NO. 14-56

In The Supreme Court of the United States

CITY OF NEWPORT BEACH, CALIFORNIA,
Petitioner,

—v—

PACIFIC SHORES PROPERTIES, LLC, et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF CALIFORNA CITIES BRADBURY, CLAREMONT, COSTA MESA, LAGUNA BEACH, AND SAN CLEMENTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can a facially nondiscriminatory zoning regulation that is supported by findings evidencing a rational basis for the regulation and that is applied neutrally be challenged because of purported discriminatory statements made by individual legislators and members of the public?

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STATEMENT OF INTEREST OF AMICI CITIES

Without review by this Court, the Ninth Circuit's decision in *Pacific Shores Properties, LLC, et al. v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013) ("Pacific Shores Properties") will overturn decades of this Court's deference to legislative bodies' findings and decisions as to facially valid regulations. The Ninth Circuit held that statements made by individual local elected officials and members of the public in the heat of debate that may evidence a discriminatory motive can abrogate the entire legislative body's collective zoning regulation decision-making process, even if the legislation is neutrally drafted and neutrally applied. This ruling casts a shadow on the police power authority of municipalities to regulate land uses within their boundaries for the protection of the public health, safety and welfare.

The cities of Bradbury, Claremont, Costa Mesa, Laguna Beach and San Clemente ("Amici Cities") are California municipal corporations located in Los Angeles and Orange Counties and respectfully submit this amicus curiae brief in support of the petition for writ of certiorari filed by petitioner City of Newport Beach.[1]

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[1] The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Cities' intention to file this brief. Letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, the Amici Cities state

The Amici Cities have a significant interest in protecting their right and ability to regulate land uses and zoning within their jurisdictions for the health, safety and welfare of their residents. First, in light of the Ninth Circuit's decision, they are concerned about their diminished ability to regulate the explosion and proliferation of for-profit businesses catering to persons with disabilities that seek to operate in areas zoned solely for residential uses. These lucrative businesses avoid state regulation by operating unlicensed "sober living facilities," and seek to avoid city and county regulation by claiming protected status under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 et seq., and Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq.

The Amici Cities need to have the ability to reasonably regulate businesses that purport to serve the disabled. Disabled individuals do not permanently reside in sober living facilities; rather, they pay high fees—much higher than normal rental rates—to live in the facilities for only a few weeks or months. The businesses are set up in single family homes or apartment units that are often not designed or located in a way to accommodate this type of operation. These individuals are often picked up and taken to unregulated medical testing and attend on- and off-site meetings and counseling. As a result, sober living facilities often become overcrowded

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that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the Amici Cities or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

boarding houses that do not adequately serve the disabled and impose significant noise, traffic, parking, and public safety burdens on the neighborhoods in which they are situated.

An over-concentration of such unregulated facilities can effectively convert a residential neighborhood into an institutional district, frustrating a primary reason for locating such facilities in close proximity to or within residential neighborhoods—to integrate the disabled into the community.

There is no question that local regulation of these businesses would be permitted, and even encouraged, if these types of businesses catered only to non-disabled persons.

Second, the Amici Cities are concerned that the Ninth Circuit's decision jeopardizes cities' authority to regulate businesses in areas zoned for residential use because the decision holds cities hostage to stray remarks by individual legislators and members of the public from whom a discriminatory motive can later be inferred. Following the Ninth Circuit's reasoning will enable a minority-overriding-the-majority atmosphere, where a local official or employee who makes an arguably discriminatory statement can destroy a piece of local legislation or regulation, either innocently or intentionally, and nullify the legislative process altogether. The Amici Cities have an interest in restoring precedent that assures deference to a legislative body's findings and that requires challenges to facially-neutral ordinances to be supported by actual proof of a discriminatory effect.

SUMMARY OF THE ARGUMENT

This Court should grant the City of Newport Beach's petition. The Ninth Circuit's decision overturns decades of deference to local land use decisions that are facially-neutral and are supported by findings that evidence a rational basis for the regulation, and abrogates a city's ability to regulate land uses where an individual legislator makes potentially improper statements that have not been recited or adopted by the legislative body as a whole. The Ninth Circuit applies a level of scrutiny reserved for racial discrimination, fundamental rights and suspect classifications to land use decisions involving sober living facilities. This heightened standard of review thwarts a city's ability to adopt and enforce ordinances aimed at protecting public health, safety and welfare, the so-called "social or economic legislation," and is in conflict with the rational basis standard applied in other circuits.

ARGUMENT

I. A Facially Nondiscriminatory Zoning Ordinance Must Be Upheld If It Is Supported by Findings That Evidence a Rational Basis for the Regulation.

A. Cities Have a Constitutional Right and the Authority to Regulate Land Uses Within Their Jurisdictions.

This Court has recognized that "zoning laws and their provisions, long considered essential to effective

urban planning, are peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508, n.18 (1975). The California Constitution grants cities the broad power to make and enforce all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. Cal. Const. Art. XI, § 7.

The "police power" establishes a city's right to adopt regulations to promote the public convenience, general prosperity, public health, public morals and public safety. *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906). A city's power to control local land use derives from this inherent police power, not from authority delegated by the state. *DeVita v. County of Napa*, 9 Cal. 4th 763, 782 (1995).

The California Legislature has declared its "'intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.'" *Id.* (quoting Cal. Gov. Code, § 65800). A city's ability to control land uses to address local conditions is well established. *IT Corp. v. Solano County Bd. of Supervisors*, 1 Cal. 4th 81, 89 (1991). "In enacting zoning ordinances, the municipality performs a legislative function, and every intendment is in favor of the validity of such ordinances." *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 460 (1949).

B. Police Power Ordinances Are Valid Unless Clearly Arbitrary and Unreasonable.

In *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), this Court first established

that police power ordinances are valid unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." A local jurisdiction has the power to forbid the erection of a building for a particular use "by considering it in connection with the circumstances and the locality," much like a nuisance. *Id.* at 388. "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.*

This Court sanctioned the ordinance in *Village of Euclid* because the validity of the legislative classification was "fairly debatable" and therefore could not be said to be wholly arbitrary. *Id.* at 388. This is a limited standard of review. On the other hand, the Ninth Circuit's decision in *Pacific Shores Properties* creates a dangerous precedent that undercuts this Court's clear holding that a zoning ordinance can only be declared unconstitutional if it is shown to be clearly arbitrary and unreasonable, meaning it has no substantial relation to the public health, safety, morals or general welfare.

The FHA and ADA were not enacted to abandon the deference courts have shown to local zoning codes. *Bryant Woods Inn, Inc. v. Howard County, Md.,* 124 F.3d 597, 603 (4th Cir. 1997). Nor are the statutes intended to shield sober living facility businesses from informed zoning decisions. *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir. 1996). "Cities have a legitimate interest in

decreasing congestion, traffic, and noise in residential areas," and "Congress did not intend for the [FHA] to remove handicapped persons from the 'normal and usual incidents of citizenship'" or to place courts in the position of zoning boards. *Id.* at 252-253.

C. A Facially Nondiscriminatory Ordinance Must Be Upheld If the Legislative Findings Evidence a Rational Basis for the Regulation.

Deference to local decision-makers and their findings is a principle long recognized by this Court "as necessary for the continued development of effective zoning and land use control mechanisms." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Justice Marshall, dissenting). The relevant governmental interest is determined by objective indicators as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings. *See, e.g.*, *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 71–72 (1976); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72–74 (1981); *Soon Hing v. Crowley*, 113 U.S. 703, 710–11 (1885). Under the traditional rationality standard of review, courts are to defer to legislative findings of fact. *See e.g.*, *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990).

The Ninth Circuit's decision in *Pacific Shores Properties* ignores longstanding judicial deference to the legislative body's findings. The City of Newport Beach's ordinance contains the findings of fact, basis, and reasoning of the legislative body for enacting the

ordinance. *See, e.g.*, findings in Ordinance No. 2008-5 in ER 5452-5456, setting forth in detail why the City enacted the legislation. The findings set forth in the City of Newport Beach's ordinance cite, among other reasons, the following: the high degree of transiency; the City's disproportionately high number of facilities serving individuals recovering from drug and alcohol use as compared to other cities in Orange County; the dangers to community safety by allowing more than two parolees to live in these facilities; and, impacts caused by group residential uses, including extensive secondhand smoke, impacts to traffic and parking, conversion of garages to other uses, noise, more frequent trash collection, increase in scavenging and petty theft, fighting and loud offensive language.

In sum, the City of Newport Beach found that the overconcentration of these sober living facility businesses in residential zones was "institutionalizing" residential neighborhoods. Importantly, the City of Newport Beach was not singling out facilities that catered only to individuals with drug and alcohol related disabilities, but rather addressed all types of group home businesses located within residential zones. Moreover, the ordinance did not attempt to ban all sober living facilities in the City of Newport Beach, but instead sought to merely regulate them through the City's inherent land use and zoning powers.

These are exactly the type of public health, safety, moral and general welfare concerns this Court declared nearly a century ago in its *Euclid* decision were within the purview of local cities to

address. Local legislative bodies are in the best position to determine whether sober living facilities are an appropriate use for a particular zone based on a variety of factors, many of which may be unique to a particular community. And while a certain number of sober living facilities in a residential zone may be appropriate, local legislative bodies as a whole should also have the ability to prevent overconcentration of unregulated business operating as sober living facilities that collectively have the effect of converting a residential neighborhood into an institutional district. Without deferring to the local legislative body, "federal courts increasingly [will] become entangled prematurely in disputes regarding application of neutral zoning ordinances to the handicapped. Federal courts [will] thus become not zoning boards of appeals, but zoning boards of first instance, a result Congress surely did not intend." *Oxford Housing, Inc., v. City of Virginia Beach*, 825 F.Supp. 1251, 1261 (E.D. Va. 1993).

When a city supports and substantiates its decision with factual findings, as the City of Newport did, the validity of the city's legislative zoning classifications must be upheld. The Ninth Circuit's decision makes legislative findings meaningless and eviscerates cities' ability to control undesirable impacts based on comments by an individual legislator. It is imperative that this Court grant the City of Newport Beach's petition and reinstate deference in the Ninth Circuit to legislative findings of fact. As stated by the 7th Circuit, "[z]oning may be good or bad, but the [FHA] is not the charter of its abolition." ,*Hemisphere Building Company, Inc., v.*

Village of Richton Park 171 F.3d 437, 440 (7th Cir. 1999).

D. A City's Constitutional Right to Regulate Land Uses Should Not Be Nullified as the Result of Statements Made by Individual Legislators That Have Not Been Adopted by the Legislative Body.

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

United States v. O'Brien, 391 U.S. 367, 383-384 (1968). "The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing v. Crowley*, 113 U.S. 703, 711 (1885). Legislation cannot be set aside by courts because it fails to embody the

highest wisdom or provide the best conceivable remedies. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 550-551 (1949).

The Ninth Circuit's decision in *Pacific Shores Properties* conflicts with this Court's well-established precedent that legislators' statements inferring a discriminatory motive made in the heat of debate cannot substantiate a discrimination claim. The statements by city councilmembers, representing less than a quorum of the legislative body, and members of the public were not an official act or incorporated into the findings of the entire council and, therefore, had no bearing on the council's collective decision to enact a municipal ordinance.

Further, absent this Court's intervention, local land use regulations will be subject to attack on all fronts. First, challengers of facially-neutral ordinances will be able to overturn local land use decisions by simply scouring the administrative record for errant comments made by individual legislators in connection with those decisions. In addition, one legislator's statement, whether intended innocently or maliciously, could taint the collective decision of the legislative body and prevent the enactment of an ordinance adopted under the municipality's constitutional police powers that is necessary to protect the public health, safety, and welfare.

This foreseeable result of the Ninth Circuit's decision raises many questions: Can a legislative body enact a facially-neutral ordinance after a legislator makes statements inferring his/her personal discriminatory intent? If so, how long must

a municipality wait after the legislator makes an allegedly improper statement before the discriminatory "taint" is deemed to have dissipated and its authority to legislate is restored? Can the same ordinance be reconsidered, or does it have to be modified to remove the taint?

II. The Application of the *Arlington Heights* Test Imposes a Heightened Level of Judicial Scrutiny on Non-Suspect Classes and Conflicts with the *Cleburne* Standard for Equal Protection Claims.

The Ninth Circuit's opinion does not comport with the standard for equal protection claims based on non-suspect classifications as articulated by this Court in *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) ("*Cleburne*"). Under *Cleburne*, the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Id.* at 440. "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude" and "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* The general rule gives way only when a statute classifies by race, alienage, or national origin. *Id.*

If allowed to stand, the Ninth Circuit's broad FHA and ADA interpretation will shield businesses serving non-suspect classes in a way that is regularly rejected in the equal protection context. "The [FHA] does not 'insulate [sober living facility operators] from legitimate inquiries designed to enable local authorities to make informed decisions on zoning

issues.'" *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir. 1996), citing *Oxford Housing, Inc. v. City of Virginia Beach, Va.,* 825 F.Supp. 1251, 1261 (E.D. Va. 1993).

The Circuits uniformly agree that recovering alcoholics and drug addicts are not suspect classes. *Ball v. Massanari*, 254 F.3d 817, 824 (9th Cir. 2001); *Mitchell v. Commissioner of the Social Sec. Admin*, 182 F.3d 272, 274 (4th Cir. 1999); *Gazette v. City of Pontiac*, 41 F.3d 1061, 1067 (6th Cir. 1994); *Palmer by Palmer v. Merluzzi*, 868 F.2d 90, 96 (3rd Cir. 1989). As long as the ordinance bears a rational relationship to a permissible state objective, it must be upheld as valid land use legislation. *Village of Belle Terre*, 416 U.S. at 8. Further, to the extent "there are meaningful, socially relevant differences between individuals, however, those individuals are not similarly situated for equal protection purposes. Government not only may, but often must classify and treat such individuals differently in order to achieve what it considers to be the just distribution of benefits and burdens in society." *Cook v. Babbitt*, 819 F. Supp. 1, 11 (D.D.C. 1993), relying on *Cleburne*, 473 U.S. at 441.

This Court has since reaffirmed its holding that legislative classifications based on disability incur only the minimum "rational-basis" review applicable to general social and economic legislation. For example, in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 367 (2001), this Court stated:

> Such a classification cannot run afoul of the Equal Protection Clause if there is a

> rational relationship between the disparity of treatment and some legitimate governmental purpose. [Citations omitted.] Moreover, the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'

Id. at 367.

In *Pacific Shores Properties*, the Ninth Circuit applied the test and multi-factor inquiry articulated by this Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268 (1977) ("*Arlington Heights*"). The Ninth Circuit's application of the *Arlington Heights* factors to a disparate-treatment claim involving businesses serving disabled individuals conflicts with the *Cleburne* standard. *Arlington Heights* involved a challenge to a zoning decision based on racial discrimination. 429 U.S. at 268. Under *Arlington Heights*, when there is proof of a discriminatory effect and proof that a discriminatory purpose has been a motivating factor in the decision, judicial deference is no longer justified. *Id.* at 265-266. *Arlington Heights* states a multi-factor inquiry for determining whether there is a disparate-treatment claim. *Id.* at 266-268. Once a plaintiff shows that a decision has a discriminatory effect and was motivated at least in part by a racially discriminatory purpose, the burden shifts to the defendant to show the same result would have been

reached even without consideration of race. *Id.* at 270 n.21. There is no presumption the government's legislation is correct, and the burden is on the government to defend its law.

By applying the *Arlington Heights* test, the Ninth Circuit employs the stricter level of scrutiny reserved for racial discrimination, fundamental rights and suspect classifications to land use decisions involving businesses serving individuals recovering from alcoholism and drug addiction–a non-suspect class. A city's constitutional right to adopt public health, safety and welfare ordinances and judicial deference to a city's findings relating thereto should not be tossed aside in the absence of a suspect class.

This Court has not ruled on whether the *Arlington Heights* test and factors are applicable when the judiciary reviews a claim of disparate-treatment of a non-suspect class under a facially-neutral land use ordinance. Must a court uphold a facially-neutral ordinance against an equal protection claim involving a non-suspect class if the ordinance bears a rational relationship to a permissible city objective, as set forth in *Cleburne*? What role, if any, does the *Arlington Heights* test and factors have in this type of case?

Without clear direction from this Court, the Circuits have applied the law inconsistently. The Ninth Circuit, as demonstrated by its opinion in the *Pacific Shores Properties* case, applies *Arlington Heights* to claims of disparate treatment of non-suspect classifications under facially-neutral ordinances without any showing of discriminatory

effect. The Second Circuit applies both *Arlington Heights* factors and the *Cleburne* standard together. *See e.g.*, *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) (involving an equal protection selective enforcement challenge to a facially-neutral land use ordinance). While the First, Third, Sixth, Seventh and Eight Circuits apply a rational basis standard for equal protection claims involving disparate treatment of non-suspect classifications under facially-neutral ordinances, the test is a little different in each jurisdiction.

In the First Circuit, this type of ordinance is presumed to be valid and not violative of the Equal Protection Clause "if the classification drawn by the statute is rationally related to a legitimate state interest." *Int'l Paper Co. v. Town of Jay*, 928 F.2d 480, 485 (1st Cir. 1991) (involving the regulation of pollutant emissions by industries and businesses), citing *Cleburne,* at 440. The First Circuit gives governments wide latitude in creating these types of ordinances and does not "delve into the motivations of the Board members who proposed and drafted the Ordinance." *Id.*

In the Third Circuit, plaintiffs must demonstrate the application of the ordinance had no rational basis. *Sullivan v. City of Pittsburgh, Pa.*, 811 F.2d 171, 184 (3d Cir. 1987) (involving a conditional use permit requirement for alcohol treatment facilities).

In the Sixth Circuit, plaintiffs must show that: (1) the government treated the plaintiff differently from a similarly situated party, and (2) the government had no rational basis to do so. *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 864

(6th Cir. 2012) cert. denied, 133 S. Ct. 1635, (2013) (involving a zone change to accommodate a charter school).

In the Seventh Circuit, the rational relationship test is applied and the burden is upon the challenging party to eliminate any "reasonably conceivable state of facts that could provide a rational basis for the classification." *Discovery House, Inc. v. Consol. City of Indianapolis*, 319 F.3d 277, 282 (7th Cir. 2003) (involving drug-addiction rehabilitation clinic), citing *Board of Trustees of University of Alabama*, at 367.

In the Eighth Circuit, facially-neutral ordinances involving non-suspect classes are upheld if rationally related to a legitimate governmental purpose. *Bannum, Inc. v. City of St. Charles, Mo.*, 2 F.3d 267, 270 (8th Cir. 1993) (involving half-way houses for convicted criminals). The legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality which is a heavy burden. *Id.*

This inconsistency, in addition to the Circuit conflict discussed in the City of Newport Beach's petition for writ of certiorari, is yet another reason for granting review. Without this Court's guidance, courts around the country will apply varying levels of scrutiny in assessing the validity of land use regulations impacting non-suspect classes.

CONCLUSION

The Amici Cities respectfully request that this Court grant the City of Newport Beach's petition for certiorari. Granting review to clarify the applicable standards will have a significant impact on the ability of the Amici Cities, and other local jurisdictions, to adopt and implement zoning regulations in the future.

Respectfully submitted,

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