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

BRIEF OF AMICI CURIAE THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae represent cities and counties across California. Their members have a substantial interest in resolving the uncertainty created by the Ninth Circuit's decision (Pet. App. 1a), which, as pointed out by Judge O'Scannlain and others dissenting from the denial of rehearing en banc (Pet. App. 132a), creates a new theory of government discrimination based on "sinister intent" decoupled from any evidence of discriminatory effect. The decision invites courts to flyspeck the legislative process surrounding adoption of facially neutral ordinances, and then encourages them to speculate about allegedly discriminatory motives of individual legislators even in the absence of any actual discrimination. The decision has serious consequences for local government agencies because it restricts local legislative authority and decision-making capability, and for that reason Amici, the League of California Cities ("League") and the California State Association of Counties ("CSAC"), respectfully submit this Brief in support of Petitioner Newport Beach.

The League is an association of 473 California cities dedicated to protecting and restoring local control

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[1] No counsel for a party authored this Brief in whole or in part, and neither such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the Brief. Per Supreme Court Rule 37.3, the parties in this case have granted blanket consent to the filing of amicus curiae briefs; counsel for Amici timely gave notice of intent to file this Brief.

to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

CSAC is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision holds that a plaintiff may demonstrate that intentional discrimination has occurred 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.*, by presenting evidence of an alleged discriminatory motive in adopting a facially neutral ordinance coupled with evidence of an alleged harm to members of a protected class. Pet. App. 7a. The decision allows plaintiffs to

proceed in the absence of any evidence that an ordinance has had a discriminatory effect. Pet. App. 28. The decision is contrary to decisions by the Eighth Circuit and Eleventh Circuit, which require a plaintiff alleging disparate treatment under a facially neutral ordinance to present evidence that "comparators," or similarly situated individuals, received better treatment, or to present some evidence of discriminatory effect. Pet. App. 6a-7a, 141a (citing *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996), and *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216 (11th Cir. 2008)).

As the Eighth and Eleventh Circuits have recognized, evidence of an allegedly discriminatory motive in adopting a facially neutral ordinance should not be examined in the absence of some evidence that the ordinance had a discriminatory effect. The Ninth Circuit's conclusion otherwise is an open, and unbounded, invitation for courts to inquire into, and speculate about, the motives of individual legislators, staffers, and others involved in local political processes. Not only does that create practical problems for local governments, it also violates established principles underlying the separation of powers doctrine.

Evidence of arguably discriminatory intent or motive in adopting a local ordinance is not, standing alone, enough to invalidate a facially neutral ordinance. If this Court does not take up the Ninth Circuit's holding to the contrary, local governments could find themselves facing a discrimination suit every time an individual decision-maker comments on an ordinance in a way that arguably suggests a

discriminatory motive. In the absence of evidence of some discriminatory effect or impact, a facially neutral ordinance should be presumed to be just what it purports to be, neutral and non-discriminatory.

ARGUMENT

A. THE NINTH CIRCUIT STANDS ALONE IN INVITING COURTS TO SEARCH FOR POTENTIALLY "SINISTER INTENT" BEHIND FACIALLY NEUTRAL ORDINANCES EVEN IN THE ABSENCE OF EVIDENCE OF DISCRIMINATORY EFFECT

The FHA and Title II of the ADA, both at issue in the underlying case, are designed to prevent governmental entities from enforcing housing policies in a discriminatory manner. *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir. 2003). Discriminatory, or disparate, treatment claims under the FHA and ADA are analyzed under the *McDonnell Douglas* burden-shifting framework, which, in the housing context, requires that a plaintiff establish a prima facie case of discriminatory treatment by showing: (1) it is a member of a protected class; (2) it sought use and enjoyment of a particular dwelling and was qualified to use and enjoy the dwelling; (3) it experienced an adverse action with respect to the dwelling; and (4) similarly situated individuals outside of the protected class were treated more favorably. See *Budnick v. Town of Carefree*, 518 F.3d 1109, 1113-14 (9th Cir. 2008); *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

(1973)).

Generally, "disparate treatment" means being singled out and treated less favorably than others similarly situated on account of being in a protected class. *Schwarz*, 544 F.3d at 1216. See *Cinnamon Hills Youth Crisis Ctr., Inc. v. St. George City*, 685 F.3d 917, 920-22 (10th Cir. 2012); *Oxford House-C*, 77 F.3d at 251-52. See also *Jauregui v. City of Glendale*, 852 F.2d 1128, 1134 (9th Cir. 1988) (describing disparate treatment in context of race discrimination claim). There are exceptions to that rule. Courts of appeals have held that a plaintiff may, as an alternative to the *McDonnell Douglas* framework, establish intentional discrimination by producing direct or circumstantial evidence that a discriminatory reason more likely than not motivated a particular action. See, e.g., *Budnick*, 518 F.3d at 1114. A plaintiff may also demonstrate a facially neutral law or policy has been applied in a discriminatory manner, or that it had an adverse effect motivated by discriminatory animus. See, e.g., *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001). The exceptions, or alternatives, to the *McDonnell Douglas* framework seek to prevent discriminatory application of a facially neutral law.

Even in cases where an exception is appropriate, courts have required evidence of a discriminatory effect coupled with a discriminatory motive. In the absence of both an effect *and* a motive, no court other than the Ninth Circuit in its decision below, has suggested a facially neutral statute could be invalidated as discriminatory. As Judge O'Scannlain, joined by Judges Bea, Callahan, Ikuta, and Tallman, pointed out in dissent from the denial of rehearing

en banc, the Ninth Circuit's decision went beyond the *McDonnell Douglas* framework and beyond any alternative to that framework. It created, "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. In doing so, as Judge O'Scannlain correctly noted, the Ninth Circuit separated itself from all other appellate courts in the nation by expanding "disparate treatment" so that it encompasses claims that do not require any actual discrimination. Pet. App. 139a.

B. THE NINTH CIRCUIT'S DECISION IS AN OPEN INVITATION TO IMPROPERLY FLYSPECK THE LOCAL LEGISLATIVE PROCESS

If plaintiffs can survive summary judgment on an intentional discrimination claim brought under the FHA or the ADA based solely on evidence of an arguably discriminatory motivation for enacting a particular ordinance, they essentially have the power to void the ordinance without ever having to prove the ordinance was in fact discriminatory. As this Court has explained, legislative motive standing alone is not a proper basis for declaring a statute unconstitutional or invalid. *United States v. O'Brien*, 391 U.S. 367, 383-85 (1968). A court may not restrain the lawful exercise of legislative power based on an assumption that power was wielded with an unlawful motive. *Id.* at 383. But, the Ninth Circuit's position is essentially that some evidence of an unlawful leg-

islative motive, even if not expressed on the face of an ordinance, and even if not coupled with any discriminatory effect, is sufficient to allow a plaintiff to survive summary judgment and establish a prima facie case of intentional discrimination.

As Judge O'Scannlain noted, the Ninth Circuit's decision breaks with decisions by other circuits that have "rejected challenges to facially neutral laws based on discriminatory motives of municipal actors." Pet. App. 141a. In doing so, the Ninth Circuit encourages plaintiffs and courts to examine every utterance by a decision-maker involved in enacting an ordinance to discern arguably discriminatory intent. Inviting courts to re-examine the legislative process and make assumptions about potentially discriminatory motives improperly restricts local legislative authority and decision-making capability. Amici agree with Judge O'Scannlain's assessment of the Ninth Circuit's decision as creating an opportunity for plaintiffs to transform every stray remark made during the sometimes messy legislative process into a complete defense to summary judgment:

> According to the panel, a plaintiff would present a triable case with only a bare accusation that a councilman or a community activist uttered an epithet in the legislative prelude to a challenged ordinance. As long as the enactment importunes a party in some even menial way, he will have suffered a sufficient injury to allege discrimination—and to survive summary judgment to boot.

Pet. App. 142a.

Courts seeking to enforce anti-discrimination laws should be focused on reviewing evidence of discrimination, not on flyspecking legislative motivation or divining legislative intent from stray remarks. Not only does the Ninth Circuit's decision encourage that kind of flyspecking and divination, it places no restrictions, and suggests no boundaries, on a court's ability to inquire into the legislative process. The decision allows courts to engage in a searching inquiry of legislative motivation that is no more limited, certain, or meaningful than tasseomancy. Amici have the same questions about the scope of an inquiry into legislative motivation as did Judge O'Scannlain, who asked in his dissent:

> What sorts of pre- or post-enactment statements may a court examine for this impermissible intent—utterances during committee meetings, quotations from newspaper articles, political stump speeches? Who among the various government actors must express this intent—only those officers with a vote on the city council, or any municipal employee involved in the drafting? What may or may not private citizens say in support of local initiatives, and when may they say it, lest any of their ill motives taint the legislative process?

Pet. App. 143a-144a.

The Ninth Circuit's decision raises all of those questions, but answers none of them, leaving local agencies in a quandary, and opening the door to judicial interference with the legislative process.

* * *

Anti-discrimination statutes are intended to prevent discrimination; they are not intended to open a dialogue about legislative motivation. If a facially neutral, non-discriminatory, ordinance results in actual discrimination against a protected group then it should be invalidated. But, in the absence of any evidence that an ordinance actually discriminates against a particular group, it must be presumed to be neutral and non-discriminatory. Assumed motivations are not actual effects, and this Court should reject the Ninth Circuit's attempt to conflate the two. Amici urge this Court to grant certiorari to correct the practical problems posed by the Ninth Circuit's decision. Amici also urge this Court to provide local agencies with guidance about the scope of their liability for disparate treatment claims based on facially neutral ordinances that do not entail any actual discrimination.

CONCLUSION

The Court should grant the petition for writ of certiorari, and reverse the Ninth Circuit's decision.

Respectfully submitted,

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