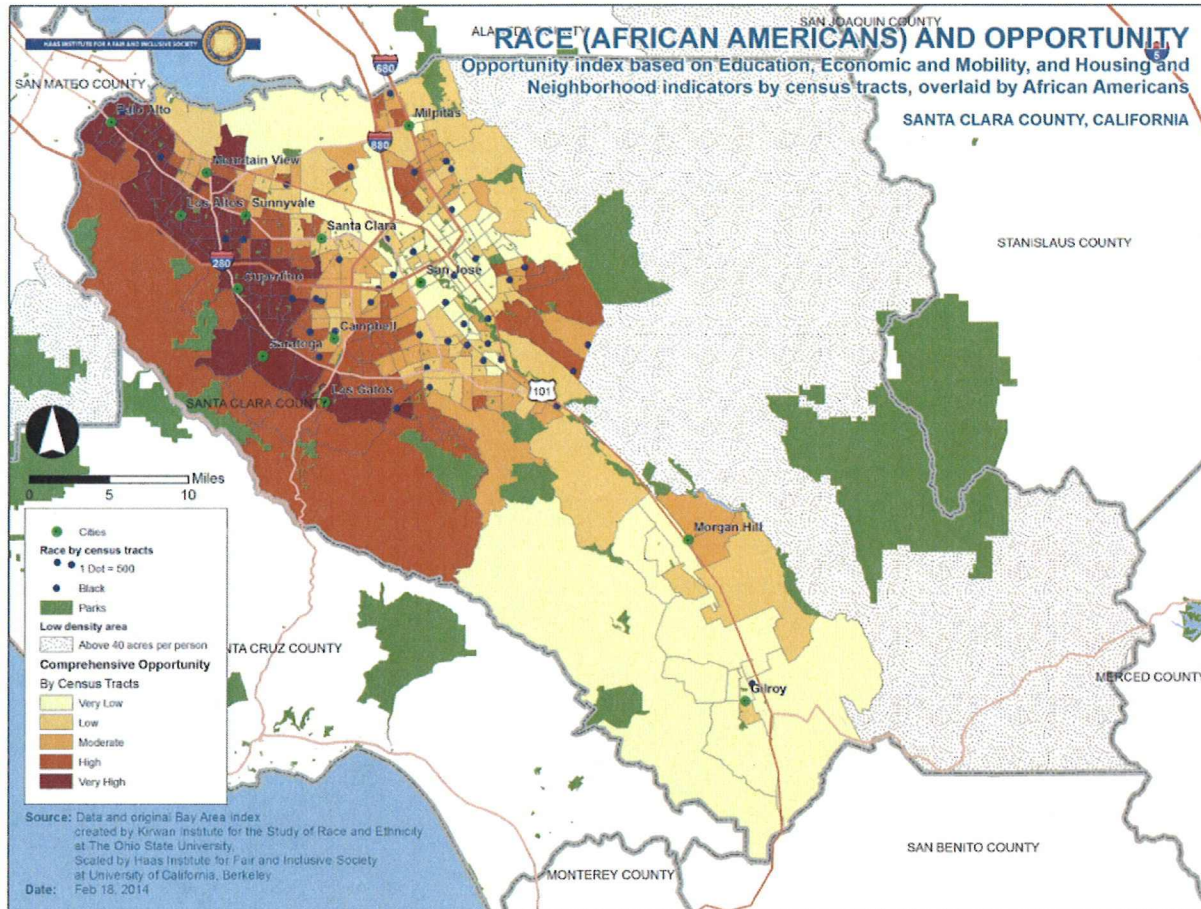
⁸ The methodology used to produce these maps is described in Methodology for Geography of Opportunity Maps of Santa Clara County, available at: https://drive.google.com/folderview?id=0B2_fvtJqs2KUYYmY1T3dnbFdLZFU&usp=sharing.

OPPORTUNITY ANALYSIS				
Opportunity	% Whites	% African Americans	% Asians	% Hispanics
Very Low	9.82%	21.51%	15.77%	43.17%
Low	17.29%	27.12%	20.78%	25.10%
Moderate	21.91%	23.18%	19.51%	16.63%
High	26.02%	16.98%	24.30%	10.84%
Very High	24.96%	11.21%	19.63%	4.27%

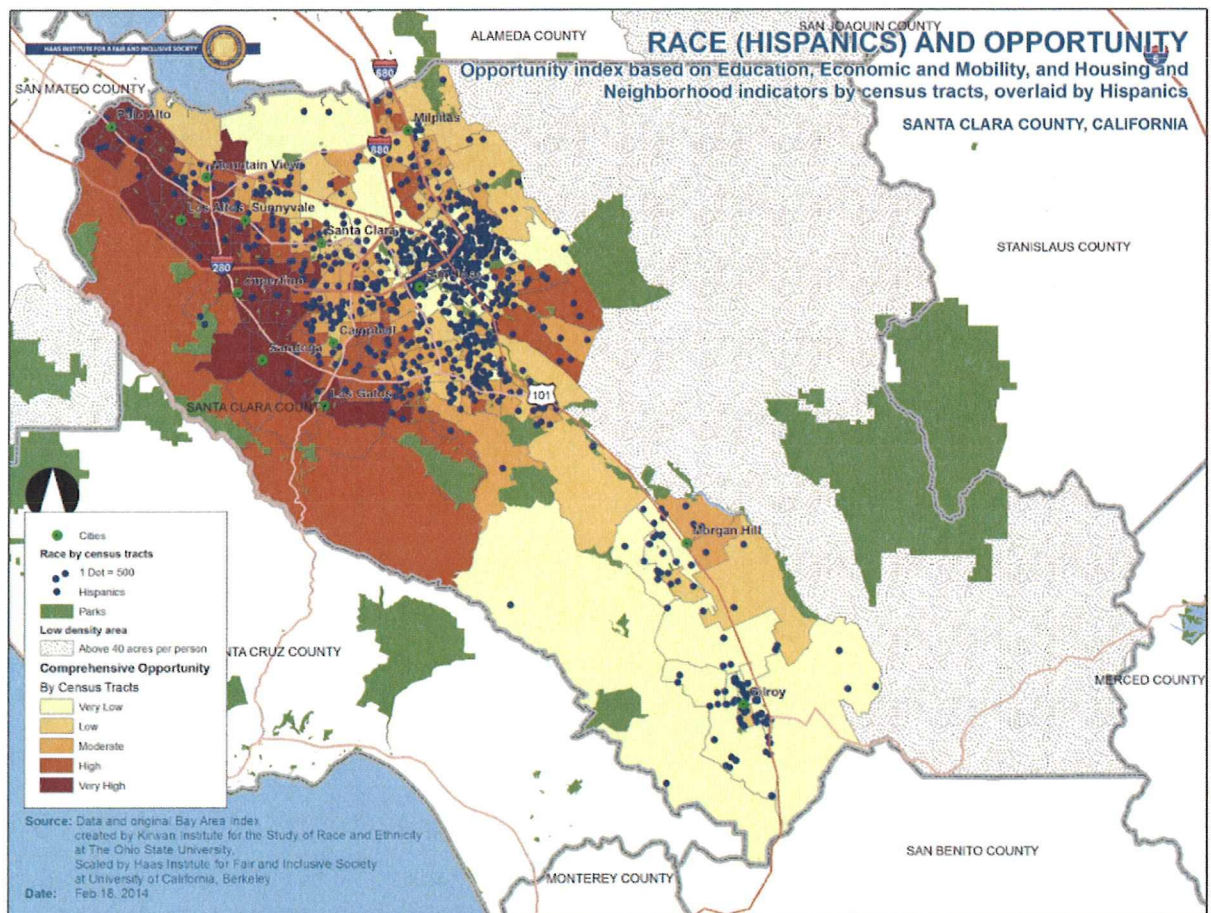


Although white families live in each opportunity quintile, what is notable about whites is how few reside in the lowest opportunity census tracts. Whites are dramatically underrepresented in the bottom fifth of opportunity environments despite being only slightly over-represented in the highest opportunity neighborhoods.

Conversely, African-Americans in the San Jose region are dramatically under-represented in the highest opportunity neighborhoods.



The largest non-white group (Hispanics) are more than double their proportion of the population in the very lowest opportunity neighborhoods.



The geography of opportunity maps show the distribution of people across space and depict the opportunity structure available to them. Policies that allow individuals and families to reside in higher opportunity environments improve their life chances. Inclusionary zoning helps remedy racial and economic residential segregation because it improves the opportunity structure available to families, especially by locating affordable housing with market-rate units in “high opportunity” communities.

C. Inclusionary Zoning Reduces Economic Segregation and Increases Opportunities

This section will explain how inclusionary zoning is an antidote to exclusionary zoning and racial and economic residential segregation because it expands the “geography of opportunity” available to families by locating affordable housing in in “high opportunity” communities.

Low income and people of color now living in heavily concentrated neighborhoods have few better housing opportunities available to them. Inclusionary zoning provides those opportunities. Families living in affordable housing located in higher income, amenity-rich neighborhoods have positive social outcomes (Schwartz, H., *Housing Policy is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland* (“Schwartz, Housing Policy”) The Century Foundation: New York (2010); De Souza Briggs, X., *More Pluribus, Less Unum? The Changing Geography of Race and Opportunity*, in *The Geography of Opportunity: Race and Housing Choice in Metropolitan America* (de Souza Briggs, X, Ed). Brookings Institution Press, Washington D.C. (2005), pp. 17 - 41.)

A recent study comparing the change in economic segregation over a 20 year period in two similar counties within the same regional housing market—one with a robust inclusionary zoning ordinance and one without

any inclusionary zoning—demonstrates the potential for inclusionary zoning to reduce economic segregation.⁹

Montgomery County, MD and Fairfax County, VA, are both wealthy suburbs of Washington, D.C. In early 1974, Montgomery County, a suburb of Washington, D.C., enacted its Moderately-Priced Dwelling Unit (MPDU) policy which required all housing developments with 50 or more units to include 12.5% – 15% units affordable to households making less than 65% of Area Median Income (AMI). To assure that MPDUs would benefit the lowest income households, the county council directed the Housing Opportunities Commission (HOC), the county-wide public housing authority and housing finance agency, to buy or rent one-third of the MPDUs built. By 1990, private, for-profit homebuilders had delivered 10,600 MPDUs integrated seamlessly into about 80,000 units of market-rate housing (many in some of the Washington region's most prestigious neighborhoods). HOC had purchased over 1,600 MPDUs (scattered in 220 different neighborhoods) and leased another 1,700 MPDU rental units for re-rent to public housing families. (*Id.*) In contrast, Fairfax County did not have an inclusionary zoning ordinance between 1970 – 1990.

⁹ A more complete description of this study is available at: https://drive.google.com/folderview?id=0B2_fvtJqs2KUYmYlT3dnbFdLZFU&usp=sharing.

The difference in the amount of economic segregation between these two counties between 1970 and 1990 is apparent. From 1970 to 1990, Montgomery County's economic segregation index was relatively stable from 27.1 in 1970 to 27.9 in 1990, while Fairfax County's economic segregation index increased rapidly from 21.9 in 1970 to 30.7 in 1990.

An important study conducted by the RAND Corporation in 2012 found that inclusionary zoning is effective in locating affordable housing in higher opportunity neighborhoods. The study analyzed 11 inclusionary zoning programs, of which two are in California, *viz.* Irvine and Santa Monica. (RAND Report, p. 3.) Although the programs studied vary considerably, overall, the study found that inclusionary policies provide access to low-poverty schools and neighborhoods. Specifically, the primary findings were that inclusionary zoning homes serve low-income people, tend to be dispersed throughout jurisdictions, are located in low-poverty neighborhoods, and that the children living in these homes are assigned to relatively low-poverty public schools and are assigned to schools performing better than schools in the same jurisdiction that do not serve inclusionary homes. (*Id.* at xii – xiii.) Another recent study found similar results. In the aggregate, inclusionary zoning units positively affect the level of both racial and income integration in neighborhoods where they are built (Kontokosta, C. E., *Mixed-Income Housing and Neighborhood*

Integration: Evidence from Inclusionary Zoning Programs, *Journal of Urban Affairs*, Vol 36, no. 2 (2013), pp. 1 - 26.)

Evidence from similar programs confirms the finding that low and moderate income families have better social results when they live in higher opportunity communities. The U.S. Department of Housing and Urban Development's Moving to Opportunity demonstration program provided housing vouchers to low and moderate income families were to move from low opportunity communities to high opportunity ones. Evaluation of the program found that the families (and especially children) who made the move and stayed for five years or more became more self-sufficient and took advantage of other educational and employment opportunities. (Dreier, *Space Matters*, p. 55.)

Almost all land use regulations have socio-economic effects on the communities because they organize different land uses in space and thereby create distinct relationships among them. Judge Westenhaver, who wrote the District Court opinion in the *Euclid* case, presciently warned about the segregative result of comprehensive zoning that privileges single-family homes: "In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life." (*Ambler Realty Co. v. Village of Euclid, Ohio*, 297 F. 307, 316 (1924).)

As a remedy for prior exclusionary zoning, inclusionary zoning also has socio-economic effects on the communities. An early case invalidated an inclusionary zoning ordinance because it was interpreted as pursuing “socio-economic zoning” interpreted as an illegitimate governmental objective (*Bd. of Sup’rs of Fairfax County v. DeGroff Enterprises, Inc.*, 214 Va. 235 (1973)). However, this framing has been rejected by courts in New York, California, and New Jersey. *Southern Burlington County NAACP v. Mount Laurel Tp.*, 456 A.2d 390, 449 (1983) responded to the Board of Supervisors of Fairfax County case stating: “It is nonsense to single out inclusionary zoning...and label it ‘socio-economic’ if that is meant to imply that other aspects of zoning are not.”). Other cases have recognized the remedial value of inclusionary zoning. *Home Builders Ass’n of No. California v. City of Napa*, 90 Cal.App.4th 188, 198 (2001) (refusing to invalidate an inclusionary ordinance because the affordable housing shortage may have been a product of the city’s own prior restrictive land use policies); *Maldini v. Ambro*, 36 N.Y.2d 481, 485 - 486 (1975) (holding that a town’s zoning of a district for retirement housing was not *ultra vires* because it was an inclusionary effort “to correct social and historical patterns of housing deprivation”).)

Simply put, if more communities became mixed income through inclusionary zoning, there would be a larger supply of good communities

for low and moderate income families to go and they would have access to the means of economic and social mobility.

D. Inclusionary Zoning Increases Employment Opportunities and Enables Local Economic Growth by Producing Workforce Housing

Economic growth inevitably creates some low paying jobs. To promote economic growth cities must supply “workforce housing,” that is, housing affordable to these low income workers. Inclusionary zoning creates “workforce housing.”

The City of San Jose’s Inclusionary Housing ordinance specifically recognizes this issue. “Because affordable housing is in short supply in the city, [employees] may be forced to...commute ever increasing distances to their jobs from housing located outside of the city. These circumstances harm the city’s ability to attain employment...goals articulated in the city’s general plan...” (San Jose Mun. Code §§5.08.010(F)(2).)

Inclusionary zoning meets existing affordable housing needs, including providing workforce housing. The latest numbers for the State are not available, but a 2007 estimate calculated that at least 4,500 homes per year have been built through inclusionary housing policies, with over 50% of these available to low-income households and 25% available to very low-income households (NPH Study, p. 14). A study of Los Angeles and Orange Counties found that the numbers of affordable homes provided through inclusionary housing programs in these counties were equal to the

number of homes produced under the Low Income Housing Tax Credit program, the largest affordable housing production subsidy program. (Mukhija, V., Regus, L., Slovin, S., & Das, A., Can Inclusionary Zoning Be An Effective and Efficient Housing Policy? Evidence from Los Angeles and Orange Counties, *Journal of Urban Affairs*, Vol. 32, No. 2 (2010), pp. 229 - 252.)

While Santa Clara County has a thriving technological sector and other promising economic growth, the county's economy also continues to produce a substantial number of low wage jobs. These jobs are not incidental to the local economy; they comprise critical roles such as personal care aids, cashiers, food service workers, janitors, and childcare workers. The California Employment Development Department projects that there will be more than 26,000 new job openings for the area covering Santa Clara and San Benito counties in occupations that currently have a median annual wage below \$20,000 (See Figure 2). An annual income of \$20,000, even assuming it is net income, amounts to \$500 per month for housing (using the standard 30% of income toward housing).

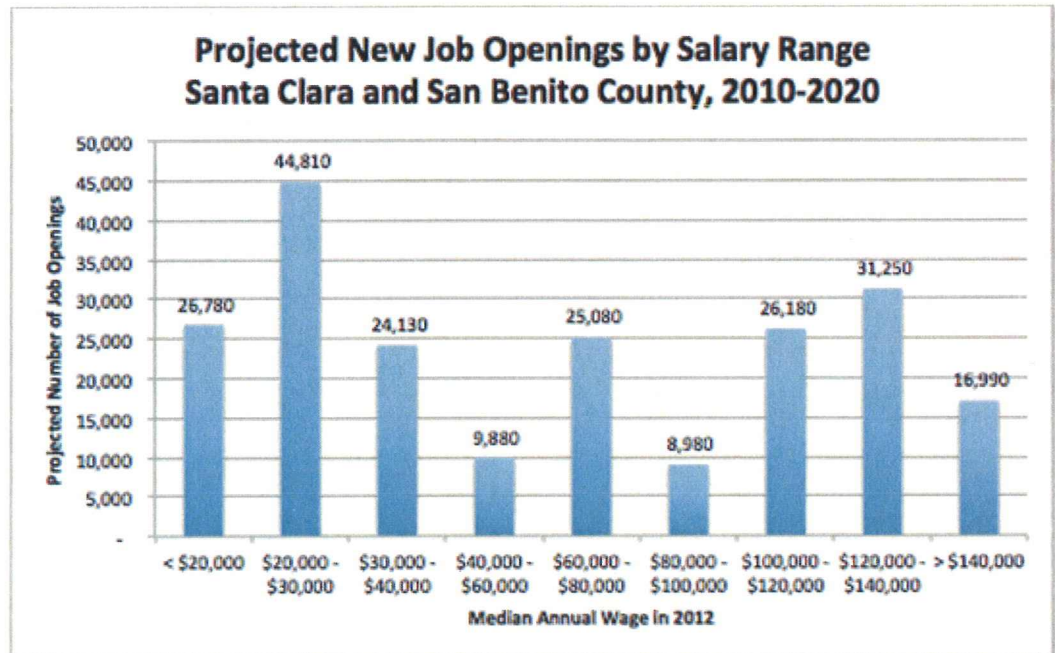


Figure 2. Source: California Employment Development Department, Labor Market Information Division (01/07/2013)

The Association of Bay Area Governments conducts a Regional Housing Needs Assessment for each county in the Bay Area every ten years, based on projected population growth and housing stock. For the period 2014 - 2022, ABAG concludes that Santa Clara County will need 16,158 homes for very low income (0-50% Area Median Income) (AMI) households and 9,542 homes for low income (51%-80% AMI) households. (Association of Bay Area Governments, *Regional Housing Needs Assessment Plan*, adopted by the ABAG Executive Board on July 18, 2013 (2014).) This amounts to a doubling of the number of homes for low income and very low income households that the county had in 2009, the most recent year the agency surveyed existing housing stock. (Association

of Bay Area Governments, *San Francisco Bay Area Housing Data* (2009), available at: http://www.abag.ca.gov/pdfs/2009_Housing_Data.pdf.)

Without policies like inclusionary zoning, the county is extremely unlikely to meet this need.

Creating workforce housing near employment centers may be the key to assuring the presence of an adequate workforce so that businesses will create jobs there. Major employers may need to offer higher wages to meet the high housing costs. These employers may find that the wage bill required for needed workers would be so great that they abandon the local market and move to locales with sufficient workforce housing. (Dreier, *Place Matters*, p. 45.)

A case study of new housing development in the Isle of Wight County, Virginia, and its impact on Smithfield Foods, Inc. (the county's largest employer) demonstrates the value of "workforce housing" for employers. (Rusk, S., Doerr, T. and the Innovative Housing Institute, *Final Report of the Isle of Wight County Task Force on Workforce Housing* (April 2007).¹⁰ In recent years new housing built in Isle of Wight County was not affordable for practically anyone who actually works within the county. The percentages of employees of the county and town

¹⁰ For a more complete description of this study, visit: https://drive.google.com/folderview?id=0B2_fvtJqs2KUYmY1T3dnbFdLZFU&usp=sharing.

governments, the public schools, and Smithfield Foods who live within the county was eroding steadily. The report found that the local affordable housing crisis could reach such an acute state that it would jeopardize the very prosperity that Isle of Wight County has experienced in recent years. As the study was being completed, a corporate executive of Smithfield Foods advised the County Commission that Isle of Wight was not being considered as the location of a new plant. The executive explained that the cost of new housing caused the company to doubt that it could recruit the needed workforce.

If workforce housing is inadequate near employment centers, workers cannot afford housing near their jobs and must endure long commutes. The U.S. Census Bureau reports that 1.9% of workers in the San Jose-Sunnyvale-Santa Clara region must travel at least 50 miles for at least 90 minutes from home to work. This makes Santa Clara County the crown prince of the “Mega-commute.” (Rapino, M.A. and Fields, A.K. “Mega Commuters in the U.S. Time and Distance in Defining the Long Commute Using the American Community Survey,” U.S. Census Bureau Working Paper 2013-03.) (The King of the Mega-Commute is the adjacent San Francisco-Oakland-Fremont region with 2.06% burdened by such long commutes (*Id.*) Of all the people that work in Santa Clara County only 77.7% are Santa Clara County residents, and 22.3% commute from elsewhere outside the county to their jobs in Santa Clara County. As shown

in the following table, nearly one-quarter of Santa Clara County's workforce commutes from outside the county (the sum of commuters from Alameda County – Sacramento County in the table).¹¹

Worker's Residence	Number of Workers	Pct of Total Workers	1-way commute (in miles)	1-way commute (in minutes)
1. Santa Clara County	711,635	77.7%	na	na
2. Alameda County	64,696	7.1%	41	49
3. San Mateo County	50,215	5.5%	23	50
4. San Francisco County	19,087	2.1%	51	64
5. Santa Cruz County	17,451	1.9%	32	43
6. Contra Costa County	11,526	1.3%	58	68
7. San Joaquin County	7,954	0.9%	72	82
8. San Benito County	7,345	0.8%	48	54
9. Monterey County	4,750	0.5%	61	66
10. Merced County	4,118	0.5%	117	130
11. Stanislaus County	3,983	0.4%	94	107
12. Sacramento County	2,022	0.2%	117	127
Other California counties (38)	10,795	1.2%	na	na
Total – counties #2 - 12	193,147	21.1%	43	51

The average out-of-county commuter is driving 86 miles and spending an hour and 21 minutes getting to and from work. (American Community Survey 2008 – 2012, five year average). Such long commutes are bad for employers because they reduce employee productivity, reduce employee retention, and increase recruitment and training costs. And they

¹¹ Table source: U.S Bureau of the Census. <http://www.census.gov/population/metro/data/other.html> Table 2. Residence County to Workplace County Flows for the United States and Puerto Rico Sorted by Workplace Geography: 2006-2010.

are bad for commuters who spend long hours away from their families and communities. In addition, spending so much time on the road prevents these workers from taking advantage of opportunities to increase their incomes, e.g. by getting additional training or education.

Creating more affordable housing through inclusionary zoning ordinances in San Jose and its sister communities would have a significant impact on lessening long-distance commuting and its economic and social costs.

E. Inclusionary Zoning Increases Educational Opportunities

Inclusionary zoning creates economically integrated housing. Economically integrated neighborhoods means economically integrated neighborhood public schools. “Low-income students benefit from attending higher-scoring (often lower-poverty) schools (Rumberger and Palardy, 2005; Schwartz, 2012)” (cited in RAND Report, p. xi.)

Economically integrating classrooms is the most powerful educational intervention to improve academic outcomes for low-income students in public schools because the social composition of the student body is more highly related to achievement than any school factor. A seminal report, *Equality of Educational Opportunity*, published by the then U.S. Office of Education in 1966, found that “the social composition of the student body is more highly related to achievement, independent of the student’s own social background, than is any school factor.” (Quoted in

Kahlenberg, R. D., *All Together Now: Creating Middle-Class Schools through Public School Choice*. Brookings Institution Press: Washington, DC. (2001), p. 28.)

The RAND report found that inclusionary zoning increases the educational opportunities of families because children living in these homes are assigned to relatively low-poverty public schools and are assigned to schools performing better than schools in the same jurisdiction that do not serve inclusionary homes. (RAND Report, p. xii – xiii.)

“Housing Policy Is School Policy,” the most recent and methodologically sophisticated study testing student achievement in public schools, found that inclusionary zoning alone had a substantial positive effect on academic achievement of students from low-income families. Schwartz, *Housing Policy*) Dr. Schwartz analyzed the impact of economic integration on the education of low-income students by studying the academic performance of public housing children in the Montgomery County (Maryland) Public Schools (MCPS). She found that the county’s longstanding inclusionary zoning policy had a powerful positive educational impact on low-income students’ performance. Low-income students in areas where inclusionary zoning had created economically integrated communities performed better on standardized tests than students living in non-economically integrated schools that had employed numerous other educational policies aimed at increasing performance.

Dr. Schwartz collected and analyzed detailed information on 858 public housing children's family background, demographics of their fellow students at the classroom level, and standardized test score performance for up to seven years. Her key finding was the different standardized test results between public housing children who attended "Red Zone" schools and "Green Zone" schools. Several years before, MCPS leadership had recognized that many low-income children in schools with larger numbers of FARM students¹² were not being effectively educated. Schools with over 20% FARM students were classified as "Red Zone" schools; schools with under 20% FARM students were classified as "Green Zone" schools. MCPS poured additional resources in Red Zone schools: a 20% boost in expenditures per student, full-day kindergarten, smaller class sizes in the early grades, increased teacher training, and a balanced literary curriculum. Green Zone schools received no additional help, but by virtue of inclusionary zoning public housing children in Green Zone schools simply attended schools surrounded by a greater proportion of classmates from higher income families with more highly educated parents than they would have encountered in Red Zone schools.

The results of Dr. Schwartz's exhaustive statistical analyses are summarized by the following two graphics (figures 6 and 7). The public

¹² In this research, low-income students are identified as those who qualify for the governmental benefit of **Free And Reduce-price Meals** (FARM).

housing children in Red Zone schools slightly closed the gap with district-wide performance levels in math and reading in the early years, but as these students approached their teenage years, they began falling farther and farther behind. After seven years, in spite of all the extra resources expended by MCPS in Red Zone schools, the gaps were greater than when these public housing children began. By contrast, the public housing children in Green Zone schools (the beneficiaries of inclusionary zoning) steadily closed the performance gaps in math and reading. In fact, as they approached their teenage years (and were presumably more influenced by peer example), their performance levels soared.

Figure 6. Effect of Red Zone/Green Zone Designation on the Math Performance of Children in Public Housing

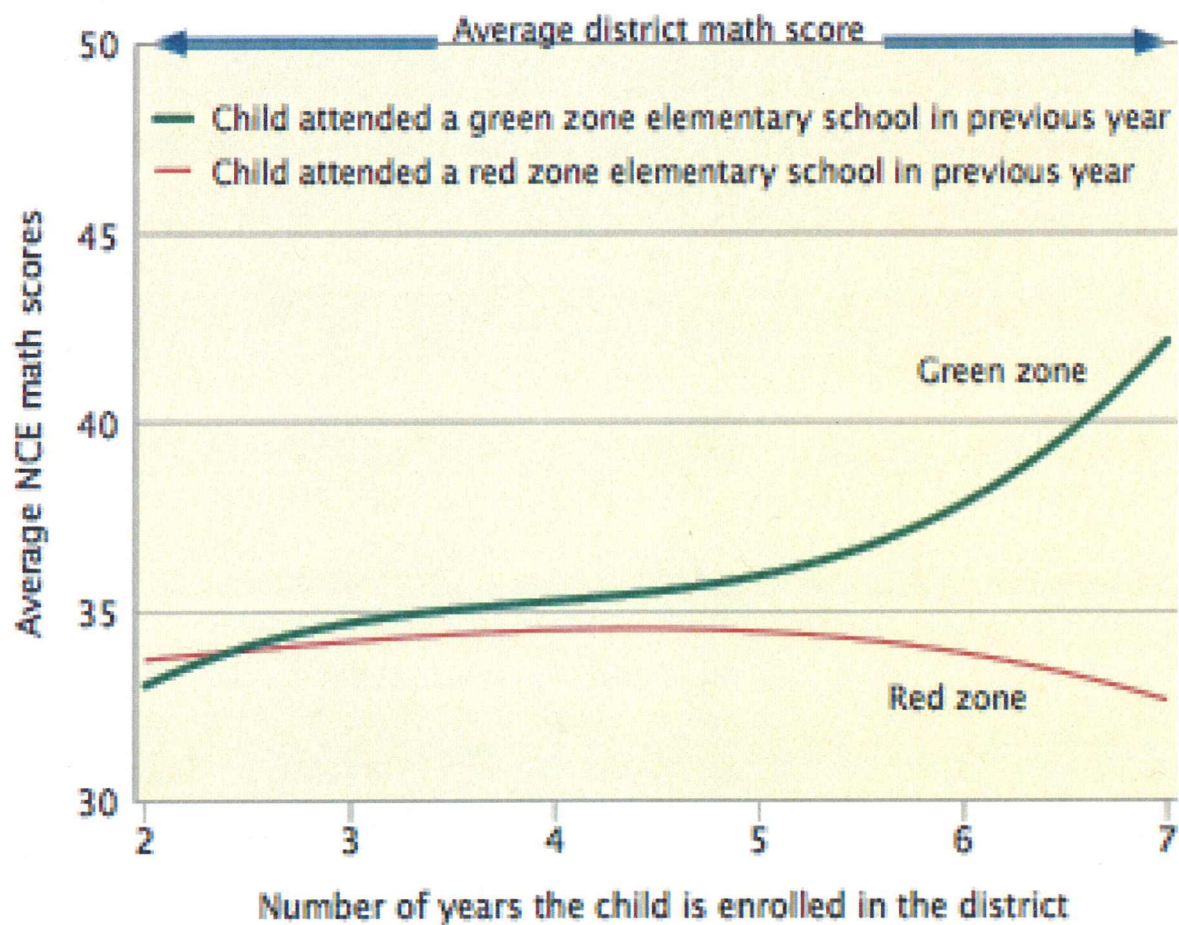
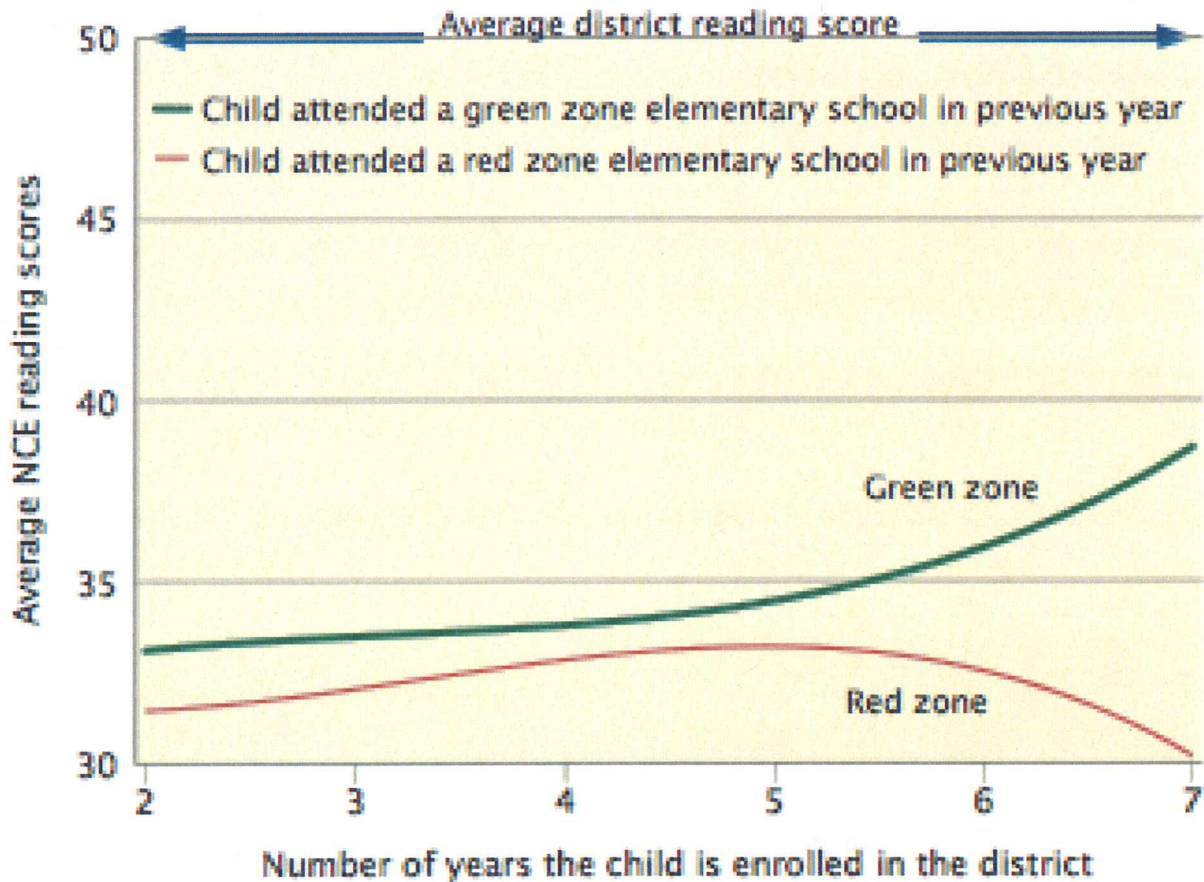


Figure 7. Effect of Red Zone/Green Zone Designation on the Reading Performance of Children in Public Housing



Dr. Schwartz summarized her findings thus:

Although the county's inclusionary zoning policy occurs outside the school walls, it has had a powerful educational impact, even as measured by the most demanding but perhaps most meaningful test. Namely, that over the course of elementary school, *highly disadvantaged children with access to the district's lowest-poverty neighborhoods and schools began to catch up to their non-poor, high-performing peers, while similar disadvantaged children without such access did not.* (Schwartz, H., *Housing Policy is School Policy*, p. 37 (emphasis added).)

Inclusionary zoning is likely to lead to similar positive outcomes in California’s public schools. Using a methodology similar to the Schwartz study, Consultant David Rusk analyzed available data for Santa Clara County’s elementary schools to test inclusionary zoning’s potential effects on academic performance in the County’s elementary schools.¹³

Over the past decades, as Santa Clara County’s population has diversified racially, its schools have become more economically segregated. On the basis of all elementary schools in the county, its economic school segregation index has increased as follows (100 = total segregation of FARM pupils):

ca. 1990	45.1
ca. 2000	48.7
2012 - 13	54.3

Economic school segregation, based on economic residential segregation, lies at the heart of the problems Santa Clara County’s public schools face in effectively educating the county’s low income children. Using on-line data from the California Department of Education, the study analyzed the relationship between the percentage of elementary school

¹³ A more complete report of this analysis, Rusk, Examining Inclusionary Zoning’s Potential Effects on Academic Performance in Elementary Schools in Santa Clara County, is available at: https://drive.google.com/folderview?id=0B2_fvtJqs2KUYmY1T3dnbFdLZFU&usp=sharing.

pupils that qualified for FARM and Standardized Testing And Reporting (STAR) results for 2012-13. Using standard statistical analysis, the study found a very high correlation (0.82) between the percentage of FARM pupils in each of the 27 city elementary schools of the San Jose Unified School District (as the independent variable) and each school's STAR decile— in effect, meaning that the socioeconomic status of the schools' student body accounted for 82% of the school-by-school variation in STAR rankings. Conducting the same analysis for 225 elementary schools in Santa Clara County's 25 school districts yielded a correlation of 0.77, meaning that the schools' FARM percentages account for 77% of the school-by-school variation in STAR rankings. Based upon the results of this study, there is every reason to expect that integrating more FARM pupils into low FARM schools within San Jose Unified School District and throughout the Santa Clara County school districts through inclusionary zoning and other mixed-income housing policies would produce the very significant academic advances that Dr. Schwartz's research showed for the Montgomery County Public Schools.

F. Inclusionary Zoning is Fair

Inclusionary zoning's set-aside requirement is fair because the public primarily pays the costs. And, if there are additional unpaid costs, in most scenarios the seller of raw land to the developer absorbs all or most of the remaining costs. This result is fair because the landowner will have

reaped additional unearned land value by governmental actions prior to the enactment of the inclusionary zoning ordinance. Finally, even if developers must ultimately absorb some costs in reduced profits, this alone does not constitute a constitutional problem. *Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926).

Undoubtedly the set-aside requirement of an inclusionary zoning ordinance creates costs because it requires building additional housing that the developer did not originally plan and these units must be sold or rented for below-market prices. Who pays the costs of compliance with the set-aside requirement is an issue of fairness. Developers sometimes claim that they bear the costs for compliance or that the costs are passed down to homebuyers or renters of market-rate units, decreasing the ability of those buyers to afford market-rate housing. This section rebuts these assertions.

First, inclusionary zoning does not *necessarily* impose *any* costs on a developer. Inclusionary zoning is never applied in the abstract, only in each particular instance with each unique development proposal. This is why local governments have designed their inclusionary zoning ordinances with options—to accommodate developers and their unique situations. Most inclusionary zoning ordinances, including the City of San Jose’s ordinance, are designed to provide at least parity if not substantial benefits to private developers when they develop set-aside units on-site, as well as

opportunities to either reduce their obligation or waive it altogether by demonstrating hardship. Because of the options, any feared harm to developers is *speculative* apart from the actual application of a particular inclusionary zoning ordinance to a particular development.

Most local governments incorporate cost offsets or incentives in their inclusionary programs. These programs may include density increases or “bonuses,” waivers or deferral of impact fees, fast-track permitting, lower parking requirements, relaxation of design standards such as street widths and setbacks, or other regulatory concessions that subsequently reduce developers’ costs. And when it applies, the State’s Density Bonus Law requires density bonuses and other incentives to be provided to developers. (Gov. Code Section §65915 et seq.) In addition, financial incentives may be provided through federal community development Block Grants and home funds or state and local subsidies, including below-market-rate construction loans, tax-exempt bond mortgage financing, and land write-downs. A survey of inclusionary zoning in California found that local financial subsidies are common among the most productive jurisdictions. (California Coalition for Rural Housing and Non-Profit Housing Association of Northern California, *Inclusionary Housing in California: 30 Years of Innovation*, (2003), p. iv.)

At the time of that survey, the most frequently used subsidy was tax increment financing (TIF), through Redevelopment Agencies in California.

With the elimination of Redevelopment Agencies and TIF for housing gone, the most widely used incentives are density bonuses and permit-related concessions, such as deferrals, reductions, or waivers of applicable permit and impact fees. These incentives often come at a public cost.

Financial incentives are paid directly by taxpayers, either through appropriations at the federal, state, or local level, or by redirecting revenues that would otherwise go into the city's general fund.

The effect of fee waivers, reductions, or deferrals is nearly as direct. Development creates demands for public facilities, services, and infrastructure, the costs of which are typically mitigated by fees whose nature and amount is directly related and roughly proportional to the development's impact. When a project does not pay its full cost, the city must make up the lost revenue or allow infrastructure or service levels to decline. In either case, the public bears a cost. For example, fast-track permit approval will require more personnel to process the plan at public cost, or lengthen delays for projects that do not benefit from fast track. As the report, *Inclusionary Housing in California: 30 Years of Innovation* points out, "The relatively high percentages of respondents providing subsidies, as well as various fee concessions and incentives, indicates that many jurisdictions are 'paying' for inclusionary housing, either by direct cash assistance, foregone revenue, or both." (p. 18).

Economists point out that, while under some conditions market-rate renters and buyers may bear some of the costs of regulations such as inclusionary housing, it is more likely that others, especially the sellers of raw land to developers will absorb all or part of any costs not borne by the public. There seems to be agreement in the literature that “in the long run...most costs will be passed backward to the owners of the land” (Mallach, A., *Inclusionary Housing Programs: Policies and Practices* “Mallach, Inclusionary Housing”), New Brunswick, NJ: Center for Urban Policy Research, Rutgers University (1984), p. 88.) because land markets will adjust to reflect those additional costs. For example, a job-housing nexus study prepared for the City of San Diego by the economic consultants Keyser Marston and Associates in 2013 found that the additional costs to developers will bring about a readjustment of land prices in a period of a few years, i.e., the landowner will pay the additional cost of development through a reduction of the price of land. (Keyser Marston Associates, *Jobs-Housing Nexus Study*, August 2013, p. 62.)

Even critics of inclusionary zoning acknowledge that landowners are likely to bear much of the cost. A report by the Building Industry Association of Southern California that was critical of inclusionary zoning admits that, “the value of existing properties as potential sites for new housing development will be reduced.” (Kosmont Partners, *Review of the David Rosen & Associates Report on Inclusionary Housing in the City of*

Los Angeles, (2004), p. 64; Ellickson, Robert, Inclusionary Zoning: Who Pays?, *Planning* 51, 8: 18-20 (1985); Rivinius, Robert, The case against Inclusionary Zoning. *Land Use Forum* 1, 1: 25-26 (1991).

How are these costs passed on to landowners? If the developers do not own the land at the time of enactment of an inclusionary housing program, they will bargain with landowners for a lower price. Once an inclusionary zoning ordinance passes, rational developers will be keen to establish how much they should pay for the land through economic analyses, such as residual land value analysis. Such an analysis calculates costs – including regulatory costs, such as inclusionary zoning – and subtracts them from projected revenues. What is left is the maximum of what a developer should pay for the land. A rational developer will buy the land at that price or less, thus avoiding the possibility of a reduction in profits or charging prices higher than the market will bear. The critical issue is whether a developer has bought the land before the enactment of an exaction. Only if the developer already owns the land at the time the inclusionary ordinance is passed (and the costs are not offset by government subsidies and regulatory relief) is he forced to choose between raising prices or lowering profits.

Competition in the housing market seriously limits developers' ability to raise prices for home purchasers in response to new regulatory costs because developers compete not only against developers of a similar

product, but also in the much larger market of similar, but existing homes. If the demand for housing is elastic, i.e. sensitive to changes in price, then developers will be unable to pass the cost increases to homebuyers and will have to reduce their profits. Under those circumstances, if newly imposed exactions increase the cost of development, either the price of the land or the developers' profits will have to come down. While developers may reduce their profit margins, it is likely that wherever possible they will seek a reduction in land costs.

Commentators explain that it is not “necessarily unfair or unreasonable” if the landowner bears much of the cost of inclusionary programs (Mallach, *Inclusionary Housing*, p. 65.) Inclusionary housing is an instrument of land value capture, not unlike tax increment financing, business-improvement districts and assessment districts.

It is widely argued that increases in land values do not generally result from the owner's unaided efforts, but rather from public investments and government decisions, and are therefore in whole or part “unearned” by the landowner. (Ingram, G. K. and Hong, Y-H., eds., *Value Capture and Land Policies*. Lincoln Institute of Land Policy, Cambridge, MA (2012), p. 4.) Conceptually, value capture is a method to recoup some of the value that accrues to private development through public investment in infrastructure (*Id.*). The price of land is clearly a function of real estate markets, but without public investment, the value cannot reach its potential

price level. Yet, without some method of recouping at least part of this public investment, it constitutes a public subsidy to private development. Thus, to the degree the imposition of inclusionary zoning reduces land value, it does not reduce it from some level “intrinsic” to the land. Rather, it represents the recapture of an increment in land value associated with governmental action.

In summary, inclusionary zoning is fair because the potential cost to developers of building set-aside units is substantially or completely offset by two factors: a system of incentives and cost offsets that generally shift costs to the public, and the likelihood that any residual costs will be paid by land owners because land markets will adjust to reflect the cost of inclusionary zoning.

IV. CONCLUSION

In the context of existing economic and racial segregation, growing diversity in its population and widening inequality, California should be concerned about promoting economic and social mobility for its low and moderate income families. Inclusionary zoning is a proven and important means to achieve this worthy goal.

Where we live affects much of our lives: access to education, jobs, safety, social networks, and other amenities. California law has long recognized the importance of housing equity through its fair share approach as well as fair housing law. Inclusionary zoning recognizes that

neighborhoods and their amenities do not exist in a vacuum. Along with market forces, neighborhoods are formed, supported or ignored through some form of governmental intervention. A number of these interventions have separated and segregated neighborhoods; others have improved communities and lives. Inclusionary zoning is among the latter.

California local governments have used inclusionary zoning for more than 30 years. More than 170 local jurisdictions now rely on some form of inclusionary zoning. A large volume of objective studies conducted by a wide variety of scholars demonstrate that inclusionary zoning has been effective in increasing economic and social mobility for low and moderate income families.

Based upon the foregoing arguments, Amici respectfully urge the Court to recognize inclusionary zoning, like other forms of zoning, as a land use control subject to the rational basis test. This decision would appropriately defer to local governments' expertise and allow them to address the housing needs of their citizens as both federal and state law require though this proven effective means.

DATED: March 24, 2014



Michael Timothy Iglesias
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of California Rule of Court 8.204(c)(1). This brief is printed in Times New Roman. I hereby certify that the number of words contained in the foregoing amicus curiae brief, including footnotes but excluding the Table of Contents, the Table of Authorities, the Application for Leave to File Brief as Amicus Curiae, and this Certificate, is 13,934 words as calculated using the word count feature of the program used to prepare this brief.

DATED: March 24, 2014



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DECLARATION OF SERVICE

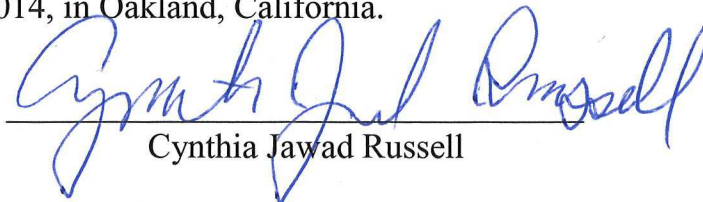
I, Cynthia Jawad Russell, declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, California 94612. On the date set forth below, I served the document(s) described below on the interested parties in this action as follows:

On March 24, 2014, I served a copy of the attached APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF LEO T. MCCARTHY CENTER FOR PUBLIC SERVICE AND THE COMMON GOOD AND FORTY-FIVE HOUSING SCHOLARS IN SUPPORT OF DEFENDANT AND RESPONDENT CITY OF SAN JOSE on each of the parties listed on the attached Service List in this action by placing true copies thereof in sealed envelopes, addressed as shown, for mailing with the United States Postal Service to the parties indicated. I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 24, 2014, in Oakland, California.


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APPENDIX

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