No.

IN THE

Supreme Court of the United States

CITY OF NEWPORT BEACH, CALIFORNIA,

Petitioner,

v.

PACIFIC SHORES PROPERTIES, LLC,
ALICE CONNER, SEAN WISEMAN, TERRI BRIDGEMAN,
NEWPORT COAST RECOVERY LLC, AND YELLOWSTONE
WOMEN'S FIRST STEP HOUSE, INC.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a disparate-treatment claim under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, that challenges a facially nondiscriminatory law on the ground that the law nevertheless intentionally discriminates on the basis of disability can prevail absent proof of discriminatory effects.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

Andrew Blair was a plaintiff in the district court but did not appeal the district court's rulings or participate in the case in the court of appeals.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 14

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT REGARDING WHETHER DISPARATE-TREATMENT CLAIMS CHALLENGING FACIALLY NON-DISCRIMINATORY LAWS REQUIRE PROOF OF DISCRIMINATORY EFFECTS 16

II. THE DECISION BELOW DEPARTS FROM THIS COURT'S PRECEDENT AND DRASTICALLY EXPANDS THE SCOPE OF DISPARATE-TREATMENT LIABILITY 23

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING AN IMPORTANT AND RECURRING ISSUE OF FEDERAL ANTI-DISCRIMINATION LAW 31

CONCLUSION 35

TABLE OF APPENDICES

Page

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit (Sept. 20, 2013) ... 1a

APPENDIX B: Order of the United States District Court for the Central District of California (Oct. 25, 2010) ... 61a

APPENDIX C: Order of the United States District Court for the Central District of California (Jan. 12, 2011) ... 108a

APPENDIX D: Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc (Mar. 4, 2014) ... 130a

APPENDIX E: Constitutional, Statutory, and Regulatory Provisions Involved ... 145a

- U.S. Const. Amend. XIV, § 1 ... 145a
- 42 U.S.C. § 3601 ... 145a
- 42 U.S.C. § 3602 ... 145a
- 42 U.S.C. § 3604 ... 148a
- 42 U.S.C. § 12132 ... 153a
- 42 U.S.C. § 12133 ... 153a
- 28 C.F.R. § 35.130 ... 154a

APPENDIX F: Newport Beach, Cal., Municipal Code (2006) ... 159a

- § 20.03.030 ... 159a
- § 20.05.030 ... 160a
- § 20.10.020 ... 162a

APPENDIX G: Newport Beach, Cal., Ordinance No. 2004-6 (2004) (excerpt) 169a

APPENDIX H: Newport Beach, Cal., Ordinance No. 2008-5 (2008) (excerpts) 171a

TABLE OF AUTHORITIES

Page(s)

CASES

Abdu-Brisson v. *Delta Air Lines, Inc.*,
239 F.3d 456 (2d Cir. 2001) 15, 21

Albemarle Paper Co. v. *Moody*,
422 U.S. 405 (1975)...4

Arlington Heights v. *Metro. Hous. Corp.*,
429 U.S. 252 (1977)..................................12, 27, 28

Church of the Lukumi Babalu Aye, Inc. v.
City of Hialeah, 508 U.S. 520 (1993)...................29

City of Edmonds v. *Wash. State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994).....................3

City of L.A., Dep't of Water & Power v.
Manhart, 435 U.S. 702 (1978) 25

Crawford v. *Marion Cnty. Election Bd.*,
553 U.S. 181 (2008)...27

EEOC v. *C.R. England, Inc.*,
644 F.3d 1028 (10th Cir. 2011)..............................3

Emp't Div. v. *Smith*,
494 U.S. 872 (1990)...29

Gallagher v. *Magner*,
132 S. Ct. 1306 (2012)..3, 5

Gallagher v. *Magner*,
132 S. Ct. 548 (2011)..3, 5

Gallagher v. *Magner*,
619 F.3d 823 (8th Cir. 2010)..................................3

Griffin v. *Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218 (1964) 29

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971)...4, 30

Hernandez v. *Hughes Missile Sys. Co.*, 362 F.3d 564 (9th Cir. 2004).................................3

Hunter v. *Underwood*, 471 U.S. 222 (1985)...28

Int'l Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977)..............................4, 24, 26, 30

LeBlanc-Sternberg v. *Fletcher*, 67 F.3d 412 (2d Cir. 1995) 21, 22

Lewis v. *City of Chicago*, 130 S. Ct. 2191 (2010)..4

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)...4, 24

O'Connor v. *Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996)...24

Oxford House-C v. *City of St. Louis*, 77 F.3d 249 (8th Cir. 1996)...............14, 15, 17, 20

Palmer v. *Thompson*, 403 U.S. 217 (1971)...........................16, 26, 27, 32

Pyke v. *Cuomo*, 258 F.3d 107 (2d Cir. 2001) 15, 21

Raytheon Co. v. *Hernandez*, 540 U.S. 44 (2003)...4

Reeves v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)...24

Ricci v. *DeStefano*,
129 S. Ct. 2658 (2009) 25, 30

Schwarz v. *City of Treasure Island*,
544 F.3d 1201 (11th Cir. 2008) ....

.... 12, 14, 15, 18, 19, 20

Smith & Lee Assocs. v. *City of Taylor*,
102 F.3d 781 (6th Cir. 1996) 15, 22

Spallone v. *United States*,
493 U.S. 265 (1990) 33

Town of Huntington v. *Huntington Branch, NAACP*, 488 U.S. 15 (1988) 5

Trans World Airlines, Inc. v. *Thurston*,
469 U.S. 111 (1985) 4, 24, 25

Twp. of Mount Holly v. *Mt. Holly Gardens Citizens in Action, Inc.*,
134 S. Ct. 636 (2013) 5

Twp. of Mount Holly v. *Mt. Holly Gardens Citizens in Action, Inc.*,
133 S. Ct. 2824 (2013) 5

U.S. Postal Serv. Bd. of Governors v. *Aikens*, 460 U.S. 711 (1983) 24

UAW v. *Johnson Controls, Inc.*,
499 U.S. 187 (1991) 25

United States v. *O'Brien*,
391 U.S. 367 (1968) 27

Washington v. *Davis*,
426 U.S. 229 (1976) 26

STATUTES

28 U.S.C. § 1254 1

42 U.S.C. § 2000e 3

42 U.S.C. § 2000e-2 4

42 U.S.C. § 3601 1

42 U.S.C. § 3604 3

42 U.S.C. § 12101 1

42 U.S.C. § 12112 4

42 U.S.C. § 12132 3

Newport Beach, Cal., Ordinance 97-09
(Mar. 24, 1997) 5

PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Newport Beach, California, respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 730 F.3d 1142. The court of appeals' order denying a *sua sponte* call for rehearing en banc (Pet. App. 130a) is reported at 746 F.3d 936. The relevant orders of the district court (Pet. App. 61a, 108a) are unpublished.

JURISDICTION

The court of appeals filed its judgment on September 20, 2013, Pet. App. 1a, and denied a *sua sponte* call for rehearing en banc on March 4, 2014, *id.* at 131a. On May 14, 2014, Justice Kennedy extended the time for filing a petition for a writ of certiorari until July 17, 2014. No. 13A1133. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the Petition Appendix at 145a.

STATEMENT

The Ninth Circuit's decision in this case creates a circuit split regarding the scope of discrimination claims under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, deepens existing confusion regarding fundamental prin-

ciples of federal anti-discrimination law, and contravenes this Court's clear teachings in closely analogous areas of law on which the court of appeals itself purported to rely.

The court of appeals' error, and the conflict and confusion it exacerbates, concern whether a plaintiff asserting disparate-treatment claims for discrimination on the basis of disability under the FHA and ADA can successfully challenge a facially neutral and evenhandedly applied law based solely on the purported motives of those responsible for adopting the measure. Under well-settled precedent, such a claim cannot succeed because disparate-*treatment* discrimination, by definition, requires proof that the plaintiff was *treated differently* based on membership in a protected class. In direct conflict with holdings of the Eighth and Eleventh Circuits, however, the decision below held that such a claim *is* cognizable.

That holding cannot be reconciled with the case law of other circuits, with the anti-discrimination jurisprudence of this Court, or with common sense. As Judge O'Scannlain and four other judges dissenting from the denial of rehearing en banc recognized, the court of appeals' ruling "invents an entirely unprecedented theory of actionable government discrimination: sinister intent in the enactment of facially neutral legislation can generate civil liability without evidence of discriminatory effect." Pet. App. 132a. If allowed to stand, that holding will drastically expand the scope of the FHA, the ADA, and other federal anti-discrimination statutes by authorizing challenges to laws that discriminate neither on their face nor in application based solely on the supposed intentions of those involved in their enactment. Indeed, the court of appeals' decision invites judicial

scrutiny of the subjective motivations of every actor involved in adopting a challenged policy, from city-council members to private citizens, potentially chilling core political discourse. *Id.* at 143a-44a. Nothing in the FHA or ADA justifies such judicial intrusion into local lawmaking.

This Court's review is warranted to resolve the direct conflict among the courts of appeals and to correct the Ninth Circuit's departure from longstanding anti-discrimination principles.

1. The FHA and ADA each prohibit discrimination against disabled persons with respect to housing. 42 U.S.C. § 3604(f)(1); *id.* § 12132. Courts have construed these anti-discrimination protections to extend to individuals recovering from an addiction to drugs or alcohol. *See City of Edmonds* v. *Wash. State Bldg. Code Council*, 18 F.3d 802, 803 (9th Cir. 1994) (FHA), *aff'd*, 514 U.S. 725 (1995); *Hernandez* v. *Hughes Missile Sys. Co.*, 362 F.3d 564, 568 (9th Cir. 2004) (ADA).

Because the provisions of the FHA and ADA in many ways parallel those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, courts construing the FHA and ADA have looked for guidance to the standards for proving discrimination under Title VII. *See* Pet. App. 29a n.19.[1] In the Title VII context, this Court has articulated two distinct types of discrimination claims: disparate *treatment* and disparate *impact*.

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[1] *See also*, *e.g.*, *Gallagher* v. *Magner*, 619 F.3d 823, 831 (8th Cir. 2010) (FHA), *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012); *EEOC* v. *C.R. England, Inc.*, 644 F.3d 1028, 1038 n.11 (10th Cir. 2011) (ADA).

Disparate-treatment claims assert that a defendant has "treat[ed] some people less favorably than others because of their" membership in a protected class. *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). "The ultimate factual issues" in adjudicating a disparate-treatment claim "are thus simply whether there was . . . disparate treatment and, if so, whether the differences were . . . premised" on an impermissible motive. *Id.* at 335 (internal quotation marks omitted). A plaintiff may prove impermissible motive either directly, by introducing evidence of discriminatory intent, *see*, *e.g.*, *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985), or indirectly, by establishing a prima facie case of discrimination and then rebutting any nondiscriminatory reasons advanced by the defendant to explain its actions, *see*, *e.g.*, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-04 (1973).

Disparate-*impact* claims, in contrast, concern "practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). To prevail on a disparate-impact claim, a plaintiff need not prove discriminatory intent, *id.* at 430, 432, but must show that the defendant's challenged conduct resulted in "significant" or "substantial" discriminatory effects. *See*, *e.g.*, *id.* at 426; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422-23 (1975).[2]

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[2] Title VII and the ADA each expressly provide for disparate-impact claims. *See* 42 U.S.C. § 2000e-2(k) (Title VII); *Lewis* v. *City of Chicago*, 130 S. Ct. 2191, 2197 (2010); 42 U.S.C. § 12112(b) (ADA); *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 53 (2003). The FHA contains no analogous provision. This Court has twice granted certiorari to decide whether disparate-impact

[Footnote continued on next page]

2. The City of Newport Beach is a beachfront community in California with a population of approximately 85,000. Because of its desirable location on the Pacific Ocean, the City has long attracted significant numbers of vacationers and part-time residents. As a result, the City has experienced extensive development of densely concentrated houses and duplexes—many on lots only 30 feet wide and built just six feet apart. *See* 13 C.A. E.R. 3208.

The City has faced numerous challenges in responding to the divergent interests of its full-time and part-time residents. In the mid-1990s, for example, the City confronted efforts to transform residential properties into de facto boarding houses by renting out as separate residences individual rooms or garages of a single dwelling unit. *See* 13 C.A. E.R. 3209-10. Seeking to preserve the residential character of its neighborhoods, the City modified its zoning code in 1997 to establish various residential districts—each subject to different regulations and limitations on the types of residential uses permitted. *See* Newport Beach, Cal., Ordinance 97-09, Ex. A, §§ 20.10.010-.020 (Mar. 24, 1997).

Over the next decade, the City retained, with minor modifications, this same basic framework of residential districts. Properties were zoned according to the number and type of their "dwelling

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[Footnote continued from previous page]
claims are cognizable under the FHA, but has not resolved the issue. *See Twp. of Mount Holly* v. *Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824, *cert. dismissed*, 134 S. Ct. 636 (2013); *Magner*, 132 S. Ct. 548, *cert. dismissed*, 132 S. Ct. 1306; *cf. Town of Huntington* v. *Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam) (assuming without deciding that the FHA allows disparate-impact claims).

units"—*i.e.*, living areas with their own sleeping, sanitation, and food-preparation facilities and a separate entrance. Pet. App. 159a (§ 20.03.030). Properties with a single dwelling unit were permitted in any residential district if they housed a "single housekeeping unit," *see id.* at 159a, 162a, 164a (§§ 20.03.030, 20.05.030(F), 20.10.020), which was defined as "the functional equivalent of a traditional family, whose members are an interactive group of persons jointly occupying a single dwelling unit . . . and sharing household activities and responsibilities such as meals, chores and expenses," *id.* at 160a (§ 20.03.030). Structures containing multiple separate dwelling units (such as apartment buildings) were permitted in particular residential districts as long as each dwelling unit housed only a single housekeeping unit. *See id.* at 161a, 164a (§§ 20.05.030(C), 20.10.020). In contrast, single dwelling units devoted to "group residential" uses (such as boarding houses and fraternities)—where shared living spaces were occupied by two or more persons not living in a single housekeeping unit—were prohibited in all residential districts. *Id.* at 161a, 164a (§§ 20.05.030(B), 20.10.020). In addition, residents were prohibited from renting their homes for a period of less than 30 days in the absence of a short-term lodging permit; in 2004, the City stopped issuing new short-term lodging permits in areas zoned single-family residential. *See id.* at 169a (§ 5.95.020).

3. Beginning in the late 1990s, a new type of transient residential use became popular in the City: "group homes," in which a company rents (typically for profit) individual rooms within a residence to persons recovering from drug or alcohol addiction. Pet. App. 8a. Such group homes frequently house 12 or

more persons in a single residence for short periods, and residents often move from one group home to another in succession. *See* 13 C.A. E.R. 3210. Over the years, the proliferation of group homes in the City yielded many of the same adverse secondary effects that the City had witnessed from other types of transient uses. Unlike group-residential uses, however, group homes were generally treated as single housekeeping units and could operate in any residential district. *See* Pet. App. 17a.

In January 2007, the City began formally to study and evaluate the effects of group homes on the community. It formed an advisory committee including city officials and private citizens to examine the impact that group homes were "having on their communities" and to propose possible solutions. 12 C.A. E.R. 3072; *see also* 14 C.A. E.R. 3595-96. The City also conducted a public survey concerning issues presented by group homes and formed a task force to study the number and locations of group homes and their compliance with existing laws. Pet. App. 11a-12a. In addition, it held public meetings, and a group-home operator was invited to present information on its facilities. *See*, *e.g.*, 14 C.A. E.R. 3459; 19 C.A. E.R. 4649-50.

While the City's study of the issue was ongoing, it implemented a temporary moratorium in April 2007 on new "transitory uses" of property in residential districts, which was applicable to short-term lodgings as well as group homes. Pet. App. 11a. In May 2007, the City revised this temporary moratorium by eliminating the prohibition on vacation rentals, and in October 2007, it extended that moratorium for another year. *Id.* at 12a.

4. On January 22, 2008, after further consultation with local residents and group-home operators, as well as a public hearing, the City Council enacted Ordinance 2008-5 ("2008 Ordinance" or "Ordinance"), which is at the heart of this suit. The Ordinance recited extensive and detailed legislative findings about the effects of group-residential living on the community. *See* Pet. App. 173a-80a (Preamble ¶¶ 1-18). The Ordinance explained that "[t]he fundamental precept of the City's Zoning Code provisions relative to residential zones is that individual dwelling units are intended for the occupancy and use of single housekeeping units." *Id.* at 175a (Preamble ¶ 9). "Group residential" uses are "[a]ccordingly" prohibited in residential zones because they "are frequently transient and institutional in nature and . . . create impacts on residential neighborhoods [that differ] from single house keeping units." *Id.* at 175a-76a (Preamble ¶ 9).

Although group homes (including those operated on a for-profit, commercial basis) previously had been treated as single housekeeping units, the City Council further determined that this classification was in fact inappropriate. "The City ha[d] received evidence of increasing numbers of residential care facilities that . . . operate more like institutional and boarding housing uses than as single housekeeping units." Pet. App. 176a (Preamble ¶ 12). The "[e]vidence presented to the City" showed that group homes presented many of the same practical "concerns and secondary impacts" for neighborhoods as did group-residential uses, such as: "impacts to traffic and parking"; "excessive noise, fighting and loud offensive language"; and "excessive debris . . . on sidewalks, in gutters, [and] on streets." Pet. App. 176a-77a (Preamble ¶ 13).

Based on the City Council's findings, the 2008 Ordinance lifted the 2007 moratorium on group homes, but modified the zoning code to treat group homes in a manner similar to—but still materially better than—group-residential uses, which continue to be prohibited in all residential districts. Pet. App. 62a-63a. The Ordinance amended the definition of "single housekeeping unit"—still permissible in any residential district—to apply only where residents live together pursuant to a single written lease and the residents themselves choose the makeup of the household. *Id.* at 17a. As a result of that amendment, some group homes continue to qualify as "single housekeeping units." *Id.* at 17a n.7. But the types of group homes that gave rise to the City's concerns—those where the commercial operator, rather than the residents, chooses who will live in the home—were reclassified as "residential care facilities." *Id.* at 17a.

While "residential care facilities" are generally prohibited in most residential zones, the Ordinance created several exceptions for such facilities that are not available to group-residential uses. *Existing* group homes could remain in any residential district if they applied for and obtained a use permit. Pet. App. 210a (§ 20.91A.020). And *new* group homes can locate in certain residential districts designated as "multifamily" if they obtain a use permit, whereas group-residential uses are categorically prohibited even in multifamily districts. *Id.* at 185a (§ 20.10.020). Finally, any group home—new or existing—may locate in any residential district without a permit if it requests and obtains a "reasonable ac-

commodation" through a process established by the Ordinance. *Id.* at 220a-21a (§ 20.98.020).[3]

5. Respondents Pacific Shores Properties LLC, Newport Coast Recovery LLC, and Yellowstone Women's First Step House, Inc., each operated group homes in Newport Beach when the 2008 Ordinance took effect. Each filed suit against the City challenging the Ordinance.

a. Pacific Shores operates two group homes in Newport Beach. After the 2008 Ordinance took effect, Pacific Shores did not seek a use permit for its facilities, but did request and obtain a reasonable accommodation. Pet. App. 21a.

Pacific Shores, as well as its owner and two residents, filed suit in 2008, alleging (as relevant here) that the Ordinance, on its face and as applied, constituted unlawful discrimination on the basis of disability in violation of the FHA, the ADA, the Equal Protection Clause, and California law. Pet. App. 23a. Pacific Shores asserted both disparate-treatment and disparate-impact theories of discrimination, and sought injunctive and declaratory relief and damages. *Ibid.*

b. Newport Coast and Yellowstone also operated group homes in Newport Beach in 2008. Pet. App. 9a. Both sought but were denied a use permit and a reasonable accommodation. *Id.* at 20a-21a. Newport

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[3] Group homes also may operate while a timely application for a use permit or reasonable accommodation is pending. Pet. App. 203a (§ 20.62.090(A)(2)(b)). State-licensed group homes with six or fewer residents are permitted in any residential district, as required by state law. *Id.* at 17a n.8; *see also id.* at 182a-83a, 185a (§§ 20.05.030(I), 20.10.020).

Coast has since ceased operating its group-home facilities in the City. *Id.* at 21a. Yellowstone, however, continues to operate four group homes. *Id.* at 123a, 127a. In 2009, Newport Coast and Yellowstone filed a separate suit against the City, asserting claims similar to those of Pacific Shores. *Id.* at 23a.

6. The district court dismissed Pacific Shores' facial challenges to the Ordinance because "the Ordinance does not facially discriminate against" group homes. D.C. Dkt. #40, at 5 (No. 08-457). Indeed, Pacific Shores did not "dispute that the Ordinance facially treats residential care facilities," including group homes, "*more favorably* than all other group residential uses" by allowing them in certain residential areas with a use permit. *Ibid.* (emphasis added). The court also dismissed Pacific Shores' as-applied challenge to the use-permitting process (which Pacific Shores had not pursued) but allowed its as-applied challenge to the underlying permit requirement to proceed. *Id.* at 8-10.[4]

Thereafter, in a single order, the district court granted summary judgment for the City on all of respondents' disparate-treatment claims. Respondents' claims under the FHA, the ADA, and state law, the court explained, are all governed by the same standard derived from Title VII disparate-treatment cases. Pet. App. 67a. Under that standard, "'a disparate treatment claim requires a plaintiff to show that he has actually been treated differently than similarly situated non-handicapped people.'" *Id.* at

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[4] Pacific Shores also asserted claims for damages stemming from the City's enforcement of the since-repealed 2007 moratorium.

69a (quoting *Schwarz* v. *City of Treasure Island*, 544 F.3d 1201, 1216 (11th Cir. 2008)). Respondents, however, had "failed to identify any evidence showing that they were treated differently than similarly situated non-disabled individuals." *Id.* at 78a.

The district court acknowledged respondents' evidence that the City adopted the 2008 Ordinance with "discriminatory intent." Pet. App. 75a. But such evidence, it held, "is irrelevant in the absence of a discriminatory act." *Ibid.*

The district court subsequently granted summary judgment on respondents' other claims for damages, holding that respondents failed to show that the City's conduct caused respondents' alleged injuries. Pet. App. 113a-28a. Respondents stipulated to dismissal with prejudice of their remaining claims, D.C. Dkt. #199 (No. 08-457); D.C. Dkt. #151 (No. 09-701); Pet. App. 24a, and the district court entered final judgment for the City, D.C. Dkt. #200 (No. 08-457); D.C. Dkt. #152 (No. 09-701).

7. The Ninth Circuit consolidated the two cases on appeal and reversed. Pet. App. 1a-60a. The panel held that, to prevail on a disparate-treatment claim under the FHA and ADA, a plaintiff need *not* prove that the defendant treated disabled persons differently from similarly situated non-disabled persons. Pet. App. 28a. Drawing on this Court's equal-protection jurisprudence, including *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252 (1977), the panel concluded that a plaintiff can survive summary judgment on a disparate-treatment claim by producing "direct or circumstantial evidence that the defendant has acted with a discriminatory purpose and has caused harm to members of a protected class." Pet. App. 7a, 30a. "[R]equiring anti-

discrimination plaintiffs to prove the existence of a better-treated entity," the panel reasoned, "would lead to unacceptable results," enabling defendants to "'overdiscriminate' by enforcing [a] facially neutral law or policy even against similarly-situated individuals who are not members of the disfavored group." *Id.* at 31a-32a.

Applying this standard, the panel held that respondents' disparate-treatment claims survive summary judgment. Pet. App. 38a-46a. According to the panel, respondents "raised a triable issue of fact as to whether the Ordinance was motivated by the desire to discriminate against the disabled." *Id.* at 38a; *see also id.* at 42a n.29. And the costs respondents incurred complying with the Ordinance constituted an "adverse effec[t]" that was "sufficient to establish injury in a disparate treatment claim." *Id.* at 43a-44a.[5]

8. The Ninth Circuit rejected a *sua sponte* call for rehearing en banc. Pet. App. 131a. Judge O'Scannlain, joined by Judges Bea, Callahan, Ikuta, and Tallman, dissented from the denial of rehearing en banc, explaining that the panel's decision "invent[ed] an entirely unprecedented theory of actionable government discrimination." *Id.* at 132a. No decision of this Court, the dissent explained, "ha[s] ever allowed challenges to facially neutral laws by simply alleging discriminatory legislative intent," unaccompanied by discriminatory effect. *Id.* at 135a.

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[5] The panel also reversed the district court's ruling granting summary judgment on respondents' remaining claims for damages, holding that respondents presented sufficient evidence of causation. Pet. App. 46a.

In short, "without any differential treatment, there can be no discrimination." *Id.* at 142a.

The panel's ruling, Judge O'Scannlain explained, also broke with decisions of other circuits that have "rejected challenges to facially neutral laws based on discriminatory motives of municipal actors." Pet. App. 141a (citing *Oxford House-C* v. *City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996), and *Schwarz*, 544 F.3d at 1216). Those cases confirm the "obvious but apparently overlooked truth" that, "'[a]s its name suggests, a disparate treatment claim requires a plaintiff to show that he has actually been treated differently than similarly situated non-handicapped people.'" *Ibid.* (quoting *Schwarz*, 544 F.3d at 1216). The "searching inquiry into municipal legislative motives" called for by the panel, the dissent warned, is an "ominous portent for future judicial interference with the political branches." *Id.* at 143a.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the Ninth Circuit's decision creates a circuit conflict regarding the standard for proving disparate-treatment claims under the FHA and ADA, and deepens confusion regarding claims under analogous provisions of federal law. The decision below also contravenes this Court's equal-protection precedent—on which the Ninth Circuit panel purported to rely—and invites unjustified judicial intrusion into local governance.

The Eighth and Eleventh Circuits each have held that disparate-treatment claims challenging the application of a facially nondiscriminatory law under the FHA or ADA cannot prevail without proof that disabled persons were actually treated differently

from nondisabled persons. *See Oxford House-C* v. *City of St. Louis*, 77 F.3d 249, 251-52 (8th Cir. 1996); *Schwarz* v. *City of Treasure Island*, 544 F.3d 1201, 1216-17 (11th Cir. 2008). As these courts have held, a defendant's alleged bias in enacting or enforcing a law, standing alone, is not sufficient to support a disparate-treatment claim.

The Ninth Circuit reached exactly the opposite conclusion here, holding that a plaintiff alleging disparate treatment need not prove any discriminatory effects, but need only show that the defendant's actions were motivated by discriminatory bias and caused the plaintiff some injury. *See* Pet. App. 28a-37a. That decision cannot be reconciled with the Eighth and Eleventh Circuits' contrary holdings. The decision also deepens confusion created by decisions of the Second Circuit—which has taken the same view as the Ninth Circuit regarding analogous claims under other federal laws, *see Pyke* v. *Cuomo*, 258 F.3d 107, 108-09 (2d Cir. 2001); *Abdu-Brisson* v. *Delta Air Lines, Inc.*, 239 F.3d 456, 467-68 (2d Cir. 2001)—and a decision of the Sixth Circuit, which has applied yet another approach, *see Smith & Lee Assocs.* v. *City of Taylor*, 102 F.3d 781, 790-93 (6th Cir. 1996).

The decision below also departs from the teachings of this Court, which has never sustained an analogous disparate-treatment claim without evidence of discriminatory effects. Although the Ninth Circuit purported to rely on this Court's precedent addressing claims under the Equal Protection Clause, this Court's equal-protection jurisprudence squarely refutes the court of appeals' conclusion that a disparate-treatment claim can succeed based solely on the defendant's allegedly discriminatory purpose

without proof of discriminatory effects. *See*, *e.g.*, *Palmer* v. *Thompson*, 403 U.S. 217, 224-25 (1971).

If allowed to stand, the court of appeals' decision will foment widespread confusion and uncertainty, and expand the reach of the FHA and ADA far beyond the bounds intended by Congress—compelling local governments and other defendants to devote scarce resources to defending policies that are facially nondiscriminatory and applied evenhandedly. In addition, by tasking courts with ascertaining the motivations of individual city-council members and even private citizens who support challenged policies, the decision below invites unwarranted judicial interference with the democratic process and threatens to chill core political speech.

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT REGARDING WHETHER DISPARATE-TREATMENT CLAIMS CHALLENGING FACIALLY NONDISCRIMINATORY LAWS REQUIRE PROOF OF DISCRIMINATORY EFFECTS.

The Ninth Circuit's holding that proof of discriminatory effects is not required for disparate-treatment claims under the FHA and ADA directly conflicts with rulings of the Eighth and Eleventh Circuits. The decision below also deepens existing confusion created by decisions of the Second and Sixth Circuits addressing analogous claims.

A. The Eighth and Eleventh Circuits have held—in circumstances indistinguishable from those here—that a disparate-treatment claim challenging the application of a facially nondiscriminatory law requires proof that disabled persons were treated differently from nondisabled persons, and that sup-

posed bias on the part of government officials is insufficient by itself to establish disparate treatment.

1. In *Oxford House-C*, the Eighth Circuit rejected a disparate-treatment challenge to the application of a facially nondiscriminatory zoning ordinance, which limited households consisting of unrelated individuals to three persons, but allowed group homes for recovering alcoholics and drug addicts to house up to eight unrelated persons. 77 F.3d at 251. The district court invalidated the ordinance on disparate-treatment grounds, finding its enactment "discriminatory because the eight-person limit would destroy the viability of many" group homes, and finding its enforcement discriminatory because the city had singled out group homes for enforcement. *Id.* at 252.

The Eighth Circuit reversed, rejecting both conclusions. "Even if the eight-person rule causes some financial hardship" for group homes, it held, the enactment of the ordinance did not constitute disparate treatment because, "[r]ather than discriminating against [group home] residents, the City's zoning code favors them on its face." 77 F.3d at 251-52. The plaintiffs' disparate-treatment challenge to the ordinance's enforcement also failed in the absence of evidence that "the City ignored zoning violations by nonhandicapped people," irrespective of certain city officials' purportedly discriminatory animus. *Id.* at 252. The plaintiffs "did not show the City treated [group homes] differently from any other group," and thus "the City's enforcement actions were lawful regardless of whether some City officials harbor prejudice or unfounded fears about recovering addicts." *Ibid.*

2. In *Schwarz*, the Eleventh Circuit, expressly relying on *Oxford House-C*, rejected a group home's

disparate-treatment claim to the application of a facially nondiscriminatory ordinance that capped annual occupancy-turnover in single-family and two-family homes—despite evidence that some city officials harbored bias against group homes. 544 F.3d at 1216-17. "As its name suggests," the Eleventh Circuit explained, "a disparate treatment claim requires a plaintiff to show that he has *actually been treated differently* than similarly situated non-handicapped people." *Id.* at 1216 (emphasis added). The plaintiffs' claim was deficient because the group home "utterly failed to establish that it was treated differently than anyone else" in the enforcement of the ordinance. *Ibid.*

The Eleventh Circuit explicitly rejected the argument that "evidence of disparate treatment is unnecessary because a few neighbors and city commissioners allegedly said at public hearings that they did not want halfway houses for recovering substance abusers in their neighborhoods." 544 F.3d at 1216. Such "evidence that neighbors and city officials are biased against recovering substance abusers is irrelevant," the Eleventh Circuit explained, "absent some indication that the recoverers were treated differently than nonrecoverers." *Ibid.* An allegedly discriminatory motive for official action, in short, did not render the city's action unlawful absent proof that, because of that motive, the city actually treated the plaintiffs differently from others.[6]

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[6] The Eleventh Circuit suggested in dictum that its "analysis might have been different" had the plaintiffs claimed that the city had "enacted the occupancy-turnover rule in order to discriminate against people with disabilities." 544 F.3d at 1217. But that passing observation casts no doubt on the Eleventh

[Footnote continued on next page]

B. The Ninth Circuit, faced with the same question on strikingly similar facts as *Oxford House-C* and *Schwarz*, reached the opposite conclusion here. The decision below held that a disparate-treatment claim challenging the application of a facially non-discriminatory law under the FHA or ADA does *not* require proof of different treatment in either the law's enactment or its enforcement if the plaintiff presents evidence that the defendant acted with a discriminatory motive. Pet. App. 28a-30a.

The Ninth Circuit acknowledged that proof of different treatment is required where a plaintiff relies on the *McDonnell Douglas* burden-shifting approach. Pet. App. 29a. But in the court of appeals' view, such evidence is *not* necessary where plaintiffs, instead of relying on *McDonnell Douglas*, attempt to prove intentional discrimination using "'direct or circumstantial evidence.'" *Ibid.* Here, the Ninth Circuit held, it sufficed that respondents had demonstrated a "triable issue of fact as to whether the Ordinance was motivated by the desire to discriminate against the disabled" and that respondents were forced to bear the costs of complying with the generally applicable use-permit process. *Id.* at 38a, 43a-46a. The same "evidence that the Ordinance was enacted with discriminatory intent," in the panel's view, "also provide[d] support for" respondents' disparate-treatment claims challenging the City's enforcement of the Ordinance. *Id.* at 42a n.29.

[Footnote continued from previous page]
Circuit's relevant holding. With respect to the enforcement of the ordinance, the court emphasized, "evenhanded application of the law is the end of the matter." *Ibid.*

The Ninth Circuit attempted to distinguish *Oxford House-C* and *Schwarz* as involving "the enforcement of *pre-existing*, facially neutral zoning laws" that had not been "enacted with a discriminatory purpose." Pet. App. 37a. The plaintiff in *Oxford House-C*, however, did challenge the enactment of the ordinance at issue; the Eighth Circuit rejected that challenge because the ordinance did not discriminate against group homes—indeed, it "favor[ed] them on its face." 77 F.3d at 251-52. Moreover, the Eighth and Eleventh Circuits' reasoning regarding the enforcement challenges they confronted flatly contradicts the Ninth Circuit's ruling regarding respondents' enforcement claim here: *Oxford House-C* and *Schwarz* held that "evenhanded application of the law is the end of the matter" for such disparate-treatment claims. *Schwarz*, 544 F.3d at 1217; *see also Oxford House-C*, 77 F.3d at 252. But in the Ninth Circuit's view, disparate-treatment claims challenging the enforcement of facially nondiscriminatory laws *may* proceed without proof of discriminatory application. *See* Pet. App. 42a n.29.

C. The Ninth Circuit's decision also deepens broader confusion regarding the scope of disparate-treatment liability in cases under the FHA and analogous contexts.

1. The Second Circuit has expressly adopted the same position as the Ninth Circuit in addressing intentional-discrimination claims under other provisions of federal law. Addressing an intentional-discrimination claim under the Equal Protection Clause—the same context to which the Ninth Circuit looked for guidance in construing the FHA and ADA (Pet. App. 30a n.21)—the Second Circuit has held that "[a] plaintiff alleging an equal protection claim

under a theory of discriminatory application of the law, *or under a theory of discriminatory motivation underlying a facially neutral policy or statute*, generally need not plead or show the disparate treatment of other similarly situated individuals." *Pyke*, 258 F.3d at 108-09 (emphasis added). *Pyke* explicitly rejected the view that "the requirement to show the existence of better treated, similarly situated persons is obviated *only* 'when challenging a law or policy that'" discriminates on its face. *Id.* at 109-10 (citation omitted).

Similarly, in addressing a claim for intentional discrimination under the Age Discrimination in Employment Act, the Second Circuit has rejected "the notion that," even under the *McDonnell Douglas* framework, "the *only* way a plaintiff can make out an inference of discrimination is to demonstrate that he was treated differently from other similarly situated employees." *Abdu-Brisson*, 239 F.3d at 467. Because of the "flexible spirit" of the prima facie requirement, the court held, "the plaintiff should be able to create an inference of discrimination by some other means," *ibid.*, such as by pointing to "invidious comments about others in the employee's protected group," *id.* at 468 (internal quotation marks omitted).

Indeed, in addressing disparate-treatment claims under the FHA, the Second Circuit has embraced an analysis that closely resembles the Ninth Circuit's here. *See LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995). In *LeBlanc-Sternberg*, the Second Circuit explained that disparate-treatment claims under the FHA require a showing that discriminatory animus "was a significant factor" motivating the defendant's decision. *Ibid.* (internal quotation marks omitted). Based on that standard, the Second Circuit

reinstated a jury verdict for plaintiffs who challenged a facially nondiscriminatory zoning ordinance—allegedly intended to discriminate against home synagogues in violation of the FHA—without identifying any evidence that the ordinance had been applied in a discriminatory fashion. *Id.* at 422, 425, 429-31.

2. Compounding the lower-court confusion, the Sixth Circuit appears to combine elements of the Eighth and Eleventh Circuits' view and that of the Ninth and Second Circuits. *See Smith & Lee Assocs.*, 102 F.3d at 790-93. Addressing a claim under the FHA challenging the denial of a zoning application, the Sixth Circuit, like the Ninth Circuit in the decision below, explained that a disparate-treatment claim under the FHA requires only proof that "'discriminatory purpose was a motivating factor in the City's decision'" to deny the plaintiff's petition for rezoning. *Id.* at 790 (citation omitted). The court nevertheless proceeded to examine whether the plaintiff had established that it was treated less favorably than a similarly situated person. In that regard, the court noted that evidence of the city's treatment of other businesses did not itself "constitute disparate treatment or evidence of discriminatory animus" because those other businesses were not similarly situated. *Id.* at 792-93. The Sixth Circuit therefore concluded that the city's "failure to require [those] businesses to comply with the" city's zoning restrictions "cannot serve as the basis of a disparate treatment claim." *Id.* at 793.

* * *

The courts of appeals are thus sharply divided regarding the scope of disparate-treatment liability under the FHA and ADA—and confused more broad-

ly concerning disparate-treatment liability under an array of federal anti-discrimination provisions. Only this Court can resolve these divisions and bring much-needed clarity to this exceedingly important area of federal law.

II. THE DECISION BELOW DEPARTS FROM THIS COURT'S PRECEDENT AND DRASTICALLY EXPANDS THE SCOPE OF DISPARATE-TREATMENT LIABILITY.

The Ninth Circuit's decision also warrants this Court's review because it departs from this Court's anti-discrimination jurisprudence. The court of appeals' holding that plaintiffs pursuing disparate-treatment claims under the FHA and ADA can prevail based on a defendant's supposedly discriminatory purpose and some harm to the plaintiff—but *without* any proof of discriminatory effects—has no foothold in this Court's case law. Indeed, this Court's equal-protection precedent—on which the decision below purported to rely—squarely forecloses the court of appeals' conclusion. If allowed to stand, that decision will expand defendants' potential liability under the FHA and ADA far beyond the bounds intended by Congress.

A. The Ninth Circuit's holding that plaintiffs alleging disparate treatment need not establish *different* treatment has no basis in this Court's case law. The panel did not cite, and petitioner has not found, any case from this Court sustaining a disparate-treatment claim under the FHA, ADA, or any analogous federal provision challenging the enactment or enforcement of a facially nondiscriminatory law without proof of discriminatory effects. To the contrary, this Court has consistently required disparate-treatment plaintiffs to demonstrate that they were

treated "less favorably than others because of their [protected trait]." *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983) (quoting *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977)).

Plaintiffs proceeding under the *McDonnell Douglas* burden-shifting framework invariably must prove that the defendant's conduct resulted in a discriminatory—not merely adverse—effect on persons in a protected class. To establish a prima facie case of disparate treatment, plaintiffs must show (among other things) that other, similarly situated persons were treated differently. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). The key factual inquiry thus is whether the plaintiff suffered *different* treatment from others, not merely whether the plaintiff suffered some harm as a result of the defendant's actions. *See*, *e.g.*, *Teamsters*, 431 U.S. at 335. Such a discriminatory effect, in fact, has been present in every case of which petitioner is aware in which this Court has found disparate treatment under the *McDonnell Douglas* framework. *See*, *e.g.*, *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308, 310 (1996); *McDonnell Douglas*, 411 U.S. at 802.

To be sure, plaintiffs asserting disparate-treatment claims may also prove discriminatory intent without reliance on *McDonnell Douglas*'s burden-shifting framework by presenting direct evidence that the defendant intentionally discriminated against a protected class. *See*, *e.g.*, *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985). But, contrary to the Ninth Circuit's view, Pet. App. 29a-31a, that alternative approach for demonstrating

a defendant's discriminatory *motive* does not excuse the plaintiff from proving that the defendant actually *discriminated* in the first place. Respondents themselves conceded below that to prevail in their challenge to a "facially neutral statute," they had to show that the statute "was motivated by discriminatory animus *and that its application results in a discriminatory effect*." C.A. Appellants Br. 37 (emphasis added).

Nothing in this Court's case law supports a contrary approach. Indeed, in every case petitioner has found in which plaintiffs successfully demonstrated disparate-treatment discrimination without reliance on *McDonnell Douglas*, the defendant's conduct did result in a discriminatory effect. *See*, *e.g.*, *UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199-200 (1991) (defendant's policy "explicitly classifie[d] on the basis of potential for pregnancy," which under Title VII constituted "explicit sex discrimination"); *Trans World Airlines*, 469 U.S. at 120-21 (employer's policy explicitly conferred privileges only on employees below age 60); *City of L.A., Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 704-05 (1978) (employer policy required women to contribute higher proportion of salary toward pension fund than men).

B. The Ninth Circuit purported to derive its contrary view from this Court's equal-protection precedent. Pet. App. 30a n.21. The court of appeals was correct that equal-protection decisions can provide useful guidance in this context; this Court itself has looked to its cases under the Equal Protection Clause in interpreting federal anti-discrimination statutes. *See*, *e.g.*, *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2675-76

(2009); *Teamsters*, 431 U.S. at 335 n.15.[7] The court of appeals erred, however, in construing this Court's equal-protection cases as permitting plaintiffs to prove intentional discrimination based on direct evidence of a defendant's allegedly discriminatory motive without proof of any discriminatory effect.

1. The Court has squarely rejected the contention that a mere discriminatory purpose—absent discriminatory effects—can transform facially nondiscriminatory state action into intentional *discrimination* in violation of the Equal Protection Clause. *See Palmer*, 403 U.S. at 224-25. The plaintiffs in *Palmer* challenged a town's decision to close all public swimming pools rather than desegregate them in compliance with a judicial desegregation order. *Id.* at 219. The plaintiffs argued that the town's action violated the Equal Protection Clause "because the decision to close the pools was motivated by a desire to avoid integration." *Id*. at 224. This Court flatly rejected that argument, explaining that "[n]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Ibid.* Instead, there must also be state action "affecting" members of the suspect class "*differently*" from others. *Id.* at 225 (emphasis added).

As *Palmer* explained, relying on a defendant's purpose alone is not only contrary to settled constitutional doctrine, but also fraught with practical prob-

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[7] *But cf. Washington* v. *Davis*, 426 U.S. 229, 239 (1976) ("We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.").

lems. "[A]scertain[ing] the motivation" of a defendant—particularly a legislative body—can be "extremely difficult." 403 U.S. at 224. Indeed, it is frequently "impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators." *Id.* at 225. That is particularly true here, where the Ninth Circuit relied on statements made by two of the City's seven city-council members—and by members of the public who attended city-council meetings—to divine the intentions of the city council as a whole. Pet. App. 10a, 15a-16a, 39a. But even where determining the legislature's collective purpose is possible, it often will prove "futil[e]." *Palmer*, 403 U.S. at 225. If the challenged measure does not treat members of the suspect class differently, then the legislature could simply reenact the measure based solely on a nondiscriminatory justification. *See ibid.*; *cf. Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (plurality opinion) ("[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators."); *United States* v. *O'Brien*, 391 U.S. 367, 383-84 (1968).

2. The panel's own authorities refute its understanding that discriminatory effect is unnecessary to prove intentional discrimination. The panel relied primarily on *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977), for the proposition that evidence of a defendant's supposedly discriminatory intent plus some injury to the plaintiff is sufficient to prove disparate treatment without any showing of discriminatory effect. *See* Pet. App. 30a-31a. But *Arlington Heights* took as its starting premise the lower court's finding that the challenged

action—denial of a rezoning request—*had* caused discriminatory effects. *See* 429 U.S. at 259-60, 264-65.

The court of appeals in *Arlington Heights* had determined that the denial of the rezoning request "had racially discriminatory effects" because it would disproportionately affect African Americans. 429 U.S. at 260. This Court did not question that discriminatory effect, but held that it was necessary but (by itself) *insufficient* to establish unconstitutional discrimination. *Id.* at 264-65. The Court accordingly proceeded to analyze the defendants' motive to determine whether the demonstrated discrimination was in fact intentional. *See id.* at 265-71. The defendant's discriminatory motive, in short, was an additional requirement *beyond* the challenged action's discriminatory effect. The Ninth Circuit erred in construing *Arlington Heights* as deeming discriminatory intent a *substitute* for discriminatory effect.

The panel's other principal authority, *Hunter* v. *Underwood*, 471 U.S. 222 (1985), confirms this understanding of *Arlington Heights*. In *Hunter*, the court of appeals had found "indisputable" evidence that an Alabama law had a discriminatory impact, and this Court found "no evidence in the record . . . that would undermine this finding." *Id.* at 227. As this Court made clear, that finding was a prerequisite to undertaking the analysis of intent described in *Arlington Heights*: "*Presented with* a neutral state law *that produces disproportionate effects* along racial lines," this Court held, "the Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause." *Ibid.* (emphases added); *see also id.* at 232 ("where *both* impermissible

racial motivation *and racially discriminatory impact* are demonstrated, *Arlington Heights* . . . suppl[ies] the proper analysis") (emphases added).

Other decisions of this Court are in accord, treating the existence of discriminatory effects as a predicate for examining discriminatory intent. *See*, *e.g.*, *Griffin* v. *Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 230 (1964) (considering the purpose behind a state law closing all public schools in a particular county only after concluding that the law "bears more heavily on Negro children"). In no case that petitioner has uncovered has the Court found intentional discrimination under the Equal Protection Clause in the absence of discriminatory effect.

3. The court of appeals also relied on this Court's decision in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). Pet. App. 39a-40a. But *Church of the Lukumi* involved a claim under the Free Exercise Clause, which as this Court has explained fundamentally differs from the Equal Protection Clause: The former carves out an *exception* to the regular application of a facially neutral law, whereas the latter ensures that a facially neutral law is regularly applied. *See Emp't Div.* v. *Smith*, 494 U.S. 872, 885-86 (1990).[8] Moreover, by the court of appeals' own description, although the challenged law in *Church of the Lukumi* was not facially discriminatory, it *did* have a discriminatory effect. Pet. App. 39a; *see also* 508 U.S. at 534-36.

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[8] The court of appeals noted that *Church of the Lukumi* invoked the *Arlington Heights* multifactor inquiry into legislative purpose, Pet. App. 40a n.25, but the portion of the opinion the court of appeals cited spoke only for a plurality, *see* 508 U.S. at 540.

C. The new theory of discrimination recognized by the decision below not only has no basis in this Court's case law, but also radically expands the scope of disparate-treatment liability under the FHA and ADA.

As this Court has made clear, federal anti-discrimination statutes prohibit two kinds of discrimination: disparate treatment and disparate impact. If a plaintiff is unable to prove disparate treatment, the only alternative is to meet the requirements of disparate impact (if the relevant law permits disparate-impact liability at all). *See*, *e.g.*, *Ricci*, 129 S. Ct. at 2672; *Teamsters*, 431 U.S. at 335 n.15. Although disparate-impact claims do not require proof of a link between discriminatory intent and different treatment, they require an even greater showing of discriminatory effects than is required for disparate-treatment claims. The plaintiff must prove not only *some* discriminatory effect, but that the law's burdens fall so disproportionately on a protected group that the discriminatory effect is "significant" or "substantial." *E.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 426 (1971).

The decision below, however, creates a *third* avenue for plaintiffs to proceed in FHA and ADA cases. In the Ninth Circuit's view, a plaintiff need not prove either that discriminatory animus resulted in different treatment, or that the defendant's conduct yielded significant or substantial discriminatory effects. Instead, "direct or circumstantial evidence that the defendant has acted with a discriminatory purpose and has caused harm to members of a protected class" is sufficient to prove discrimination. Pet. App. 7a. The requisite "harm," moreover, can be nothing more than the costs of complying with a generally

applicable regulatory regime. *See id.* at 43a. As Judge O'Scannlain underscored, under the panel's approach, the fact that a law "importunes a party in some even menial way" is sufficient injury—even if that injury neither applies nor is enforced in a discriminatory fashion. *Id.* at 142a.

By creating out of whole cloth a new type of discrimination claim not subject to the requirements for disparate-treatment *or* disparate-impact claims, the decision below enables plaintiffs to circumvent the standards articulated by Congress and this Court for proving unlawful discrimination—and in so doing drastically expands the scope of liability under the federal anti-discrimination statutes.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING AN IMPORTANT AND RECURRING ISSUE OF FEDERAL ANTI-DISCRIMINATION LAW.

A. The question presented has far-reaching implications for local governments and municipal officials across the country—as well as for landlords, employers, and every other private entity potentially subject to anti-discrimination claims. Because courts generally apply the same standards to claims under the FHA and ADA that they apply to claims under Title VII and the other federal anti-discrimination provisions, the panel's holding is likely to affect numerous cases involving alleged discrimination in a variety of contexts.

The Ninth Circuit's view vastly expands the scope of defendants' potential liability under federal anti-discrimination laws and their costs of defending against such claims. Courts that follow the Ninth Circuit's approach will permit challenges to a facially

nondiscriminatory law or policy even where plaintiffs make no attempt to show that it affects members of a protected class differently from others similarly situated. And, as the Ninth Circuit recognized, "very little" evidence is needed to raise a genuine factual issue on discriminatory intent. Pet. App. 31a (internal quotation marks omitted). Thus, based purely on purported bias, public and private defendants alike will be forced to litigate *to trial* countless additional lawsuits, even though the challenged policies are nondiscriminatory and applied evenhandedly.

B. These pernicious consequences will be particularly acute for local governments, like the City, which enact and administer many facially nondiscriminatory policies that suddenly are now subject to challenge. Such claims will interfere with the work of local governments, curtailing their ability to establish and enforce nondiscriminatory policies solely because those who would prefer not to comply with those policies can create a triable issue of fact as to whether some government officials acted with a discriminatory motive. The risk of litigation and associated burdens will hinder local governments' work and skew their decision-making.

The Ninth Circuit's decision also invites untoward judicial scrutiny of the local-governance process. As *Palmer* recognized, 403 U.S. at 225, courts generally are poorly positioned to ascertain the intentions of individual participants in the legislative process. Those difficulties are compounded for local governments where legislators and citizens often collaborate closely to shape local policies. Inviting judges to comb through statements by individual council members and concerned residents—as the panel did here—and to rely on such statements as

the basis for overturning a facially nondiscriminatory policy not only puts courts in an untenable position, but also threatens to distort the democratic process. The possibility of such invasive judicial scrutiny will inevitably chill paradigmatic political discourse between elected officials and the public, and may even perversely incentivize opponents of policies to distort the legislative record to provide ammunition for a policy's subsequent invalidation. *Cf. Spallone* v. *United States*, 493 U.S. 265, 300 (1990) ("Private lawsuits threaten to chill robust representation by encouraging legislators to avoid controversial issues or stances . . . .").

C. This case provides an ideal opportunity for the Court to provide much-needed guidance on this important question of federal statutory interpretation. The question presented was thoroughly pressed and passed upon below by the district court, the panel, and the dissent from denial of rehearing en banc. The issue also is determinative of the relevant claims here. The district court granted summary judgment to the City on respondents' disparate-treatment claims based on its conclusion that respondents failed to show that they were treated differently from similarly situated, non-disabled persons. Pet. App. 67a-78a. The Ninth Circuit allowed those claims to go forward based on its contrary conclusion that such a showing was unnecessary. *Id.* at 28a-46a. If its decision stands, respondents' disparate-treatment claims under the FHA and ADA will proceed to trial. If the Ninth Circuit's decision is reversed, however,

the City will be entitled to judgment on those claims.[9]

* * *

The decision below "canonizes a novel theory of liability under the antidiscrimination statutes." Pet. App. 144a (O'Scannlain, J., dissenting from denial of rehearing en banc). In the Ninth Circuit, "plaintiffs may now challenge facially neutral and fairly enforced municipal ordinances on the mere accusation that improper intent had tainted the legislative process without any showing of actual discriminatory treatment." *Ibid.* That conclusion is impossible to reconcile with the decisions of other circuits, with this Court's jurisprudence, or with fundamental principles of anti-discrimination law and democratic governance.

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[9] Respondents' state-law and equal-protection claims would fail as well. The court of appeals did not separately analyze those claims, *see* Pet. App. 25a n.14, which are governed by the same relevant standards as the FHA and ADA claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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