No. 14-56

IN THE

Supreme Court of the United States

CITY OF NEWPORT BEACH, CALIFORNIA,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' opposition to review rests on a severe misreading of the decision below. The Ninth Circuit held that disparate-*treatment* claims under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, can proceed to trial without any proof that the plaintiff was *treated differently* because of a disability. Pet. App. 28a-32a, 38a-46a. That holding directly contradicts decisions of the Eighth and Eleventh Circuits, deepens broader confusion concerning disparate-treatment claims, and contravenes this Court's clear precedents.

Respondents elide these conflicts by defending a ruling very different from the one the Ninth Circuit actually rendered. They contend that the decision below comports with the case law of other circuits and this Court because the City enforced the 2008 Ordinance in a discriminatory fashion. Opp. 1, 19-36. That is incorrect: The record shows—and the Ninth Circuit relied on—enforcement, not *discriminatory* enforcement. The district court held that respondents "failed to identify any evidence showing that they were treated differently than similarly situated non-disabled individuals." Pet. App. 78a. The Ninth Circuit reversed based solely on purported evidence that the Ordinance "was enacted in order to discriminate against [respondents]" and that "its enactment and enforcement *harmed* them." *Id.* at 44a, 60a (emphasis added). It expressly held that disparate-treatment plaintiffs *need not* "prove the existence of a better-treated entity." *Id.* at 31a. As Judge O'Scannlain's dissent explains, the decision below entrenches a new theory of disparate-treatment liability that other circuits have rejected and this

Court's precedents foreclose. *See id.* at 132a, 135a (O'Scannlain, J., dissenting from denial of rehearing en banc).

Respondents' assurances that this recurring issue is unimportant (Opp. 36-38) are premised on the same misunderstanding of the decision below. They disregard the broad sweep of the Ninth Circuit's new "overdiscrimination" standard, which will subject facially nondiscriminatory policies to challenge whenever plaintiffs can muster "'*any indication* of discriminatory motive.'" Pet. App. 31a, 33a (emphasis added). And respondents have no answer to the City's and *amici*'s showing that the panel's reliance on statements of individual officials and citizens to establish animus will invite intrusive interference with local governance and chill political speech.

Left undisturbed, the decision below and the uncertainty that it deepens will take an unwarranted toll on local governments and the democratic process. Only this Court can avert these burdens and restore uniformity and clarity to this important area of federal law.

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT AND DEEPENS EXISTING CONFUSION.

A. The Ninth Circuit's holding that disparate-treatment claims under the FHA and ADA do not require proof of discriminatory effect (Pet. App. 28a-32a) flatly contradicts both *Oxford House-C* v. *City of St. Louis*, 77 F.3d 249, 251-52 (8th Cir. 1996), and *Schwarz* v. *City of Treasure Island*, 544 F.3d 1201, 1216-17 (11th Cir. 2008). Pet. 16-20. Respondents' attempt to refute this conflict rests on a fundamental misunderstanding of all three cases.

1. Respondents claim that there is no conflict because the City, unlike the defendants in *Oxford House-C* and *Schwarz*, enforced the 2008 Ordinance in a discriminatory manner. Opp. 19-22. But that is not what the Ninth Circuit held.

The district court rejected respondents' disparate-treatment claims because respondents did not present "any evidence that similarly situated nondisabled individuals have been treated differently than disabled individuals in the enforcement of [the Ordinance]." Pet. App. 68a. The Ninth Circuit reversed *not* because respondents demonstrated a discriminatory effect, but because, in the panel's view, proof of a discriminatory effect is *unnecessary*. *Id.* at 31a. A disparate-treatment plaintiff, it held, need show only "'that a discriminatory reason . . . motivated' the defendant and that the defendant's actions adversely affected the plaintiff in some way." *Id.* at 29a.

Applying that erroneous standard, the Ninth Circuit held that respondents' disparate-treatment claims could proceed because the Ordinance supposedly "was enacted in order to discriminate against [respondents] on the basis of disability" and because "its enactment and enforcement harmed them," Pet. App. 60a—without regard to whether respondents were treated less favorably than others similarly situated. Properly understood, the rule the Ninth Circuit articulated and applied thus cannot be squared with the Eighth and Eleventh Circuits' holdings that discriminatory effect is required. *See Schwarz*, 544 F.3d at 1216-17; *Oxford House-C*, 77 F.3d at 251-52; *see also* Pet. App. 141a-42a (O'Scannlain, J., dissenting from denial of rehearing en banc).

2. Respondents concede that the Ninth Circuit does not require "proof of disparate treatment of similarly situated persons" for claims "not premised on selective prosecution." Opp. 22. They argue that the decision below nevertheless does not conflict with *Oxford House-C* or *Schwarz* because those cases concerned only "claims of discriminatory enforcement of pre-existing, facially neutral laws." *Id.* at 20.

That is wrong. The plaintiffs in *Oxford House-C* claimed that part of the law at issue—its eight-person limit for group homes—was itself discriminatory. *See* 77 F.3d at 251-52. The Eighth Circuit rejected that claim because, "[r]ather than discriminating against [group-home] residents, the [law]"—like the 2008 Ordinance—"*favors* them on its face." *Id.* at 251 (emphasis added). And although *Schwarz* did not directly confront a facial challenge to a law, its reasoning applies equally to such claims. *See* 544 F.3d at 1216-17.[1]

Even on respondents' crabbed reading, moreover, the decisions still conflict because the Ninth Circuit also applied its misguided standard to respondents' discriminatory-enforcement claims. After reviving respondents' challenge to the Ordinance itself, the

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[1] Citing dictum in *Schwarz* that the "'analysis *might* have been different'" for claims challenging a law itself, respondents argue that the Eleventh Circuit's analysis *would* be different. Opp. 20-21 (emphasis added). But their own authority, *Johnson* v. *Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc), refutes that conjecture. *Johnson* rejected a challenge to a voting law as racially discriminatory because, *inter alia*, the "racial effects of the provision were minor." *Id.* at 1226-27. Such discriminatory effects would be irrelevant if the Eleventh Circuit followed respondents' view.

panel held that, "*[f]or similar reasons*," a "triable issue of fact" existed on respondents' challenge to its enforcement. Pet. App. 42a n.29 (emphasis added). The same "evidence that the Ordinance was enacted with discriminatory intent," it reasoned, "also provides support for [respondents'] claim that the City's enforcement strategy was similarly calculated to accomplish a discriminatory goal." *Ibid.*

The decision below thus deemed purported evidence of the City's *intent* in enacting and enforcing the Ordinance sufficient to sustain respondents' discriminatory-enforcement claims, regardless of whether respondents were treated differently from others similarly situated. That holding is antithetical to the Eighth and Eleventh Circuits' view that for "selective-enforcement" claims, "evenhanded application of the law is the end of the matter." *Schwarz*, 544 F.3d at 1216-17; *see also Oxford House-C*, 77 F.3d at 252.[2]

B. Respondents also fail to refute the broader lower-court confusion regarding the requirements of disparate-treatment claims. Respondents concede that the Second Circuit "agree[s]" with the Ninth Circuit's approach in addressing selective-enforcement claims under other federal laws. Opp. 22; *see also* Pet. 20-22. And they do not address the Third Circuit's contrary holding in *DiBiase* v.

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[2] Contrary to respondents' contention (Opp. 21), the panel's passing reference to "the City's actual enforcement strategy" (Pet. App. 42a n.29) does not refer to discriminatory *effect*. As the context makes clear, that supposed "enforcement strategy" was merely evidence of what the City's enforcement of the Ordinance was "*calculated*" to achieve, *ibid.* (emphasis added), not proof that enforcement actually yielded a discriminatory result.

SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995), that disparate-treatment plaintiffs under the Age Discrimination in Employment Act, 29 U.S.C. § 623, must "prove both unequal treatment and intent to discriminate." 48 F.3d at 728 (emphasis omitted). Respondents briefly attempt to distinguish *Smith & Lee Associates, Inc.* v. *City of Taylor*, 102 F.3d 781 (6th Cir. 1996), because the plaintiffs there "failed to establish discriminatory intent." Opp. 24. But respondents do not attempt to square the hybrid legal standard that the Sixth Circuit applied—combining elements of the Eighth and Eleventh Circuits' standard with elements of the Ninth and Second Circuits' standard, *see* Pet. 22—with other circuits' holdings.

Respondents, in short, utterly fail to refute the conflict and disarray on this important question of federal law.

II. THE DECISION BELOW CONTRADICTS THIS COURT'S PRECEDENTS.

Respondents' attempt to square the decision below with this Court's cases (Opp. 25-36) likewise misconstrues the Ninth Circuit's ruling and misreads this Court's precedents.

A. The Ninth Circuit did *not* conclude, as respondents claim, that they "had shown that the Ordinance had a discriminatory effect." Opp. 30. As explained above, *supra* pp. 3-5, the panel expressly deemed proof of a discriminatory effect *unnecessary*. Pet. App. 31a. It held only that respondents presented evidence that the City "caused harm," *id.* at 7a—*i.e.*, *some* injury, even if nondiscriminatory. Under this Court's cases, however, mere injury is insufficient, even with proof of discriminatory motive.

Pet. 24-29. The Ninth Circuit nevertheless relied on generalized harm to respondents—rather than a discriminatory injury—because injurious (but nondiscriminatory) effects are all respondents have shown. In fact, as the district court found, the 2008 Ordinance treats group homes "'*more favorably* than all other group residential uses.'" Pet. App. 90a (emphasis added).

Respondents' claim that the Ordinance's use of the "single housekeeping unit" concept as a "proxy to exclude group homes" is itself "evidence of discrimination" (Opp. 31-32) fares no better. Proxy discrimination involves the use of "criteria that are almost exclusively indicators of membership in the disfavored group." Pet. App. 33a n.23. As respondents' own authority illustrates, that is a high threshold indeed. *See Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 270-81 (1979) (upholding classification that gave preference to group that was 98% male). Respondents did not show, and the Ninth Circuit did not hold, that this high standard was satisfied. *See* Pet. App. 33a n.23 (distinguishing respondents' claims from "proxy discrimination").[3]

B. Unable to show that the Ninth Circuit found evidence of discriminatory effect, respondents ultimately embrace its view that disparate-treatment plaintiffs need not prove they were treated differently. Opp. 29. But respondents, like the Ninth Circuit, fail to reconcile that view with this Court's teaching.

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[3] Nor is respondents' comparison of group homes to vacation rentals availing. Opp. 34. The district court expressly found that such short-term lodgings were not similarly situated to group homes. Pet. App. 70a-72a. The Ninth Circuit left that finding undisturbed. *See id.* at 40a-41a.

As the City demonstrated, *Palmer* v. *Thompson*, 403 U.S. 217, 224-25 (1971), repudiated respondents' view in the equal-protection context. Pet. 26-27. Respondents' assertion that *Palmer* "was not confronted with direct evidence" of discriminatory motive (Opp. 34) is incorrect. *Palmer* acknowledged that "[s]ome evidence in the record" indicated a discriminatory motive, 403 U.S. at 225, and three dissenters concluded that discrimination was the defendants' *sole* motive, *see id.* at 255, 258-60 (White, J., dissenting). But the Court held that motive alone did not matter *absent* proof that a protected class was treated "differently from" others. *Id.* at 225 (majority opinion). And *Washington* v. *Davis*, 426 U.S. 229 (1976), noted only that "legislative purpose" is not "irrelevant," *not* that it is *sufficient* to prove disparate treatment. *Id.* at 244 n.11.

Respondents offer no other analogous case where disparate treatment was found without discriminatory effect. They do not deny that such an effect was present in *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). And although they invoke *Hunter* v. *Underwood*, 471 U.S. 222 (1985), and *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964), discriminatory effects plainly were present in each case. *See Hunter*, 471 U.S. at 227 (disparate effect was "indisputable"); *Griffin*, 377 U.S. at 230 (school closing affected only black students). The same is true of every case respondents offer as proof that a defendant's "purpose of injuring" a disfavored group suffices to establish disparate-treatment liability. Opp. 26-27, 35-36; *see also United States* v. *Windsor*, 133 S. Ct. 2675, 2694 (2013); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534-36 (1993); *City of Cleburne* v. *Cleburne Living Ctr., Inc.*,

473 U.S. 432, 447-48 (1985); *Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 538 (1973); *Flores* v. *Pierce*, 617 F.2d 1386, 1389 (9th Cir. 1980).

Respondents claim that *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999), held that disparate-treatment plaintiffs need not prove they were treated differently. Opp. 29-30. But *L.C.* concerned an ADA claim of "segregation," which the ADA expressly *identifies* as a "'form of discrimination.'" 527 U.S. at 600 (brackets omitted). *L.C.* is thus the exception that proves the rule.

Adopting respondents' and the Ninth Circuit's position, in short, would require expanding disparate-treatment liability far beyond what this Court's precedents permit. The Court should not countenance lower courts' attempts to expand the reach of federal law to prohibit facially nondiscriminatory policies that Congress did not intend to forbid.[4]

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Respondents have conceded that "[t]he issues raised" have "significant importance." Resp. Extension App. 2 (Aug. 1, 2014). Indeed, as *amici* explain, "absent this Court's intervention, local land use regu-

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[4] The Court recently granted certiorari again to consider whether the FHA permits disparate-impact claims. *Tex. Dep't Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, No. 13-1371 (cert. granted Oct. 2, 2014). Given that respondents have asserted disparate-impact claims, Pet. App. 45a, and given the relationship between disparate-treatment and disparate-impact theories, *id.* at 139a (O'Scannlain, J., dissenting from denial of rehearing en banc), the Court, at a minimum, should hold this petition pending its disposition of that case.

lations will be subject to attack on all fronts." Cal. Cities Br. 11. The decision below will "frustrate the democratic process" by "chilling crucial speech," causing "public agency staff and legal counsel to skew their advice," deterring innovation in local governance, and inhibiting candid dialogue between the public and elected officials. IMLA Br. 3-12 (capitalization omitted); *see also* League of Cal. Cities Br. 6-9. These effects will not be confined to local zoning issues, but likely will spread to many areas of quintessentially local concern—from public-health regulations to rules governing public parks. *See* IMLA Br. 13-14.

Respondents do not deny that allowing plaintiffs "to challenge any facially neutral law by alleging the existence of lawmaker or citizen statements indicating an evil motive" (Opp. 36) would significantly interfere with local governance. Instead, they claim that the decision below will not "forc[e]" municipalities "into extended litigation" or subject them to liability based on "stray remarks" because disparate-treatment plaintiffs must prove that "'the decisionmaker'" chose "'a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.'" *Id.* at 36-37. The decision below belies that conjecture.

As the Ninth Circuit explained, "'*very little*'" evidence of improper motive is needed to survive summary judgment. Pet. App. 31a (emphasis added). Moreover, because the decision below subjects defendants to disparate-treatment liability without any proof of discriminatory *effect*, "'any indication of discriminatory motive . . . may suffice'" to reach trial. *Ibid.* (alteration in original). *Amici*'s concern that a remark by a single legislator or private citizen could,

under that standard, "taint the collective decision" and invite burdensome, intrusive litigation is amply justified. Cal. Cities Br. 11-12; *see also* IMLA Br. 6-7.

Respondents' assertion that this case is "unusual" and unlikely to recur (Opp. 37) similarly disregards the breadth of the Ninth Circuit's holding. Local governments commonly enact facially nondiscriminatory laws that impose some burdens on regulated persons.[5] Under the decision below, any such law might trigger a disparate-treatment claim, which must be litigated to trial if the plaintiff musters "'any indication'" of discriminatory motive. Pet. App. 31a. And because the same disparate-treatment standard underpins an array of federal laws, the Ninth Circuit's holding could implicate "nearly every facially nondiscriminatory municipal legislative enactment." IMLA Br. 13.

IV. RESPONDENTS' ASSERTED VEHICLE PROBLEMS ARE ILLUSORY.

Respondents' assertions that this case is an unsuitable vehicle to resolve this important and recurring question are makeweights. Contrary to their claim (Opp. 17), the case's posture poses no obstacle to review. The Court often grants certiorari where, as here, a district court dismissed claims or granted summary judgment but a court of appeals reversed.

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[5] Respondents acknowledge, for example, the City's legitimate concern with preventing over-concentration of group homes. Opp. 13. Indeed, the City followed federal guidance warning that over-concentration "could adversely affect" disabled individuals and "would be inconsistent with" their integration into communities. C.A. Supp. E.R. 5; *see also* Pet. App. 179a.

See, *e.g.*, *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2127 (2014); *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1817-18 (2014); *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1317 (2011). If this Court reverses the Ninth Circuit's ruling, the district court's decision will be reinstated, and the City will be entitled to judgment on the relevant claims. There is no reason to require defendants to shoulder the burdens of litigating *to trial* claims that are foreclosed by federal law.[6]

Respondents' contention that the Ninth Circuit's resuscitation of their discriminatory-enforcement claims provides an independent basis to affirm the decision below (Opp. 17-18) is equally meritless. As discussed above, *supra* pp. 4-5, the Ninth Circuit's analysis of those claims was expressly predicated on its holding regarding respondents' challenge to the Ordinance itself. A ruling rejecting the Ninth Circuit's erroneous disparate-treatment test would invalidate its judgment on respondents' discriminatory-enforcement claims also. Moreover, respondents' discriminatory-enforcement claims concern only specific, prior applications of the Ordinance. Even if those claims could survive independently, reversal of the decision below would allow the City to apply the Ordinance prospectively.

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[6] The respondents in another case concerning the FHA's scope raised the same supposed vehicle problem, almost verbatim. Br. in Opp. 6-7, *Magner* v. *Gallagher*, No. 10-1032 (U.S. June 15, 2011). This Court nevertheless granted review. 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012) (dismissed by stipulation).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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