No. 14-56

In The
Supreme Court of the United States

CITY OF NEWPORT BEACH,

Petitioner,

vs.

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 Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

STEVEN G. POLIN
LAW OFFICES OF
STEVEN G. POLIN
3034 Tennyson Street, N.W.
Washington, D.C. 20015
Tel: (202) 331-5848

ELIZABETH BRANCART
Counsel of Record
CHRISTOPHER BRANCART
BRANCART & BRANCART
Post Office Box 686
Pescadero, CA 94060
Tel: (650) 879-0141
ebrancart@brancart.com

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CORPORATE DISCLOSURE STATEMENT

Respondent Pacific Shores Properties, LLC has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Newport Coast Recovery LLC has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Yellowstone Women's First Step House, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

Fair Housing Act

TABLE OF AUTHORITIES – Continued

BRIEF IN OPPOSITION

Pacific Shores Properties, LLC, Alice Conner, Sean Wiseman, Terri Bridgeman, Newport Coast Recovery LLC, and Yellowstone Women's First Step House, Inc. ("plaintiffs" or "respondents") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by the City of Newport Beach ("Newport Beach," "City," or "petitioner").

INTRODUCTION

Newport Beach asks this Court to answer a hypothetical question not posed by the facts of this case, a question that is premised on a fundamental misstatement of the facts of record and legal issues decided below. Plaintiffs, respondents here, do not challenge a "facially neutral and fairly enforced" municipal ordinance; the Court of Appeals did not sustain an intentional discrimination claim based solely on "the mere accusation that improper intent had tainted the legislative process without any showing of actual discriminatory treatment." Pet. 34, citing Pet. App. 144a (O'Scannlain, J., dissenting from denial of rehearing en banc). Instead, plaintiffs presented evidence that Newport Beach crafted, enacted and enforced a zoning ordinance for the purpose of eliminating or reducing the number of group homes serving disabled persons, while allowing other more popular housing uses such as vacation rentals, which posed the same alleged problems, to continue.

Newport Beach openly acknowledged that its ordinance aimed to shut down and exclude housing for persons with disabilities from the City's residential neighborhoods, targeting group homes for persons recovering from alcoholism and drug addiction who are protected by the anti-discrimination laws. Group homes for persons in recovery from alcoholism and drug abuse provide housing in which those persons may reside together, mutually supporting each other in their sobriety. To implement its discriminatory goal, Newport Beach drafted and enacted an ostensibly neutral ordinance – designed to evade a court challenge for facial discrimination – that it deliberately crafted to target group homes. It then enforced the ordinance against every group home in the City and only against those homes. Six months later, Newport Beach had successfully reduced available housing opportunities for persons in recovery by almost one-half.

Newport Beach's conduct injured each plaintiff, subjecting them to adverse action under the Ordinance – forcing one to close, others to cut their services, and all to incur significant financial losses and additional expenses. The Court of Appeals examined those facts, weighed them in the light most favorable to plaintiffs, and concluded that plaintiffs had raised triable issues of fact precluding summary judgment on their intentional discrimination claims under the Fair Housing Act and Americans with Disabilities Act. *See* Pet. App. 1a (Kozinski, C.J., Reinhardt and Thomas, JJ.).

Against that backdrop, Newport Beach's petition should be denied for several reasons. First, the Court of Appeals had a separate basis for reversing the district court's summary judgment order, one not challenged by petitioner here – that plaintiffs had presented triable issues of fact whether the City engaged in discriminatory enforcement of its ordinance against them, an alternative basis for an intentional discrimination claim.

Second, there are no grounds for the assertion that the Circuits are split on the requirements for proof of intentional discrimination under the federal anti-discrimination laws. Once Newport Beach's misstatement of the facts and mischaracterization of the Ninth Circuit's ruling are set aside, the alleged circuit split disappears and there is no reason to believe that any other circuit would reach a different result given the set of facts presented in this case.

Finally, the Court of Appeals's opinion neither strays from this Court's anti-discrimination jurisprudence, nor expands the scope of the Fair Housing Act or Americans with Disabilities Act. Municipal governments need not fear increased litigation or liability as a result of the decision. The extraordinary course of conduct undertaken by Newport Beach in this case is so highly unusual, deviating from the range of normal municipal governance, that it is unlikely to be repeated in the future.

STATEMENT OF THE CASE

1. **Applicable federal statutes.** The Fair Housing Act ("FHA") forbids discrimination in housing on the basis of disability, as does the Americans with Disabilities Act ("ADA"). 42 U.S.C. § 3601 *et seq.*; 42 U.S.C. § 12132; Pet. App. 145a-153a. The FHA explicitly protects persons with disabilities as well as those seeking to provide them with housing. 42 U.S.C. § 3604(f)(1); Pet. App. 149a. As petitioner acknowledges, persons recovering from alcoholism or drug addiction are protected under both the FHA and ADA. Pet. 3. Both apply to municipal zoning decisions. *See, e.g., Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (FHA); *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 573-74 (2d Cir. 2003) (FHA and ADA); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 257 n.6 (1st Cir. 1993) (FHA).

2. **The City of Newport Beach.** Newport Beach is a beachside community in Southern California. Its Balboa Peninsula runs along the beachfront and is the site of many single-family houses, duplexes, and triplexes that are used as vacation rentals. 1 C.A. E.R. 113; 8 C.A. E.R. 1808. Newport Beach allows property owners to rent their dwellings in residential zones as short-term vacation rentals ("vacation rentals") if they register and obtain the required business permits from the City. 19 C.A. E.R. 4691, 4864. As of 2007, the City had issued permits allowing 801 dwelling units to be used as vacation

rentals, providing 5,739 beds for vacationers. 19 C.A. E.R. 1811.

As the City acknowledges, vacation rentals cause negative impacts in residential districts, requiring expanded law enforcement, code enforcement, refuse collection, and other services, and contributing to parking problems and traffic congestion. Newport Beach's vacation renters engage in a wide variety of "nuisance behaviors such as excessive noise, litter, loud offensive language, and public drunkenness." 15 C.A. E.R. 3875-76.

Before 2008, Newport Beach also allowed group homes for persons with disabilities to locate in residential neighborhoods, including on the Peninsula. As of 2007, prior to amending its zoning code, Newport Beach was home to 73 group homes, together offering housing for 673 persons – a little over one-tenth the capacity of vacation rentals. 1 C.A. E.R. 113-14; 8 C.A. E.R. 1811.

3. **The plaintiff group homes.** Pacific Shores Properties, LLC ("Pacific Shores") is a family operation that offers sober living in three homes it owns in Newport Beach. 3 C.A. E.R. 493, 552; 23 C.A. E.R. 5681-82. Plaintiff Yellowstone Women's First Step House, Inc. ("Yellowstone") is a nonprofit corporation founded by persons in recovery in order to provide services to persons seeking to achieve and maintain their sobriety. 4 C.A. E.R. 907, 987. It offers sober living in four houses it owns in Newport Beach.

Both Pacific Shores and Yellowstone provide safe, attractive housing in residential neighborhoods for persons in recovery where they may live side-by-side with others in recovery, helping one another maintain sobriety. 3 C.A. E.R. 552; 4 C.A. E.R. 988. Residents live together as the functional equivalent of a family, sharing meals and chores. Persons who use drugs or alcohol are immediately evicted. 11 C.A. E.R. 2844-49; 12 C.A. E.R. 3055. There is no time limit on tenancy – as of 2007, Pacific Shores had residents who had stayed anywhere from three months to three years. 12 C.A. E.R. 3056-57.

Newport Coast Recovery LLC was a licensed substance abuse treatment facility located in an apartment building along busy Balboa Boulevard on the Peninsula. It looked like any of the other apartment houses lining that street. Newport Coast Recovery offered a 90-day residential substance abuse treatment program. 4 C.A. E.R. 967.

4. **Newport Beach targets group homes.** In January 2007, the Newport Beach City Council formed a special citizens' committee for the purpose of focusing on problems that Peninsula residents alleged they were experiencing with homes "that cater to recovering alcoholics and drug addicts." 12 C.A. E.R. 3072-73. Local residents attended meetings, venting their frustrations and fears about group home occupants, referring to them as "not true handicapped," "criminals," "gang members," and "druggies," among

other derogatory terms.[1] *See, e.g.*, 12 C.A. E.R. 3099-3191. These emotional meetings set the tone for every City meeting or hearing that followed on regulating group homes. Newport Beach excluded group home operators and residents from participating on the citizens' committee. Although the committee's mandate was to focus solely on group homes, 19 C.A. E.R. 4692, the problems residents attributed to group homes mirrored the well-documented problems caused by vacation rentals. *See* 22 C.A. E.R. 5455.

In April 2007, Newport Beach took the next step: the City Council adopted a special 45-day moratorium on new "transitory uses" in residential districts, including vacation rentals and group homes. 22 C.A. E.R. 5531-39. The City Attorney publicly explained that vacation rentals had been included in the moratorium "to avoid the appearance of discriminating against drug recovery facilities." 12 C.A. E.R. 2981. A firestorm of public protest erupted over including vacation rentals in the moratorium and residents pressured the City to drop them from the moratorium. 16 C.A. E.R. 3960-69; 17 C.A. E.R. 4361.

To justify lifting the moratorium on vacation rentals while maintaining it on group homes, Newport Beach took the unusual step of distributing an ersatz "survey" on the effects of those housing types to citizens in the neighborhoods where complaints

[1] The Ninth Circuit noted, but did not examine, that evidence in reaching its decision. Pet. App. 40a n.26.

about group homes were concentrated, even enlisting the help of group home opponents to distribute the survey. 13 C.A. E.R. 3147; 14 C.A. E.R. 3600-08; 15 C.A. E.R. 3921, 3951-53. Based on the results of that "survey," the City Council voted to end the moratorium on new vacation rentals, but to continue it with respect to new group homes. 15 C.A. E.R. 3912-17, 3935-38; 22 C.A. E.R. 5542-50. The district court later held that the amended moratorium was facially discriminatory against group homes. Pet. App. 82a.

5. **Newport Beach singles out group homes for legislation.** Meanwhile, the City moved forward against group homes on two fronts. First, it created a task force of City employees to identify existing group homes and enforce code violations against them. The task force, in the words of Assistant City Manager Kiff, "[v]erified suspected [group homes]. Hour after hour." 16 C.A. E.R. 4054; 19 C.A. E.R. 4789. The task force worked hand in glove with a citizen advocacy group opposed to group homes, Concerned Citizens of Newport Beach ("CCNB"), meeting in private homes to identify and report potential group homes to be shut down. 16 C.A. E.R. 5225; 17 C.A. E.R. 4256-58. Newport Beach also sued Pacific Shores for allegedly violating the moratorium. 3 C.A. E.R. 553; 15 C.A. E.R. 3733, 3756.

Second, the City Council commenced the process leading to the enactment of the ordinance at issue in this case, passing "A Resolution . . . Initiating an Amendment to Title 20 of the Newport Beach Municipal Code to Revise Definitions and Procedures

Relating to Residential Care Facilities," (i.e. group homes), the very title of which identified the City's purpose. 14 C.A. E.R. 3598. The City Planning Commission conducted hearings on drafts of the proposed ordinance. Although initial drafts applied to both group homes and vacation rentals, intense citizen protest against regulating vacation rentals along with group homes led the Planning Commission to demand a rewrite eliminating regulation of vacation rentals. 13 C.A. E.R. 3153, 3162, 3169-78, 3189-94, 3212-13, 3273; 14 C.A. E.R. 3633-35. CCNB submitted its own proposed ordinance that expressly singled out group homes for regulation, which the City's outside counsel advised the Planning Commission would be facially discriminatory. The same counsel also cautioned the Planning Commission that eliminating vacation rentals from regulation under the proposed ordinance left, as a practical matter, group homes as the only use subject to the ordinance. The Planning Commission nonetheless approved a draft of the proposed ordinance not applicable to vacation rentals. 13 C.A. E.R. 3262, 3273.

Newport Beach then fired outside counsel, 13 C.A. E.R. 3239-40, 3249-50, and formed special committees to both hire and work with new outside counsel to revise the draft ordinance. 5 C.A. E.R. 1251-52, 1273, 1313. Council Member Henn, who represented the Peninsula, served on both committees and was the recognized leader in the effort to pass and enforce the anti-group home ordinance challenged here. 14 C.A. E.R. 3502, 3506.

The City Council conducted two hearings on the proposed ordinance. At the first, Council Member Henn identified the four "specific objectives" of the City's proposed ordinance: (1) to ensure that no new group homes would open in Newport Beach's single-family districts; (2) to assure that those homes that were allowed to exist went through a stringent process to obtain a permit and agree to strict operational guidelines; (3) to assure strict enforcement of the new ordinance going forward; and (4) "to substantially relieve the existing overconcentration of group homes and their adverse impacts." 14 C.A. E.R. 3499-3504. He concluded by stating that he believed the terms of the ordinance would, "in fact, result in a substantial reduction in the number of group homes on the Peninsula." *Id.* at 3505. He urged residents seeking stricter regulation to judge the City's proposed solution "by our actual results." *Id.*

At the second council hearing, Council Member Henn described the use permit process required by the ordinance as constituting "a very substantive attack" with respect to "the existing [group] homes on the Peninsula." 14 C.A. E.R. 3535-36. Immediately following his comments, the City Council voted unanimously to approve Ordinance 2008-5 (the "Ordinance"). 22 C.A. E.R. 5452, 5526.

6. **The Ordinance.** The Ordinance prohibits group homes from existing as of right in any residential district and required group homes already in those districts to be abated or go through an arduous administrative permit process, including public

adjudication of their permit applications. Pet. App. 183a-186a, 202a-205a, 210a-212a (§§ 20.10.020, 20.62.090, 20.91A.020-030). Plaintiffs showed that the City, to ensure that adoption of the Ordinance affected only group homes, redefined the attributes of households entitled to live in residential districts as of right, so-called "single housekeeping units." Plaintiffs raised a triable issue that Newport Beach "reverse engineered" the new "single housekeeping unit" definition by identifying the attributes of group homes and then using those attributes as triggers to prevent group homes from qualifying as "single housekeeping units" and all the while appearing facially neutral.

Specifically, the Ordinance added additional elements to the definition of "single housekeeping unit," including that if the unit is rented, that "all adult residents have chosen to jointly occupy the entire premises of the dwelling unit, under a *single written lease* with joint use and responsibility for the premises, *and the makeup of the household occupying the unit is determined by the residents of the unit rather than the landlord or property manager.*" Pet. App. 181a (§ 20.03.030 [emphasis added]).

Plaintiffs showed that this amended definition targeted group homes because in many such homes, including Pacific Shores and Yellowstone, the owner or house manager takes on responsibility for assuring that residents are committed to sobriety before moving in and remain sober as a condition of occupancy. 12 C.A. E.R. 3055-56; 21 C.A. E.R. 5149-50, 5211-12,

5215-17, 5265, 5267-68; 22 C.A. E.R. 5453-54; 23 C.A. E.R. 5695-98. That aspect of group homes, central to the operation of so many, is what also prevents them from being "single housekeeping units" under the Ordinance and subjects them to the administrative burdens it imposes.

Prior to enactment of the Ordinance, both Pacific Shores and Yellowstone were "single housekeeping units" allowed to exist in residential districts as of right. Pet. App. 160a (Former § 20.03.030). After adoption of the Ordinance, both lost their "single housekeeping unit" status and became, instead, so-called "residential care facilities." Pet. App. 182a-183a (§ 20.10.020). As a result, they and all other group homes in the City (other than a small subset of licensed homes protected under state law not at issue here) were funneled into a burdensome administrative process that forced many to close, making housing unavailable for persons in recovery. 19 C.A. E.R. 4722-23, 4856; 20 C.A. E.R. 5119.

No other use existing in the City at the time of passage of the Ordinance was affected by the change in the definition of "single housekeeping unit." Although the Ordinance facially purported to treat group homes "better" than other group residential uses that were not allowed in any residential zone in the city (i.e., fraternities, sororities, parolee homes and boarding houses), the "benefit" was illusory because none of those other types of group uses had been permitted in residential zones prior to passage of the Ordinance and none actually did exist (except

two illegally operating boarding houses closed pursuant to action commenced by the City before passage of the Ordinance). 13 C.A. E.R. 3156; 16 C.A. E.R. 4054; 19 C.A. E.R. 4836.

7. **Newport Beach enforces the Ordinance.** After passing the Ordinance, the City quickly began the process of shutting down group homes. The City Manager mailed a letter to all City residents stating that the City believed that group home operators "have gone too far" by placing "too many homes in close proximity to each other within neighborhoods," and advising group home operators that they must apply for a permit by May 20, 2008, or face abatement. 15 C.A. E.R. 3725, 3729; 19 C.A. E.R. 460. Three days after expiration of that May deadline, the City served abatement notices on each group home in the City that had not applied for a permit, including Pacific Shores, but on no other uses. 15 C.A. E.R. 3705-22; 19 C.A. E.R. 4708, 4722-23, 4856.

The City proceeded to apply the terms of the Ordinance to *every* known group home in the City (except a small state-protected subset not at issue here), requiring them to engage in a complex administrative process to obtain a permit or a reasonable accommodation or else leave the City. Pet. App. 209a-218a (§§ 20.91A.030, 20.91A.040, 20.91A.060). At a public presentation, Assistant City Manager Kiff described the Ordinance as driving "specific administrative actions for the recovery home operators. They had to choose to fight, stay [if the fight was successful], or leave." 16 C.A. E.R. 4054. Pacific

Shores, he informed the assembly, was "not going quietly." *Id.*

Plaintiffs showed that the administrative process was stacked against group homes from the start. 3 C.A. E.R. 556; 4 C.A. E.R. 993. As of two years after enactment of the Ordinance, only two group home operators had been able to obtain the required permits; three had been able to obtain reasonable accommodations; over 25 had closed rather than go through the administrative process or were pending closure or abatement. 6 C.A. E.R. 1363; 16 C.A. E.R. 4145-56; 19 C.A. E.R. 4790-92.

Plaintiffs also presented evidence that the City engaged in discriminatory enforcement of the Ordinance. The terms of the Ordinance, in order to retain the veneer of neutrality, technically required abatement of a small number of non-group home uses in residential zones along with a large number of group homes. Nonetheless, the City failed to follow the abatement mandates of the Ordinance with respect to any of those non-group home uses. 12 C.A. E.R. 2885-88, 2898-99; 11 C.A. E.R. 2765-72.

Similarly, while the arduous application and administrative requirements mandated by the Ordinance's terms applied to *all* applicants for use permits in residential zones – both group home and non-group home uses – it is undisputed that the City imposed those requirements only on group homes. 17

C.A. E.R. 4316-17; 20 C.A. E.R. 5117-18; *compare* 14 C.A. E.R. 3541-84 *with* 14 C.A. E.R. 3585-92.

Finally, the City's zoning concerns were selective, focusing only on group homes. Although the City acknowledged that vacation rentals and group homes created complaints about the same secondary effects in residential neighborhoods, and that there were nine times as many vacation rentals as group homes in the City, Newport Beach chose to ignore the effects caused by vacation rentals and targeted only group homes and their residents.

8. **Plaintiffs suffer adverse actions.** Yellowstone and Newport Coast Recovery applied for use permits under the Ordinance, completing the lengthy permit applications and going through protracted administrative hearing processes only to have their applications denied in full. 9 C.A. E.R. 2053, 2100-54; 10 C.A. E.R. 2548; 11 C.A. E.R. 2519, 2574-97, 2686-76, 2690; 2849-51; 10 C.A. E.R. 2328. During the course of that process, Newport Coast Recovery could no longer afford to fight and decided to close its doors. 4 C.A. E.R. 983-84. While this case was on appeal to the Ninth Circuit, the City commenced abatement proceedings against Yellowstone, currently on hold. After it was served with an abatement notice, Pacific Shores applied for a reasonable accommodation which was denied by the City's hearing officer. 6 C.A. E.R. 1352-54. While the denial was on appeal to the City Council, Pacific Shores submitted a revised request seeking approval of operations in a reduced capacity.

Id. at 1428. That request was eventually granted. *Id.* at 1363.

9. **The City made housing unavailable.** Since adoption of the Ordinance, the City has succeeded in its publicly announced goal of reducing the number of group homes in the City. 16 C.A. E.R. 4145-46; 19 C.A. E.R. 4711-12, 4790-91. Throughout the process, the City kept the public apprised of its efforts on the City's website, keeping score of group home closures and pending abatements. 16 C.A. E.R. 4145-46; 19 C.A. E.R. 4789-90. At a public presentation in July 2008, Assistant City Manager Kiff boasted of the City's success, telling the assembly that the number of housing opportunities in group homes for persons in recovery had decreased between 40% and 44% from mid-2007. 16 C.A. E.R. 4080; 19 C.A. E.R. 4789.

Within two years of the adoption of the 2008 Ordinance, almost one-half of the housing opportunities in the City for persons in recovery had disappeared. (Compare 673 spaces in 2007 [16 C.A. E.R. 4054]) to 359 spaces by February 2010 [16 C.A. E.R. 4147].) Since mid-2007, no new group home has opened in the City. 19 C.A. E.R. 4712. Nor are any new homes likely – the siting requirements of the Ordinance limit potential sites for new group homes to approximately 33 of the City's 16,811 residential parcels. 21 C.A. E.R. 4282, 5329-51.

The City's actions directly affected the availability of group housing for persons in recovery in

Newport Beach, making housing unavailable within the meaning of the Fair Housing Act. 42 U.S.C. § 3604(f); Pet. App. 149a. The evidence just recounted, plus more discussed in the Ninth Circuit opinion and in the record, reflects a course of conduct by Newport Beach raising a strong inference that its adoption and enforcement of the Ordinance was "because of" the disability of group home residents and the Ninth Circuit correctly held that the district court erred in granting summary judgment against plaintiffs.

REASONS TO DENY THE PETITION

I. The Decision Below Is Interlocutory and Rests on Additional Grounds Not Challenged by Petitioner Here.

The first reason the petition should be denied is that it seeks review of an interlocutory ruling. This Court does not review such rulings except in "extraordinary cases." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893) (requiring "extraordinary inconvenience and embarrassment" for such review). No extraordinary factors justify interlocutory review here: Newport Beach will have a full and fair opportunity to persuade the district court to reject plaintiffs' claim – a result that would moot the need for review by this Court.

Indeed, interlocutory review is especially inappropriate here, because the Ninth Circuit concluded

that plaintiffs had created a triable issue of fact with respect to their discriminatory enforcement claims as an additional basis for denying Newport Beach's motion for summary judgment on plaintiffs' intentional discrimination claims. Pet. App. 42a n.29. Given the Court of Appeals's recognition of this additional ground for reversal, one that petitioner does not challenge, any decision by this Court on the question presented by petitioner will not change the outcome of the case – reversal of summary judgment and remand to the district court. As for the Court of Appeals's fact-based conclusion that plaintiffs' evidence was sufficient to withstand summary judgment based on Newport Beach's discriminatory enforcement of the Ordinance, Pet. App. 42a n.29, that decision is the kind of everyday appellate determination that does not warrant review by this Court.[2]

---

[2] [A] substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment. The present case falls into that very large category. . . . Thus, the only issue is whether the relevant evidence, viewed in the light most favorable to the nonmoving party, is sufficient to support a judgment for that party.

Tolan v. Cotton, ___ U.S. ___, ___, 134 S. Ct. 1861, 1868-69 (2014) (Alito, J., concurring in the judgment, joined by Scalia, J.).

II. There Is No Split Among the Circuits Regarding the Elements Necessary to Prove Intentional Discrimination.

No circuit split is suggested by the Ninth Circuit decision. Nor does the decision deepen any "broader confusion" regarding the scope of disparate treatment liability under the FHA and analogous federal anti-discrimination laws. Pet. 29. Petitioner's claim of a circuit split rests, again, on its fundamental error in characterizing the factual record as one showing that Newport Beach acted with a discriminatory purpose and no more. In fact, plaintiffs also claimed that the Ordinance was designed to, and did, principally target group homes and that Newport Beach proceeded to apply it to every group home in the City, including plaintiffs, causing them to suffer adverse consequences. Respondents have located no case from any Circuit where a similar course of conduct was found to be lawful. Instead, to find any support for its claimed circuit split, Newport Beach ignores the facts and mischaracterizes the actual holdings in this case and the other circuit cases it cites. Read properly, there is no division among the lower courts.

A. The Eighth and Eleventh Circuit decisions on which petitioner relies to claim a circuit split differ significantly from this case. Neither involved, as does this case, the enactment or enforcement of a facially neutral statute that was shown to have been adopted for a discriminatory purpose and enforced in furtherance of that purpose. Instead, both decisions involved

unproven claims of discriminatory enforcement of pre-existing, facially neutral laws.

1. Newport Beach misrepresents the Eighth Circuit's decision in *Oxford House-C v. City of St. Louis*, 77 F.3d 249 (8th Cir. 1996), as passing on whether the "enactment" of the ordinance at issue was discriminatory. *See* Pet. 17. But the *Oxford House-C* plaintiffs did not challenge the enactment of the ordinance, nor did they argue that the ordinance was enacted for an improper purpose. As the first sentence of the Eighth Circuit's opinion makes plain, the issue was whether the city violated the FHA "by *enforcing* the City's zoning code to limit the number of residents in two group homes for recovering substance abusers." 77 F.3d at 250 (emphasis added).

The Eighth Circuit held that the ordinance was non-discriminatory as applied to Oxford Houses and that the city had not singled out Oxford Houses for inspections and enforcement proceedings because of their residents' disabilities. *Id.* at 252. Thus, there is no conflict between *Oxford House-C* and the Ninth Circuit's holding that an ordinance enacted with discriminatory animus and applied so as to adversely affect persons in a protected class can violate the FHA and ADA.

2. Newport Beach's reliance on *Schwarz v. City of Treasure Island*, 544 F.3d 1201 (11th Cir. 2008), is even more misplaced. The *Schwarz* plaintiffs claimed discriminatory enforcement of a neutral statute adopted decades before, and the Eleventh Circuit

opined that evidence of differential treatment is essential to a *selective enforcement* claim. 544 F.3d at 1217. It then explained that "[t]he analysis might have been different if [the plaintiff] claimed that the City enacted the [ordinance] in order to discriminate against people with disabilities." *Id.* Indeed, just three years earlier, the *en banc* Eleventh Circuit had described as "well-established" the constitutional prohibition on enacting a facially neutral law with the intent to injure a protected class. *Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1218 (11th Cir. 2005) (en banc).

The *Schwarz* panel's holding was simply that "in *selective-enforcement* claims like this, even handed application of the law is the end of the matter." *Schwarz*, 544 F.3d at 1217 (emphasis added). That holding, therefore, does not conflict with the Ninth Circuit's holding that a showing of differential treatment of similarly situated persons is not essential to challenge a facially neutral ordinance enacted for a discriminatory purpose and enforced against persons in a protected class.

B. *Oxford House-C* and *Schwarz* are easily distinguishable from this case, not only because they involved application of pre-existing, facially neutral zoning laws, but also because plaintiffs here, unlike the plaintiffs in those cases, produced substantial evidence of Newport Beach's discriminatory enforcement of its "facially neutral" law. Pet. App. 42a n.29. (concluding that plaintiffs had created triable issues of fact whether Newport Beach's "actual enforcement

strategy" against plaintiffs amounted to discriminatory enforcement of the Ordinance). Pet. App. 42a n.29.

C. Nor does the Court of Appeals's decision contribute to any "broader confusion" regarding the scope of disparate treatment liability under the FHA and analogous statutes. Pet. 29.

1. Both the Ninth and Second Circuits agree that proof of disparate treatment of similarly situated persons is not necessary to prove an intentional discrimination claim that is not premised on selective prosecution. Pet. App. 31a-32a; *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004); *Pyke v Cuomo*, 258 F.3d 107, 108-09 (2d Cir. 2001). For instance, in *Pyke* the plaintiffs alleged that the State of New York had failed to provide police protection to persons on the Mohawk Indian reservation *because* the persons in need of protection were Native Americans. *Id.* at 108. The Second Circuit held that the plaintiffs did not need to allege or establish disparate treatment of otherwise similarly situated non-Native American individuals to make that claim – nor was there any likelihood that such comparators existed. *Id.* at 109.

Similarly, in *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467-68 (2d Cir. 2001), the Second Circuit held that proof of disparate treatment of similarly situated employees was not a requirement for an intentional discrimination claim under the Age Discrimination in Employment Act. There, again, no

similarly situated comparators existed – all those similarly situated had suffered the same adverse consequences. *Id. See also Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 534 n.4 (6th Cir. 2002) ("We note that the record contains no indication that the OSHP employs explicit racial criteria or admits to racially-motivated decision making. If such a showing could be made, the plaintiffs would not need to establish the existence of a similarly situated class that was not investigated.").

In addition, contrary to petitioner's argument, neither the Ninth or Second Circuits allow proof of intentional discrimination in the absence of enforcement or threatened enforcement of a facially nondiscriminatory ordinance enacted for a discriminatory purpose. Pet. 21-22. In *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996), the Second Circuit did not, as petitioner describes it, dispense with requiring proof of discriminatory enforcement in upholding an FHA claim based on a facially neutral zoning ordinance. Pet. 21-22. Instead, the Second Circuit ruled that the FHA's explicit grant of standing to persons who believe they *will* be injured by a discriminatory housing practice that is about to occur authorized pre-enforcement litigation. 67 F.3d at 425. In that case, the plaintiffs presented evidence that the Village of Airmont had been incorporated for the purpose of excluding Orthodox Jews and had proceeded to adopt a zoning code that was intended to, and would be interpreted to, curtail home synagogues, thereby deterring Orthodox Jews from purchasing homes in many Village

neighborhoods. *Id.* at 419-20, 429. Thus, in that case, where it was established that the facially neutral zoning ordinance had been adopted for a discriminatory purpose and would likely be applied in a discriminatory manner, the plaintiffs had standing to challenge it before it was actually applied against them. *Id.*

2. Nor does the Sixth Circuit's decision in *Smith & Lee Associates, Inc. v. City of Taylor, Mich.*, 102 F.3d 781, 792 (6th Cir. 1996), "compound" lower-court confusion as claimed by Newport Beach. Pet. 22. In *Smith & Lee*, the Sixth Circuit explicitly stated that the city's "zoning ordinance existed before this dispute began, and there is no suggestion that the ordinance was passed specifically to exclude handicapped residents from single-family areas." *Id.* at 792. The court's ruling rested on its finding, after examination of all the evidence, that the plaintiffs had failed to establish discriminatory intent. *Id.* at 790-94.

* * *

There is no division among the courts of appeals regarding the scope of disparate treatment liability under the FHA and ADA and no broader "confusion" amongst the lower courts on that issue. Petitioner's claims to the contrary do not support granting the petition.

III. The Decision Below Follows Traditional Anti-Discrimination Analysis and Breaks No New Ground Regarding Intentional Discrimination Claims Under the FHA or ADA.

Newport Beach enlists the dissent from the denial of rehearing en banc to miscast the panel opinion as inventing "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. 2. But Judge O'Scannlain's dissent from denial of rehearing en banc is premised on a mistaken understanding that the plaintiffs in this case submitted to the municipal administrative procedures mandated by the Ordinance, "successfully applied for a permit," and suffered no "adverse action." Pet. App. 136a, 138a. That mistaken understanding of the facts pervades both the petition and the dissent from rehearing en banc and underlies their assertions that the panel opinion expands the scope of the FHA and ADA.

The correct reading of the record shows that Newport Beach enforced the Ordinance against each plaintiff because they provided housing for persons with disabilities and that each suffered injury because of adverse action by the City. Newport Coast Recovery closed after the City denied its application for the use permit mandated by the Ordinance. 4 C.A. E.R. 983-84. The City denied all of Yellowstone's applications for use permits and reasonable

accommodations, 10 C.A. E.R. 2328, 2355-63, and abatement is pending. Newport Beach twice denied Pacific Shores's reasonable accommodation requests, but then granted the request pending a second appeal on the condition that Pacific Shores artificially cap its number of residents. 6 C.A. E.R. 1363, 1428. Having lost twice, Pacific Shores capitulated to the condition to mitigate its damages rather than be forced to close.[3] Each plaintiff suffered injury – closure, lost revenue, higher costs – as a result of an adverse action by the City of the very sort that the dissent from rehearing en banc recognizes as actionable discriminatory treatment. Pet. App. 138a.

That conclusion finds support in this Court's teaching that imposing burdens on persons in a protected class for the purpose of injuring them because of their protected status is unlawful. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (if equal protection of the laws means anything, it must at the very least mean that "'a bare . . . desire to harm a politically unpopular group'" is not a legitimate government interest (quoting *Dep't of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973));

[3] The grant of that request, under the burden of the Ordinance targeting Pacific Shores because of the disabilities of its residents, does not affect Pacific Shores's right to challenge its treatment under the Ordinance. *See, e.g., Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457 (1988) (family that signed school bus contract and sent child to school by bus could still challenge constitutionality of bussing fee scheme and the burden it imposed).

United States v. Windsor, ___ U.S. ___, ___, 133 S. Ct. 2675, 2693 (2013). *See also Flores v. Pierce*, 617 F.2d 1386, 1391 (9th Cir. 1980) (Kennedy, J.) ("If the rigors of the governmental or administrative process are imposed upon certain persons with an intent to burden, hinder, or punish them by reason of their race or national origin, then this imposition constitutes a denial of equal protection. . . ."). Nonetheless, Newport Beach claims plaintiffs have shown no "discriminatory effect," sometimes using the term to mean proof of different treatment of similarly situated persons and at other times to mean proof of disparate impact. Neither of those showings are required elements of a claim under the FHA or ADA.

1. The FHA and ADA prohibit specified conduct. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("The Fair Housing Act itself focuses on prohibited acts."). For example, the FHA prohibits "discriminatory housing practices." 42 U.S.C. § 3602(f), Pet. App. 146a. A "discriminatory housing practice" is an act that violates, *inter alia*, 42 U.S.C. § 3604, which makes it unlawful, because of disability, "[t]o discriminate in the sale or rental, *or to otherwise make unavailable or deny*, a dwelling." 42 U.S.C. § 3604(f)(1) (emphasis added), Pet. App. 149a. That prohibition reflects no talismanic evidentiary requirements, supporting the conclusion that a plaintiff may rely on any relevant evidence to prove that a defendant made

housing unavailable because of disability.[4] The FHA authorizes an "aggrieved person" – any person who claims to have been injured by one of these "discriminatory housing practices" – to commence a civil action with respect to that practice. 42 U.S.C. § 3602(i), Pet. App. 146a; 42 U.S.C. § 3613(a)(1)(A).[5] Here, each of the plaintiffs is an aggrieved person under the FHA because each alleges injury as a result of discriminatory housing practices committed by Newport Beach. The ADA similarly, does not dictate what kind of evidentiary showing is necessary to prove a violation. *See* Pet. App. 153a-158a.

Thus, whatever "discriminatory effect" a plaintiff must prove under the FHA and ADA must be informed by the prohibitions in the statutes themselves. As detailed above, the record contains

---

[4] The phrasing of other FHA prohibitions supports a conclusion that there are no talismanic evidentiary requirements. *See, e.g.*, 42 U.S.C. § 3604(d) (prohibiting making false representations of housing unavailability), Pet. App. 148a-149a; 42 U.S.C. § 3604(e) (prohibiting inducing or attempting to induce, for profit, any person to sell or rent a dwelling by representations regarding the entry into the neighborhood of persons of a particular protected class [blockbusting]), Pet. App. 148a.

[5] 42 U.S.C. § 3613(a)(1)(A) provides:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

substantial evidence that Newport Beach restricted housing opportunities or otherwise used its zoning laws to make housing unavailable to persons in recovery because of their disability. To survive summary judgment on their intentional discrimination claims plaintiffs were not required to prove that similarly-situated persons were not subject to the same treatment by Newport Beach or that application of its Ordinance resulted in a disparate impact, although, as discussed above, plaintiffs submitted evidence of both.

2. Newport Beach acknowledges, as it must, that a plaintiff can demonstrate intentional discrimination without reliance on the *McDonnell Douglas* framework[6] and its use of a better-treated similarly-situated comparator. Pet. 24. Newport Beach, however, posits that no *discrimination* may be shown under the federal anti-discrimination statutes without proof of differential treatment of similarly situated persons. Pet. 24-25. Putting aside the absence of any such requirement in the text of the FHA or ADA, this Court has previously disavowed such a narrow definition of discrimination. The majority in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999), rejected a similar argument that proof of "discrimination" under the ADA necessarily requires uneven treatment of similarly situated individuals. In his *Olmstead* concurrence, Justice Kennedy emphasized

[6] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

his view that "*absent a showing of policies motivated by improper animus or stereotypes*, it would be necessary to show that a comparable or similarly situated group received differential treatment." *Id.*, 527 U.S. at 613 (Kennedy, J., concurring) (emphasis added). Whereas in *Olmstead* such proof was lacking, in this case it is not – therefore no proof of differential treatment of similarly situated groups is required.

3. The Ninth Circuit did not incorrectly construe this Court's decision in *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), "as deeming discriminatory intent a *substitute* for discriminatory effect." Pet. 28. The Ninth Circuit recognized that plaintiffs here had not only shown discriminatory intent but, separately, had shown that the Ordinance had a discriminatory effect "by coming forward with statistics, *provided by the City,* that the Ordinance had the effect of reducing group home beds by 40%," Pet. App. 38a, and by showing that "all group homes were ultimately affected by the ordinance and few other facilities were." Pet. App. 41a. Plaintiffs also showed that the siting requirements of the Ordinance have the effect of limiting potential locations for new group homes to approximately 33 of the City's 16,811 residential parcels. 21 C.A. E.R. 4282, 5329-51.

Thus, even if the Court accepts the City's argument that *Arlington Heights* and this Court's other equal protection cases require plaintiffs to show a discriminatory effect in the form of a disparate impact before they may prove discrimination resulting

from application of a facially neutral ordinance adopted for a discriminatory purpose, plaintiffs' evidence meets that standard here. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (discriminatory effect shown where conviction of certain misdemeanors triggered disenfranchisement of black voters at a much higher rate than white voters); *Griffin v. Cnty. School Bd. of Prince Edward Cnty.*, 377 U.S. 218, 230 (1964) (discriminatory effect shown where closure of county schools "bears more heavily on Negro Children"). Indeed, by triggering application of the use permit requirements of the Ordinance off a definition of "single housekeeping unit" that served as a proxy to exclude group homes, the City guaranteed the discriminatory effect it now claims plaintiffs must show.

Newport Beach's use of that proxy itself is evidence of discrimination, not just discriminatory intent. A statute may be unlawful because it overtly discriminates against persons in protected classes *or* if it places burdens as a result of "covert" classifications that appear neutral. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979). Therefore, "[w]hen the Constitution forbids the political branches to do something directly (for example, to disqualify blacks from public employment or to favor Episcopalian applicants for unemployment benefits), it becomes necessary to curtail the use of proxies – seemingly neutral criteria adopted only because they approximate a more desired (but strictly forbidden) scheme of classification." *La Porte Cnty. Republican*

Cent. Comm. v. Bd. of Comm'rs of Cnty. of La Porte, 43 F.3d 1126, 1130 (7th Cir. 1994) (Easterbrook, J.). When that occurs, the court should treat the "neutral" law as a discriminatory one. *Id.*

In this case, plaintiffs raised a triable issue of fact whether the Ordinance's new definition of "single housekeeping unit" was a proxy for group homes and the Ordinance's apparent facial neutrality a pretext for intentional discrimination. *See, e.g.*, *Christian Legal Soc. Chptr. of the Univ. of Calif. v. Martinez*, 561 U.S. 661, ___, 130 S. Ct. 2971, 3017 (2010) (Alito, J., dissenting) ("Even if it is assumed that the policy is viewpoint neutral on its face [footnote omitted], there is strong evidence in the record that the policy was announced as a pretext."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 354 (5th Cir. 2011) (Jones, J., concurring) ("To allow a school district to use geography as a virtually admitted proxy for race, and then claim that strict scrutiny is inapplicable because '[the district rule] designated geographical lines for student assignment with no *mention* of race is inconsistent with the Supreme Court's holdings.").

4. Nor does the Court of Appeals's decision countenance a "searching inquiry into municipal legislative motives" contrary to this Court's teachings. Pet. 14, citing Pet. App. 143a (O'Scannlain, J., dissenting

from denial of rehearing en banc). To support such an argument, Newport Beach relies on the statement in *Palmer v. Thompson*, 403 U.S. 217, 224 (1971), 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." Pet. 26. But This Court in *Washington v. Davis* rejected the suggestion that *Palmer* should be read to state a "generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication." 426 U.S. 229, 244 n.11 (1976).

While legislative motivation does not *per se* make an otherwise-proper law invalid, *e.g., United States v. O'Brien,* 391 U.S. 367, 383-84 (1968), knowledge of improper intent is often essential in understanding and evaluating the law under review. *See, e.g.*, *Washington v. Davis,* 426 U.S. 229 (Fourteenth Amendment); *Church of the Lukumi Babalu Aye*, 508 U.S. at 540 (1993) (Free Exercise Clause); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (Commerce Clause); *see also City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 377 n.6 (1991) (Scalia, J.) (inquiry into motive of legislature appropriate "in the 'very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry' ") (internal citation omitted).

Here, unlike in *Palmer*, the Court of Appeals found that plaintiffs had raised a triable issue of fact whether Newport Beach's sole objective in enacting and enforcing its Ordinance was to discriminate

against – and harm – group homes for persons in recovery. Pet. App. 6a. The Court in *Palmer* was not confronted with direct evidence that the town was shutting down its pools for the sole purpose of denying blacks the right to use public swimming pools, and subsequent decisions demonstrate that the absence of such evidence was crucial to the *Palmer* decision. *See Washington*, 426 U.S. at 242-43 (stressing that *Palmer* had accepted "the finding that the pools were closed to avoid violence and economic loss" and to advance "the otherwise seemingly permissible ends served by the ordinance").

In this case, there was not only ample proof of a discriminatory purpose but, unlike the municipality in *Palmer*, petitioner did not enact a law that affected all citizens alike; instead, it carefully crafted the restriction to eliminate access to group housing for disabled individuals while allowing commercial housing that caused the same asserted problems (vacation rentals) to freely continue in residential zones. *Palmer* does not establish that a municipality that harms protected persons by enacting such a law, and that does so based on clear discriminatory animus, can escape liability under federal anti-discrimination statutes by claiming that its motivations are off limits to judicial review.

The Ninth Circuit opinion did not, as petitioner states, attribute to the City the discriminatory statements made by local residents opposed to group homes, nor did it rely on the statements reflecting discriminatory animus made by citizens to assess

whether plaintiffs raised a triable issue regarding the City's motivation. Pet. App. 40a n.26. The Court of Appeals properly relied on the statements of Council Member Henn – the recognized leader on the City Council in the effort to bring about enactment of the Ordinance – describing the *purpose* of the Ordinance. Doing so was in keeping with this Court's approval, in *Hunter*, of reliance on the speeches of the president of the Alabama Constitutional Convention of 1901 stating the *purpose* of the convention in considering whether a constitutional amendment disenfranchising certain criminals was motivated by a racially discriminatory purpose. 471 U.S. at 229-30. The statements of Council Member Henn as to the purpose of the Ordinance serve the same function here. The Court of Appeals did not countenance examination of the secret motives behind any council member's vote in favor of the Ordinance. That the Ordinance was drafted for the purpose of targeting group homes and imposing administrative burdens designed to drive them from the City was freely acknowledged by the City before, during and after enactment of the Ordinance and was not disputed by it in the summary judgment proceedings. 7 C.A. E.R. 1738-39.

5. The Ninth Circuit correctly relied on this Court's decision in *Church of the Lukumi Babalu Aye,* 508 U.S. 520, and Newport Beach's attempts to distinguish that case on the ground that it involves the Free Exercise Clause are ineffectual. Pet. 29. *Lukumi* concerned a supposedly neutral statute of

general application that, in truth, was drafted for the purpose of burdening a particular religious group. 508 U.S. at 535-36. Likewise, this case concerns a supposedly neutral statute of general application that, the record shows, was enacted – **and applied** – for the purpose of burdening persons in recovery seeking to live in group homes. True, the ordinance in *Lukumi* had a discriminatory effect – it prohibited Santeria worship. Pet. App. 39a. But the Ordinance in this case had a similar type of "effect" – it forced group homes to "fight" closure through the administrative permit process or "leave" the City. 16 C.A. E.R. 4054.

IV. Petitioner's Concern That the Decision Below Expands the Scope of Liability for Local Government for Violations of the Anti-Discrimination Laws Is Misplaced.

There is nothing in the Ninth Circuit's decision that expands potential liability for a local government or any other defendant for violations of the FHA or ADA. The concerns expressed by Newport Beach – that the Ninth Circuit's decision will allow an individual to challenge any facially neutral law by alleging the existence of lawmaker or citizen statements indicating an evil motive in support of the law – are not implicated by the decision in this case. The fear that municipalities will be forced into extended litigation by such stray remarks was put to rest years ago by this Court's ruling that proof of discriminatory purpose implies "more than intent as volition or

intent as awareness of consequences. It implies that the decisionmaker, in this case a [city council], selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. at 279; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009). In this case, the evidence is overwhelming that harm to a protected group was the purpose of the Ordinance, not merely incidental.

What Newport Beach did in this case – openly acknowledging that it was acting to harm an unpopular minority group and that it was drafting its legislation in a "neutral" manner so as to escape judicial review, and then applying that legislation to impose burdens on that unpopular group – is, fortunately, so unusual in the modern era that similar cases rarely arise. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (laws "singling out a certain class of citizens for disfavored legal status or general hardships are [now] rare"); *Church of the Lukumi Babalu Aye*, 508 U.S. at 523 ("The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

The actions of Newport Beach shown by the evidence in this case bear far more in common with

the actions of state legislators in Oklahoma in 1901[7] or Alabama in the "Jim Crow" era[8] than they do with any modern concepts of responsible governance. Thus, this case does not present the Court with a "recurring issue" of federal law, nor is this Court's intervention necessary because the Ninth Circuit's opinion has no likelihood of affecting "numerous cases involving alleged discrimination in a variety of contexts" as petitioner claims. Pet. 32-33.

[7] *Guinn v. United States*, 238 U.S. 347 (1915) (striking down constitutional amendment imposing literacy requirement for voter registration that exempted from the requirement all persons who were eligible to vote as of January 1, 1866, or their lineal descendants, as proxy for discrimination against black citizens).

[8] *Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down Alabama constitutional provision adopted in 1901 that disenfranchised persons convicted of crimes thought to be more frequently committed by blacks and which resulted in higher rate of black disenfranchisement).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

STEVEN G. POLIN
LAW OFFICES OF
STEVEN G. POLIN
3034 Tennyson Street, N.W.
Washington, D.C. 20015
Tel: (202) 331-5848

ELIZABETH BRANCART
Counsel of Record
CHRISTOPHER BRANCART
BRANCART & BRANCART
Post Office Box 686
Pescadero, CA 94060
Tel: (650) 879-0141
ebrancart@brancart.com

Counsel for Respondents

September 26, 2014