**No. 26-1085**

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**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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redT Homes, LLC, and
redT Capital Partners, LLC,

Plaintiffs-Appellants

v.

City of and County of Denver,

Defendant-Appellee

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# BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE POVERTY AND RACE ACTION COUNCIL IN SUPPORT OF APPELLEES

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## INTEREST OF *AMICI CURIAE*[1]

**The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee")** is a nonpartisan, non-profit civil rights organization founded in 1963, to secure equal justice for all through the rule of law, targeting the inequities confronting Black Americans and other people of color. The Lawyers' Committee uses legal advocacy to achieve racial justice to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. The Lawyers' Committee has worked extensively with local governments, private fair housing nonprofits, and community organizing groups to advance inclusionary zoning as a model policy for fostering inclusive, integrated communities that are free from discrimination and provide access for all residents, including Black families that have been subjected to discrimination. A decision in favor of Appellant would make it significantly more difficult and cost-intensive for state and local governments to promote affordable housing development through legislatively imposed impact or linkage fees and could deter the adoption of inclusionary zoning.

[1] Amici hereby certify that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than amici or their counsel contributed money intended to fund preparation or submission of the brief. All parties have consented to the filing of this amicus brief.

**The Poverty & Race Research Action Council ("PRRAC")** is a national civil rights law and policy organization that organization based in Washington, D.C. PRRAC's mission is to promote research-based advocacy strategies to address structural inequality and change the systems that disadvantage low-income people of color. PRRAC has worked extensively to ensure that state and municipalities take proactive steps to further fair housing and address racial inequality, including through the adoption of policies that increase the supply of affordable housing in well-resourced neighborhoods like inclusionary zoning.

## SUMMARY OF ARGUMENT

For over fifty years, local governments nationwide have sought to increase the availability of housing that is affordable to low- and moderate-income households while fostering racially and socioeconomically diverse communities through a policy known as inclusionary zoning ("IZ"). Under IZ policies, developers are required to set aside a portion of the units that they construct at rents or sale prices that are within reach for individuals and families that might otherwise struggle to obtain housing in the private market. Municipalities often either adopt IZ policies concurrently with major zoning reforms or link compliance with IZ ordinances with incentives, such as density bonuses and reduced parking requirements, that help offset the cost of compliance for developers. When well-designed, these policies have a tremendous track record of success.

Appellees' Mandatory Affordable Housing Ordinance ("MAHO") is just this type of policy. Denver, as the hub of a strong and growing regional housing market with an increasing base of high paying jobs, is precisely the type of municipality in which IZ is needed. The magnitude of affordable housing set-aside required under MAHO is modest in national context, and incentives are available to mitigate the cost of compliance. MAHO's implementation has coincided with a multifamily building boom in Denver, undermining the argument that IZ is a significant constraint on new housing supply.

In addition to being good housing policy, MAHO is, as the district court held in granting Appellees' motion to dismiss, legally sound. As this brief describes, Appellants' argument that MAHO violates the Takings Clause of the Fifth Amendment of the U.S. Constitution fails. The analytical frameworks proposed by Appellants are inapposite to the review of this type of policy, and, when the correct framework is applied, the result must be to uphold the validity of Appellees' policy.

The stakes of this case could not be higher. Both the City of Denver and its surrounding metropolitan area face a severe housing affordability crisis that is manifest in high rates of housing cost burden and homelessness. These harms are not experienced equally by all groups, with Black and Latino households disproportionately experiencing adverse housing situations. MAHO is not the only tool, but it is one of the critical policy interventions that are necessary to face this crisis down. Because MAHO is consistent with decades of Takings Clause jurisprudence and because it is vital tool for addressing a housing affordability crisis that is perpetuating racial inequality, *amici* urge affirmance of the decision of the district court.

## ARGUMENT

### I. Inclusionary Zoning Policies Do Not Constitute Physical Takings or Otherwise Implicate the Takings Clause.

Local governments nationwide have consistently applied IZ policies like Denver's MAHO for over fifty years. Those policies respond to the needs of communities facing severe affordable housing crises and have consistently withstood legal challenges in the federal courts. The reason why is simple: inclusionary zoning policies do not even implicate, much less violate the Takings Clause of the Fifth Amendment of the U.S. Constitution.

#### A. The Mandatory Affordable Housing Ordinance Does Not Effectuate a Physical Taking.

Appellants' argument that the MAHO constitutes a physical taking wrongly relies on the Supreme Court's decisions in *Horne v. Dep't of Agriculture*, 576 U.S. 350, 361-62 (2015) and *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149-50 (2021) holding that property rights are comprised of a bundle of sticks, consisting of attributes of what it means to own property like the right to exclude others from one's property and the right to make reasonable use of one's property. Appellants attempt to stretch that precedent past its breaking point. In doing so, Appellants make several key errors. First, they are incorrect that any purported right to sell or lease one's property at a particular price is equivalent to the "right to exclude". Second, they make factual representations about the nature of their business that are totally at odds with how housing development actually works in order to obfuscate the virtual certainty that it is their intent to voluntarily sell their property.

**B. The Right to Sell or Lease One's Property at a Particular Price Is Not a Core Component of Property Ownership.**

The MAHO does not prevent Appellants from selling or leasing their property and therefore does not impinge upon any right to alienate that might comprise a core component of what it means to own property or, alternatively stated, a stick in the bundle that comprises property rights. Binding Supreme Court precedent dictates that result. In the housing context, the Supreme Court stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982), that "[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty*

*Co. v. Saxl*, 328 U.S. 80 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control). This clear and unambiguous precedent is such a barrier to claims like Appellants' that litigants in challenges to rent control policies subsequent to *Loretto* explicitly disclaimed arguments that price regulations in the housing context constitute *per se* takings. *See Yee v. City of Escondido*, 503 U.S. 519, 526 (1992); *Pennell v. San Jose*, 485 U.S. 1, 12, n.6 (1988).[2]

Appellants attempt to fashion a new right that is not subject to reasonable regulation by synthesizing one clear component of property – the right to alienate (or sell or lease) – with an interest in obtaining the best price the market will yield for that property. This synthesis is necessary for their argument to function because, by its terms, the MAHO does not prevent Appellants from selling their property. Indeed, the MAHO could not function effectively if owners subjected to the ordinance did not wish to sell or rent the homes that they develop.

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[2] Similarly, outside of the housing context, the Supreme Court has made clear that businesses do not have an absolute right to set the prices at which they sell goods and services and that rates selected from a "broad zone of reasonableness…cannot properly be attacked as confiscatory." *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968).

To make their argument work, Appellants must conjoin a purported right – rightfully understood, an interest – in obtaining the highest price the market will bear to the right to alienate. However, Appellants can cite no support for a federal, constitutional property right to achieving a maximum sale or rental price, and the primary case that they do cite is inapposite. In *AbbVie, Inc. v. Brown*, 809 F. Supp. 3d 1341, 1361 (D. Utah 2025), the district court denied a motion to dismiss the claim that a state law that would require pharmaceutical manufacturers to sell their products to particular pharmacies violated the Takings Clause. Due to the arguments made by the defendants in that case, the decision turned entirely on the scope of what entities the plaintiffs had voluntarily agreed to sell their products to rather than on sale price. *Id.* That decision simply does not establish a right to set one's own sale price for one's property.

Notwithstanding that the ability to sell or lease one's property at market price is not a core component of property rights, there is certainly no basis for concluding that such an asserted right is of equal constitutional importance to the right to exclude others such as trespassers from one's property. In *Cedar Point Nursery*, the Supreme Court described the right to exclude as "one of the most treasured rights of property ownership." 594 U.S. at 149 (quoting *Loretto*, 458 U.S. at 435) (internal quotations omitted). It went on to describe the right to exclude as "fundamental," "most essential," and of "central importance." *Id.* at 150 (citing *Kaiser Aetna v. United*

*States*, 444 U.S. 164, 176, 179-80 (1979); *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). Appellants will not find similar language to quote regarding their purported right. Appellants' argument, if accepted, would have far-reaching implications beyond the type of IZ ordinance immediately before this Court and lack a meaningful limiting principle. Courts have consistently upheld reasonable regulatory constraints on property owners' right to exclude others from their holdings. In light of *Heart of Atlanta Motel, Inc.*, it is well established that state actors can impose nondiscrimination requirements that impose guardrails on property owners' right to exclude when voluntarily providing public accommodations and, by extension, housing under statutes like Title II of the Civil Rights Act of 1964, the Fair Housing Act of 1968, and their state and local analogues. 379 U.S. at 261.

**C. Appellants Have Voluntarily Subjected Themselves to Regulation of the Terms on Which They May Sell Their Property.**

Furthermore, as in *Yee*, Appellants have voluntarily subjected themselves to reasonable regulation of the alienation of their property. Appellants' representation that "redT has not voluntarily entered any market, rental nor sale" is simply absurd (Appellants' Corrected Br. at 23). No entity incurs the substantial costs associated with residential property development for any purpose other than to sell or rent their property. Choosing to do so would be wholly irrational, amounting to a self-imposed choice to deprive one's property of all economic value, a choice utterly at odds with Appellants' theory of the case. And, in fact, Appellants contradict themselves by averring, in their opening brief, that "redT's business is an important component of the market forces seeking to address this [housing] supply gap" (*Id.* at 2). That can only be true if Appellants are voluntarily entering the market to sell or rent the homes that they are building and thereby consenting to regulation of the terms and conditions of the sale or rental of their property. *Yee*, 503 U.S. at 531 ("Because [property owners] voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.") (*citing PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-84 (1980); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)); *compare with Cedar Point Nursery*, 594 U.S. at 156-57 (distinguishing *PruneYard Shopping Ctr.* from access requirements for farmworker labor organizers to whom, unlike shoppers, the subject property was not voluntarily open).

### D. Courts That Have Applied the Correct Takings Clause Framework to Inclusionary Zoning Policies Have Consistently Upheld Them.

Courts analyze land use regulations that do not effectuate a physical invasion or inflict a total loss of economic viability under a regulatory takings framework. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-39 (2005) (holding that there are narrow categories for physical, total, and exaction takings and all other claims must be analyzed through a *Penn Cent.* framework); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 302, 331 (2002) (holding that a regulation that does not result in total elimination of value is governed by *Penn Cent.* standards). Since 1978, *Penn Cent. Transp. Co. v. New York City* has been the landmark authority on regulatory takings. 438 U.S. 104 (1978). This case addressed the constitutionality of a landmark preservation ordinance that prevented property owners from pursuing certain developments and thereby limited potential earnings. *Id*. at 110-12. The Supreme Court weighed three factors to determine if a regulatory taking had occurred: the economic impact of the regulation on the owner, the owner's reasonable investment-backed expectations, and the character of the government's actions. *Id*. at 124. The Court held that there can be no expectation of ever-increasing property values and that the intangible, partial economic harm of reduced property values does not constitute a taking under the Fifth Amendment. *Id.* at 131. Since then, the ad hoc test developed in this case has been applied by lower courts to analyze a wide variety of regulations, including IZ policies like the MAHO. Under this framework, courts have consistently upheld such IZ policies.

In *California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435 (2015) the California Supreme Court considered whether an IZ ordinance was a taking under the Fifth Amendment. Plaintiffs expressly disclaimed reliance on the regulatory takings framework of *Penn Cent.* and instead claimed the ordinance violates the unconstitutional conditions doctrine, which the court, for reasons consistent with Appellees' arguments in their brief in this case, rejected as inapplicable. *Id.* at 500. The unconstitutional conditions doctrine constrains the ability of state actors to coerce private parties into agreeing to requirements that would be unconstitutional if imposed directly by conditioning access to discretionary benefit on such agreement. The court instead applied the *Penn Cent.* factors to the defendants' IZ ordinance and ruled in their favor. *Id.* at 499.

Across the country, other courts have reached the same conclusion when they have applied the *Penn Cent.* factors to IZ ordinances and other housing regulations. The U.S. District Court for the District of Columbia upheld the District of Columbia's IZ ordinance after applying that analytical framework. *2910 Georgia Ave. LLC v. District of Columbia*, 234 F. Supp. 3d 281, 299-301 (D.D.C. 2017). Similarly, the U.S. District Court for the Northern District of Illinois upheld a similar Chicago policy after conducting the ad hoc inquiry called for by *Penn Cent*. *Home Builders Ass'n of Greater Chicago v. City of Chicago*, 213 F. Supp. 3d 1019, 1028-32 (N.D. Ill. 2016). Although denials of writs of certiorari do not have precedential value, the U.S. Supreme Court has repeatedly denied writs of certiorari in Takings Clause challenges to IZ policies. *See, e.g.*, *Cherk v. Cnty. of Marin*, 589 U.S. 1102, 1102 (2019); *616 Croft Ave., LLC v. City of West Hollywood*, 583 U.S. 958, (2017); *California Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179 (2016). Thus, it is clear that application of the proper *Penn Cent.* framework vindicates the authority of government actors like Appellees to enact IZ policies like the MAHO.

## II. Denver Has an Acute Housing Affordability Crisis That Disproportionately Harms Black Households and Households of Color.

Denver has an acute housing affordability crisis. In 2025, Colorado was ranked 43rd in affordability by US News & World Report. *Colorado Rankings*, U.S. News & World Report (last visited June 24, 2026), https://www.usnews.com/news/best-states/colorado. In October 2024, Pew Research's indicated that Colorado was one of only 13 states where more than 50% of renters were considered "cost burdened" (i.e., the household spends more than 30% of its income on rent). Drew DeSilver, *The state of affordable housing in the US,* Pew Rsch. Ctr. (Oct. 25, 2024), https://www.pewresearch.org/short-reads/2024/10/25/a-look-at-the-state-of-affordable-housing-in-the-us/. The City of Denver made legislative findings that the city is experiencing "an unprecedented escalation in housing costs, and thus a critical lack of housing opportunities for households with low and moderate incomes." Denver, Colo., Rev. Municipal Code § 27-151 (2026). Today, more than 115,000 Denver households are housing cost burdened, meaning they spend more than one-third of their income on housing alone – putting them at risk of displacement. *Affordable Housing Prioritization Policy*, City and Cnty. of Denver (last visited June 24, 2026), https://www.denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Department-of-Housing-Stability/About-Housing-Stability/Operations-Impact/Affordable-Housing-Prioritization-Policy.

The housing affordability crisis is exacerbating the homelessness crisis in Denver. Between 2022 and 2023, 30,409 people accessed services or housing related to homelessness in the Denver Metropolitan Area, according to data reported to the U.S. Department of Housing and Urban Development. 7,217 of those individuals were unsheltered. Metro Denver Homeless Initiative, *State of Homelessness 2023* at 14-15 (2024), https://static1.squarespace.com/static/5fea50c73853910bc4679c13/t/65a97b759426763893db64c3/1705606013237/MDHI+State+of+Homelessness+Report+2023.pdf. Point in Time data for 2023 showed 9,065 people experiencing homelessness in the region, of whom 2,763 (30.5%) were unsheltered. *Id*.

The housing affordability crisis in Colorado disproportionately harms Black households and households of color. Both Black Coloradans and Native Americans are more than two times likely to be impoverished than non-Hispanic white Coloradans. Non-white Latinos are just less than two times more likely. Mateo Parsons, *Colorado's Racial Wealth Gap: Homeownership & Credit* at 2, Bell Pol'y Ctr. (Dec. 2019), https://www.bellpolicy.org/wp-content/uploads/2019/12/Racial-

Wealth-Gap-Homeownership-Credit.pdf. Colorado's Black families are 62% less likely to own a home than the state's non-Hispanic white families. Latino families are 43% less likely to own a home than white families. *Id* at 1. Black and Latino renters are disproportionately cost burdened as compared to white renters. 33.6% of Black renters and 27.9% of Latino renters report being severely cost burdened while only 24.6% of White renters report being severely cost burdened. Efren Garcia, *Colorado Housing Primer 2025*, Bell Pol'y. Ctr. (Mar. 14, 2025), https://bellpolicy.org/colorado-housing-primer-2025/.

These economic disparities and the trends in housing affordability exacerbate patterns of displacement that have gentrified historically Black and Latino neighborhoods. Over the course of several decades, the Five Points neighborhood, which is historically Black, has seen waves of redevelopment drive families away from the once redlined community. Michelle Rich, *"Change will occur, for whose benefit?": Gentrification in Five Points, 1975 – 1984*, Hist. Stud. J. (May 2, 2026), https://cudenverhistoryjournal.org/2024-volume-41/change-will-occur-for-whose-benefit-gentrification-in-five-points-1975-1984/. Longtime residents of historically Latino neighborhoods in Denver have been forced to leave due to rising rents and are replaced by younger, more affluent residents. Mead & Hunt, *Nuestras Historias: Mexican American/Chicano/Latino Histories in Denver*, City of Denver (Feb. 2022), https://denvergov.org/files/assets/public/v/2/community-planning-and-development/documents/landmark-preservation/historic-context/nuestrashistoriascontext_en.pdf .

### III. Inclusionary Zoning Alleviates the Housing Affordability Crisis While Furthering Fair Housing.

IZ policies, like MAHO, are an effective tool for alleviating the city's Housing Affordability Crisis while furthering fair housing. IZ creates a steady supply of moderately affordable units by requiring a percentage of otherwise market-rate multifamily developments to be priced for low-or moderate-income families at rents they can afford or to pay a fee into an affordable housing fund instead of constructing those units directly. Robin Kniech, *The Promise of Inclusionary Housing: A Case Study Putting Denver's Early Implementation Into Context* at 1, Bell Pol'y. Ctr. (Nov. 2024), https://www.bellpolicy.org/wp-content/uploads/FINAL-Inclusionary-Housing-Robin-Kniech-11-2024.pdf. IZ policies have created more than 100,000 affordable homes across more than a thousand policies in more than 31 states. *Id* at 9.

Studies show that IZ does not depress housing production over time. Evidence from across the nation demonstrates that local markets adjust to accommodate carefully calibrated affordability requirements over time and still produce new housing. *Id.* at 2. Denver's Expanding Housing Affordability guidelines require developers to set aside 10%-15% of total units at 60%-90% AMI. Inclusionary homes priced between 50 to 80% of AMI can serve much lower AMIs when rented by families with housing vouchers that help pay their rent. *Expanding Housing Affordability – Public Review Draft Summary*, City and Cnty. of Denver (Mar. 9, 2022), https://www.denvergov.org/files/assets/public/v/2/community-planning-and-development/documents/zoning/text-amendments/housing-affordability/eha_legislative_reviewdraft_summary_march2022.pdf. These policies are particularly impactful because Denver and Colorado have "source of income" laws that make it illegal to discriminate against voucher holders. *Colorado Civil Rights Division announces that, as of January 1, 2021, discrimination based on source of income is prohibited by law*, Colorado Dep't of Regul. Agencies (Jan. 5, 2021), https://dora.colorado.gov/press-release-source-of-income. Colorado law also limits the income required to rent a home to twice the annual cost of rent. Colo. Rev. Stat. § 38-12-904(1)(c) (2025). These policies are a good example of how affordable housing production, renter assistance and protections can work together to expand access to housing for low-income Denver citizens, who are disproportionately Black and Latino. Kniech, *The Promise of Inclusionary Housing* at 9.

Because of the persistent correlation between race and socioeconomic status, Black and Latinx households are more likely to be able to move to these higher opportunity areas if dedicated affordable housing is available in them. Fair Share Hous. Ctr., *Dismantling Exclusionary Zoning: New Jersey's Blueprint for*

*Overcoming Segregation* 22-28 (Apr. 2023), https://www.fairsharehousing.org/wp-content/uploads/2025/06/Dismantling-Exclusionary-Zoning_New-Jerseys-Blueprint-for-Overcoming-Segregation.pdf. IZ and affordable housing impact fees increase the supply of affordable housing in these areas and thus foster more integrated, inclusive communities. *Id*. Once this housing is built, the residents of it are more likely to be Black and/or Latinx than are the residents of the surrounding neighborhood or municipality. *Id*. This development level diversity, in turn, contributes to more integrated neighborhoods, municipalities, and regions. This is especially true when local governments require affordable units in developments that are subject to IZ to be provided on-site and require that projects funded with affordable housing fees be located near to the developments that generated those fees. Christina Plerhoples Stacy et al., *Inclusionary Zoning: How Different IZ Policies Affect Tenant, Landlord, and Developer Behaviors* 9-10, Urb. Inst. (July 30, 2021), https://www.urban.org/sites/default/files/2023-08/Inclusionary%20Zoning%20How%20Different%20IZ%20Policies%20Affect%20Tenant%2C%20Landlord%2C%20and%20Developer%20Behaviors.pdf.

Finally, research shows that suspending IZ policies does not result in lower rental rates in the market overall and conversely increases rents for those in the lowest quartile of the market. Ann Hollingshead, *Do Inclusionary Housing Policies Promote Housing Affordability? Evidence from the Palmer Decision in California*, Lincoln Inst. Land Pol'y 12, 15 (Dec. 2015), https://www.lincolninst.edu/app/uploads/legacy-files/pubfiles/hollingshead-wp15ah1.pdf . By pushing affordable units to be built on the same site as the market-rate units, the MAHO helps ensure that Denver's rapidly developing neighborhoods, like Five Points, remain racially diverse in the face of gentrification. Stacy, *Inclusionary Zoning* at 3.

**CONCLUSION**

Denver's MAHO is an effective tool to combat the city's affordability crisis while affirmatively furthering access to fair housing for Black households and households of color, which are disproportionately burdened by affordability crises as a result of overlapping socio-economic factors. The judgment of the District Court of Colorado should be affirmed.

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