No. _____

In the
Supreme Court of the United States

CITY OF COSTA MESA

Petitioner,

v.

SOCAL RECOVERY, LLC, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq*.) and Fair Housing Act (42 U.S.C. § 3601 *et seq*.) define "disability" as an impairment that substantially limits one or more major life activities. This Court's precedent* requires a natural person suing for disability discrimination to make an individualized showing of substantial limitation.

Can entities such as group homes, which derive their standing to sue from the disability of their residents, forego proving that their individual residents are substantially impaired and thereby disabled, even though their residents would have to make such a showing if they had brought the discrimination claims directly themselves?

2. The Americans with Disabilities Act and Fair Housing Act also define disability as "being regarded" as having a physical or mental impairment.

Can public comments made to a governmental entity be used to show that the entity regarded individuals as disabled, even when the entity did not adopt or approve the particular comments?

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* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

PARTIES TO THE PROCEEDING

Petitioner City of Costa Mesa is a California municipality that was the defendant in the district court and the appellee in the court of appeals.

Respondents SoCal Recovery, LLC, and RAW Recovery, LLC, are California limited liability companies that were the plaintiffs in the district court and the appellants in the court of appeals.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

SoCal Recovery, LLC v. City of Costa Mesa, No. 18-cv-1304 (Apr. 10, 2020)

National Therapeutic Services, Inc. v. City of Costa Mesa, No. 18-cv-1080 (July 17, 2020)

United States Court of Appeals (9th Cir.):

SoCal Recovery, LLC v. City of Costa Mesa, Nos. 20-55820, 20-55870 (Jan. 3, 2023)

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PETITION FOR A WRIT OF CERTIORARI

The City of Costa Mesa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a-35a) is reported at 56 F.4th 802. The orders of the district court (Pet. App. 36a-52a, 53a-69a) are not published in the *Federal Supplement* but are available at 2020 WL 2528002 and 2020 WL 5005550.

JURISDICTION

The court of appeals entered judgment on January 3, 2023 (Pet. App. 2a), and denied petitioner's timely petition for rehearing en banc on February 23, 2023 (Pet. App. 70a). On May 5, 2023, Justice Kagan extended the time to file a petition for a writ of certiorari to July 21, 2023. No. 22A971. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 3602 provides in pertinent part:

§ 3602. Definitions

As used in this subchapter—

* * *

(h) "Handicap" means, with respect to a person—

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21).

* * *

42 U.S.C. § 12102 provides in pertinent part:

§ 12102. Definition of disability

As used in this chapter:

(1) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

* * *

INTRODUCTION

Group homes for persons recovering from alcoholism or drug addiction ("sober living homes") are part of the $50 billion addiction-recovery industry. *See* Colton Wooten, *My Years in the Florida Shuffle of Drug Addiction*, New Yorker (Oct. 14, 2019), https://tinyurl.com/346ur44m. These homes, which offer no medical treatment, have proliferated in recent decades, particularly in coastal cities. *See id.*; *Rehab Riviera: An Investigation into the Southern California Rehab Industry*, Orange County Register (2017), https://tinyurl.com/semabuex. So have the legal controversies they generate.

Because most states do not regulate these facilities, local municipalities are often on the front lines addressing the impacts. Municipalities must walk a fine line to reconcile their public safety obligations and zoning responsibilities with the constraints of federal statutes prohibiting discrimination on the basis of disability.

This case is an exemplar of such disputes. Petitioner the City of Costa Mesa (the City) requires group homes, including sober living homes, to be spaced at least 650 feet apart to prevent an overconcentration of recovery facilities in one neighborhood. Respondents SoCal Recovery, LLC (SoCal) and RAW Recovery, LLC (RAW) operated homes closer than allowed. When the City declined to grant them exceptions from the distancing requirement, they separately sued the City, alleging disability discrimination. The district court granted summary judgment in the City's favor, and the Ninth Circuit reversed.

The summary judgments and the appeals turned on a threshold question in every disability discrimination suit – whether the persons allegedly discriminated against qualified as "disabled" under federal statutes. This Court has held that *individuals* bringing Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*., claims must provide individualized evidence that they qualify as disabled under federal law. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

But this Court has never addressed the standard for *entities* bringing Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq*., or ADA claims on behalf of those they serve, and here the Ninth Circuit held that an entity such as a sober living home "need not provide individualized evidence of the 'actual disability' of their residents" to defeat summary judgment. Pet. App. 24a. Compounding this error, the Ninth Circuit also held that comments made by members of the public in open City meetings about the sober living homes could be attributed to the City (even if the City expressed no opinion about them) to assess whether the City generally regarded the entities' clients as disabled.

These holdings go against rulings of this Court which require an individualized showing of disability and governmental expression of discriminatory intent. Other circuits, too, have deviated from this Court's holdings on these two issues, in the process adopting a wide array of differing tests that share one characteristic: a lower standard of showing a disability than an individual plaintiff would have to meet

under this Court's precedent. This case offers the opportunity to bring the circuits into alignment with this Court and among themselves.

STATEMENT OF THE CASE

California licenses alcohol and drug program facilities that provide substance abuse treatment on site. *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1148 n.3 (9th Cir. 2013). In contrast, "sober houses," also known as "sober living homes," are group homes with no formal substance abuse treatment program, occupied by persons in recovery and run by third-party companies. *Id.* California, like most states, does not regulate or license these sober living homes.

Over time, however, the City enacted ordinances governing various group homes, including sober living homes. 20-55870 C.A. Doc. 35 (C.A. Statutory Addendum), at 85-135.[1] In doing so, it recognized:

> [T]he purpose of sober living homes is to provide a comfortable living environment for persons with drug or alcohol addictions in which they remain clean and sober and can participate in a recovery program in a residential, community environment, and so that they have the opportunity to reside in the . . . neighborhood of their choice.

Id. at 87, 112, 124.

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[1] Reproducing Costa Mesa, Cal., Ordinance 14-13 (Oct. 21, 2014); Costa Mesa, Cal., Ordinance 15-06 (July 7, 2015); Costa Mesa, Cal., Ordinance 15-11 (Nov. 17, 2015); Costa Mesa, Cal., Ordinance 17-05 (May 2, 2017).

The City enacted these ordinances because it had "seen a sharp increase in the number of sober living homes," driven at least in part by the provisions of the Patient Protection and Affordable Care Act and California's Substance Abuse and Crime Prevention Act of 2000, which placed an emphasis on rehabilitation and provided insurance coverage for it. C.A. Statutory Addendum 86, 111, 123. The rise in the number of purported sober living homes in Costa Mesa led to "the clustering of sober living facilities in close proximity to each other creating near neighborhoods of sober living homes," and contributed to "neighborhood parking shortfalls, overcrowding, inordinate amounts of second-hand smoke, and noise." *Id.* at 86, 111, 123.

The City's stated purpose in enacting these ordinances included providing "an accommodation for the handicapped that is reasonable and actually bears some resemblance to the opportunities afforded non-handicapped individuals to use and enjoy a dwelling unit in a residential neighborhood," and "comfortable living environments that will enhance the opportunity for the handicapped, including recovering addicts to be successful in their programs." C.A. Statutory Addendum 93, 115.[2]

The findings prefacing the ordinances noted that "at least some operators of sober living homes [were]

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[2] *Accord* Matthew M. Gorman, Anthony Marinaccio & Christopher Cardinale, *Fair Housing for Sober Living: How the Fair Housing Act Addresses Recovery Homes for Drug and Alcohol Addiction*, 42 Urb. Law. 607, 608 (2010) (sober living facilities and operators "vary greatly": "[b]ecause nearly any single family home can become a 'sober living home' [just] by adopting the label, some single family homes house upwards of twenty or thirty individuals").

driven more by a motivation to profit rather than to provide a comfortable living environment . . . which remotely resemble[d] the manner in which the non-disabled use and enjoy a dwelling." C.A. Statutory Addendum 88, 112, 125. The City aimed to provide the disabled with opportunities similar to those of non-disabled individuals, and to prevent operators from skirting the City's regulations on boarding-houses. *Id.* at 93, 115.

The City's purpose in doing so was far from discriminatory. As the City noted in its reasons for denying one of the applications in this case:

> The City determined that housing inordinately large numbers of unrelated adults in a single dwelling or congregating sober living homes in close proximity to each other does not provide the disabled with an opportunity to "live in normal residential surroundings," but rather places them into living environments bearing more in common with the types of institutional/campus/dormitory living that the state and federal laws were designed to provide relief from for disabled persons.

20-55870 C.A. E.R. 2260.

To fulfill these goals, the City's ordinances created various regulations governing group homes and sober living homes. In particular, the ordinances created a dispersal requirement for all sober living homes. They required that "[t]he sober living home is not located within 650 feet, as measured from the closest property lines, of any other sober living home or a state licensed alcoholism or drug abuse recovery or treatment facility." C.A. Statutory Addendum 95, 97,

130, 132. The City found that "a 650-foot distance requirement provides a reasonable market for the purchase and operation of a sober living home within the City and still results in preferential treatment for sober living homes."[3] *Id.* at 90.

The ordinances provide that an applicant wanting to operate a sober living home may seek relief from the strict application of these requirements by applying to the City setting forth specific reasons as to why accommodation is necessary. C.A. Statutory Addendum 96, 116, 131, 133.

When the ordinances were passed, SoCal and RAW operated sober living homes that did not comply with the 650-foot spacing requirement. 20-55820 C.A. E.R. 535-36; 20-55870 C.A. E.R. 2023. Both sought relief from the distancing requirement by applying for

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[3] The City's zoning code defines:

- A "boardinghouse" as "[a] residence or dwelling, other than a hotel, wherein rooms are rented under two (2) or more separate written or oral rental agreements, leases or subleases or combination thereof";
- A "group home" as "[a] facility that is being used as a supportive living environment for persons who are considered handicapped under state or federal law"; and
- A "sober living home" as "a group home for persons who are recovering from a drug and/or alcohol addiction and who are considered handicapped under state or federal law."

C.A. Statutory Addendum 48-50. The ordinances give preferential treatment to such residences over similar living facilities for non-disabled individuals (i.e., boardinghouse-style residences). *Id.* at 90, 113.

permits to operate these homes, which the City denied. 20-55820 C.A. E.R. 1720-22, 1732-34, 1752-54; 20-55870 C.A. E.R. 2254-56.

SoCal and RAW separately sued the City in the United States District Court for the Central District of California. They alleged that the City had violated the ADA and FHA, among other federal and state statutes, in failing to grant permits for their sober living homes. 20-55820 C.A. E.R. 2238; 20-55870 C.A. E.R. 2983.

In discovery in each case, the City sought from SoCal and RAW all documents related to its clients' "medical information, drug use, disability status, record of such, and being regarded as such." 20-55820 C.A. E.R. 2131; 20-55870 C.A. E.R. 2820. SoCal and RAW objected and refused to produce such documents on the ground they violated their residents' medical privilege. 20-55820 C.A. E.R. 2131; 20-55870 C.A. E.R. 2820.

In each case, the City moved for summary judgment on various grounds, including that "[a]ll of Plaintiffs' discrimination claims fail because Plaintiffs cannot meet their burden to prove that they are associated with individuals that qualify as disabled." 20-55820 C.A. E.R. 2102; 20-55870 C.A. E.R. 2787. The district court agreed. In both cases, it held that

> Plaintiffs have not created any genuine dispute of material fact as to whether [their] clients are disabled, and ha[ve] not made a showing sufficient to establish the existence of this element

> essential to their FHA and ADA causes of action, on which they will bear the burden of proof at trial . . . .

Pet. App. 48a-49a; *id.* at 66a.

SoCal and RAW appealed the summary judgments to the Ninth Circuit. The Ninth Circuit decided the two appeals in a single 38-page published decision, in which it reversed both summary judgments and remanded the cases to the district court. Pet. App. 1a-35a. In so doing, it held that "Appellants need not provide individualized evidence of the 'actual disability' of their residents" to defeat summary judgment. *Id.* at 24a. Instead, the Ninth Circuit announced that entities could satisfy the threshold disability element of FHA and ADA claims simply by showing "on a collective basis" through their policies and procedures "that they serve or intend to serve individuals with actual disabilities." *Id.* The court also opined that testimony of former residents about the effect of their addiction *before* entering recovery, including loss of a job, home, or family from drinking or drug use, could show the requisite substantial limitation on a major life activity – even though this did not establish that they experienced a substantial limitation while they were sober and residing at the sober living home. *Id.* at 28a-29a.

The court of appeals also held that, in evaluating summary judgment, the trial court should consider that "the City may have been influenced by the way others wrote and spoke about those with disabilities at public hearings." Pet. App. 33a. The City petitioned for rehearing en banc, which the court of appeals denied. *Id.* at 70a-71a.

REASONS TO GRANT THE PETITION

The sober living home industry, and more broadly the addiction treatment industry, has experienced explosive growth in the past ten years. Katrice Bridges Copeland, *Liquid Gold*, 97 Wash. U. L. Rev. 1451, 1452 (2020). Yet as of 2020, sober living homes were unregulated in 44 of the 50 states. Bess Greenberg, *Blind Spot in Plain Sight: The Need for Federal Intervention in the Sober Living Home Industry and the Path to Making It Happen*, 71 Emory L.J. 107, 111 (2021).

This has left local municipalities on the frontlines, particularly through the exercise of their zoning responsibilities, to protect the residents of these homes.[4] The record below reflects reporting on the mounting problems municipalities must confront.[5]

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[4] *See, e.g.*, Anaheim, Cal., Mun. Code § 18.38.123, https://tinyurl.com/4yh9zn9s; Dublin, Ohio, Code of Ordinances § 153.073, https://tinyurl.com/jctxvxj7; Howard Fischer, Tucson.com, *Judge Allows Arizona to Enforce New Regulations on 'Sober Living' Homes* (June 4, 2020), https://tinyurl.com/y6tu4vf9.

[5] *See, e.g.*, 18-cv-1080 Dist. Ct. Doc. 82-14, at 42-44 ("Body brokering, where addicts are sold as investments, can continue in sober homes, for now"), 90-91 ("Long shower leads to stabbing, arrest at Dana Point sober living facility"), 98-102 ("No one is inspecting sober living homes, but bill would require minimum standards if they want funding"), 105-08 ("O.C. District Attorney charges family, doctors with insurance fraud related to sober living homes, urine tests"), 150-55 ("Sober Living: Modern family or big business?"), 162-64 ("OPINION: The Access to Sober Living Act will stop unethical practices at sober living homes").

News coverage elsewhere is similarly filled with concerns about the proliferation of these homes and their abuse of vulnerable communities for profit.[6]

The result has been a tsunami of federal disability discrimination litigation between sober living homes and municipalities seeking to reconcile the need to protect the homes' vulnerable residents with the interests they must safeguard for the public at large.

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[6] *See, e.g.*, Cecily Hilleary, *Phony 'Sober Living' Homes in Arizona Target Vulnerable Native Americans*, Voice of Am. (Feb. 28, 2023), https://tinyurl.com/yc4ys58w (homes that bill for healthcare benefits they never deliver to at-risk Native Americans "skirt[ ] Phoenix regulations that facilities with six or more residents must register with the city and may not operate within 1,320 feet of any other group home. By keeping just five people to a house, they avoid registration and can rent adjoining properties"); Elise Kaplan, *They Were Promised Help Getting Sober and a Fresh Start. Instead, They Ended up Stranded in Arizona*, Albuquerque J. (June 8, 2023), https://tinyurl.com/58bkaxcm; Substance Abuse & Mental Health Servs. Admin., *Recovery Housing: Best Practices and Suggested Guidelines* 6, https://tinyurl.com/4vc99nx8 (last visited July 20, 2023) (highlighting unethical practice of "patient brokering," where "a broker or agent refers a person, who is either in active use or has relapsed after treatment, to an unethical treatment center for a financial fee or some other valuable kickback"); Teri Sforza, *OC Cities Continue to Wrestle with Irresponsible Addiction Recovery Homes, Grand Jury Finds*, Orange Cnty. Reg. (June 13, 2023), https://tinyurl.com/4cctp9kk; Orange Cnty. Grand Jury, *Welcome to the Neighborhood: Are Cities Responsibly Managing the Integration of Group Homes?* (2023), https://tinyurl.com/yu3vp3xb (chronicling concerns about sober living homes in Orange County, California, and citing multiple news reports of challenges associated with these homes).

The Central District of California has been a particular flashpoint for these cases,[7] but they have now proliferated in district courts across the United States.[8] Much of this litigation is now reaching the circuit

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[7] *See Ohio House, LLC v. City of Costa Mesa*, 2022 WL 18284406, at *1 (C.D. Cal. Nov. 16, 2022); *Summit Coastal Living, Inc. v. City of Costa Mesa*, 2020 WL 4353677, at *2-3 (C.D. Cal. May 1, 2020); *Intervention911 v. City of Palm Springs*, 2020 WL 1889042, at *1, *3 (C.D. Cal. Apr. 15, 2020); *Pac. Shores, LLC v. City of Costa Mesa*, 2020 WL 2475091, at *2-3 (C.D. Cal. Mar. 31, 2020); *Casa Capri Recovery, Inc. v. City of Costa Mesa*, 2019 WL 7882531, at *2 (C.D. Cal. Nov. 19, 2019); *Yellowstone Women's First Step House, Inc. v. City of Costa Mesa*, 2019 WL 6998664, at *1 (C.D. Cal. July 16, 2019), *aff'd in part, vacated in part*, 2021 WL 4077001 (9th Cir. Sept. 8, 2021); *Solid Landings Behav. Health, Inc. v. City of Costa Mesa*, 2015 WL 13919156, at *1, *3 (C.D. Cal. Sept. 18, 2015).

[8] Alabama (*Oxford House, Inc. v. City of Dothan*, 2022 WL 17475763, at *1 (M.D. Ala. Dec. 6, 2022)); Arizona (*Ariz. Recovery Hous. Ass'n v. Ariz. Dep't of Health Servs.*, 462 F. Supp. 3d 990, 994-96 (D. Ariz. 2020)); Florida (*Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale*, 479 F. Supp. 3d 1298, 1305, 1313 (S.D. Fla. 2020), *aff'd*, 46 F.4th 1268 (11th Cir. 2022)); Georgia (*Vision Warriors Church, Inc. v. Cherokee County*, 2022 WL 775417, at *1, *6 (N.D. Ga. Feb. 17, 2022), *appeal docketed*, No. 22-10773 (11th Cir. argued Jan. 26, 2023)); Illinois (*Trinity Sober Living, LLC v. Village of Hinsdale*, 2021 WL 1057749, at *1 (N.D. Ill. Mar. 18, 2021)); Louisiana (*James v. Tangipahoa Parish*, 2022 WL 17830464, at *1-2 (E.D. La. Dec. 21, 2022)); Michigan (*Amber Reineck House v. City of Howell*, 2022 WL 17650471, at *2 (E.D. Mich. Dec. 13, 2022)); Minnesota (*Meraki Recovery Hous., LLC v. City of Coon Rapids*, 2021 WL 5567898, at *1 (D. Minn. Nov. 29, 2021)); Ohio (*Lake-Geauga Recovery Ctrs., Inc. v. Munson Township*, 2021 WL 1049661, at *4 (N.D. Ohio Mar. 19, 2021)); Texas (*Swanston v. City of Plano*, 557 F. Supp. 3d 781, 785-86 (E.D. Tex. 2021); *Harmony Haus Westlake, LLC v. Parkstone Prop. Owners Ass'n*, 468 F. Supp. 3d 800, 805 (W.D. Tex. 2020)).

court level.[9] Such litigation can be expected only to become more frequent as the number of profitable sober living homes continues to grow.

The Legislative Analysis and Public Policy Association is a nonprofit organization that drafts legislation on effective law and policy in public safety and health, substance use disorders, and the criminal justice system.[10] In 2021, it released a Model Recovery Residence Certification Act (Model Act), supported by a grant awarded by the Office of National Drug Control Policy, Executive Office of the President.[11] Strikingly, the Model Act contains two mutually exclusive proposals on zoning regulations; members of the working group could not reach a consensus on the potential effect of the ADA and FHA because "court decisions vary considerably." Model Act § XIII cmt.

This Court's guidance on the threshold disability requirement for these claims is needed. The question of how disability is to be proved when a municipality is accused of discriminating against the clients of a facility serving recovering alcoholic or drug-addicted clients has spawned confusion and inconsistency in

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[9] On top of the many circuit court decisions cited *infra*, see also *Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale*, 46 F.4th 1268 (11th Cir. 2022); *His House Recovery Residence, Inc. v. Cobb County*, 806 F. App'x 780, 781-82 (11th Cir. 2020) (per curiam); *Turner v. City of Englewood*, 195 F. App'x 346, 347-49 (6th Cir. 2006).

[10] Legis. Analysis & Pub. Pol'y Ass'n, About, https://tinyurl.com/2s4a3suh (last visited July 20, 2023).

[11] Model Recovery Residence Certification Act (Legis. Analysis & Pub. Pol'y Ass'n, Feb. 2021), https://tinyurl.com/458sby54 (cover page and acknowledgments).

the circuit courts, and, as shown below, much of the resulting jurisprudence contradicts the principles this Court has laid down for discrimination suits brought by individuals.

I. This Court Should Grant Review to Clarify the Standard an Entity Must Meet to Show the Disability of Its Residents When Suing for Disability Discrimination on Behalf of the Individuals It Serves.

A. There is uncertainty and inconsistency in the lower courts on what standard an entity suing on behalf of purportedly disabled individuals must meet.

Much of the Ninth Circuit's opinion dealt with what an entity must show to satisfy the first prong of the FHA and ADA's three-pronged definition of disability[12]: a physical or mental impairment that substantially limits one or more major life activities of the individual. Pet. App. 20a-29a (citing 42 U.S.C. §§ 3602(h), 12102(1)). This Court has addressed and resolved a different but related issue: what an *individual* must show to establish that his or her physical or mental impairment substantially limits one or more major life activities. It has held that whether a person has a disability under the ADA requires an individualized inquiry. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L.

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[12] The FHA defines "handicap," and the ADA defines "disability" in essentially the same way. 42 U.S.C. §§ 3602(h), 12102. This petition will use the terms "disability" and "disabled" to include "handicap" and "handicapped" under the FHA.

No. 110-325, 122 Stat. 3553. The law requires those "claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002) (alterations in original) (citation omitted), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999).[13]

The circuit courts have widely recognized that the impairments at issue – alcoholism and substance abuse – cannot be presumed to substantially limit an individual's major life activities. *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665, 670 (7th Cir. 2011); *Burris v. Novartis Animal Health U.S., Inc.*, 309 F. App'x 241, 249-51 (10th Cir. 2009); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46-47 (2d Cir. 2002), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. Thus, the circuit courts consistently require *individual* claimants to make an individualized showing that, even when they abstain from using drugs or alcohol, alcoholism or drug addiction substantially limits major life activities. *See, e.g.*, *Mora v. Univ. of Tex. Sw. Med. Ctr.*, 469 F. App'x 295, 297-98 (5th Cir. 2012) (per curiam); *Cunningham v. Nature's Earth Pellets, L.L.C.*, 433 F. App'x 751, 752 (11th Cir. 2011) (per curiam); *Ames*, 629 F.3d at 670-

[13] The ADA Amendments Act of 2008 lowered the degree of limitation that the claimant must prove but did not remove the requirement of an individualized showing that the impairment substantially limits major life activities. § 2(a)(4)-(8), 122 Stat. at 3553-54; *see* 29 C.F.R. § 1630.2(j)(1)(iv).

71; *Burris*, 309 F. App'x at 249-51; *Bailey v. Ga.-Pac. Corp.*, 306 F.3d 1162, 1166-68 (1st Cir. 2002); *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 859-60 (5th Cir. 1999).

However, this case and the many like it present a different question – what must an *entity* prove when it claims someone discriminated against the individuals the entity serves? Entities providing housing and other services to persons recovering from alcoholism or substance abuse can make FHA and ADA claims only indirectly. A group home claiming to be a sober living home must show that it provides services to, or is associated with, individuals who are disabled. *See* 42 U.S.C. § 3604(f); *Budnick v. Town of Carefree*, 518 F.3d 1109, 1115 (9th Cir. 2008). By definition, these homes are not themselves disabled; they must show they have been injured by discrimination because of disability against the persons they serve. *See, e.g.*, *RHJ Med. Ctr., Inc. v. City of DuBois*, 564 F. App'x 660, 664 (3d Cir. 2014). To proceed on this basis, plaintiffs must prove they have a relationship with or are associated with a disabled individual. *E.g.*, *Oliveras-Sifre v. P.R. Dep't of Health*, 214 F.3d 23, 26-27 (1st Cir. 2000) (associational disability claim of advocates for persons with AIDS failed for lack of specific association with any disabled individual). This is because a plaintiff relying on a relationship has no greater protection under the anti-discrimination laws than an individual claiming an actual disability would receive.

A plaintiff alleging disability discrimination has the burden of proving disability. *Geraci v. Union Square Condo. Ass'n*, 891 F.3d 274, 277 (7th Cir.

2018). To meet the statutory definition of being actually disabled, individual plaintiffs must establish that their impairment substantially limits a major life activity. 42 U.S.C. § 12102(1)-(2); 24 C.F.R. § 100.201(b). Conclusory, self-serving statements claiming disabilities are not enough. *Glass v. Asic N., Inc.*, 848 F. App'x 255, 257-58 (9th Cir. 2021). An entity claiming disability discrimination must establish that the alleged discrimination against it was because its clients are disabled within the statutory definition.

This Court has never addressed the proper test for discrimination claims by these entities. The Ninth Circuit's decision is one of multiple inconsistent circuit court decisions that have wrestled with the issue.

B. Some circuits allow entities to evade the requirement of showing substantial limitations on major life activities.

Some circuits effect the sharpest contrast possible between individual and entity plaintiffs by permitting entities to proceed without even showing that their clients' claimed disability has substantially limited the clients' major life activities. These courts simply presume a substantial limitation.

The Fourth Circuit reached this result through circular reasoning in *United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992). There, a company that managed apartment complexes, SMC, refused to lease apartments to a community service entity for use as "reentry" housing for clients of its drug and alcohol abuse program. *Id.* at 916. The United States sued SMC under the FHA for disability discrimination. *Id.* On cross-motions for summary judgment, the trial court ruled that the entity's clients

were disabled under the Act. *Id.* At trial, the jury found that SMC had violated the rights of the entity's clients, and the court awarded damages, a penalty, and an injunction against SMC. *Id.*

On appeal, SMC argued for reversal because the government had failed to show how each of the entity's clients slated for an SMC apartment had a substantial limitation of one or more major life activities. 955 F.2d at 917-18. While the circuit court recognized that whether a particular person is disabled is usually an individualized inquiry, it considered the question "immaterial" in that case. *Id.* at 918.

To reach this conclusion, the circuit court noted in part that SMC had refused to rent to the entity because the prospective tenants were former substance abusers. 955 F.2d at 919. This alone was enough in the court's view to settle the question of substantial limitation:

> The clients are clearly impaired, and their ability to obtain housing (a major life activity) was limited by the attitudes of the SMC officials. Thus, we conclude that the clients qualify as having a handicap under the general definition . . . .

Id. (footnote omitted).

The obvious problem with this conclusion is that it necessarily writes the "substantially limits" requirement out of the statute. The FHA prohibits a refusal to provide housing if it results from discrimination on the basis of a disability – which is defined as an impairment that substantially limits major life activities. In the Fourth Circuit's view, an entity that sues

a defendant for failure to provide housing to its allegedly impaired clients has automatically satisfied the "substantially limits" requirement.

The Third Circuit, too, has elected to ignore the "substantially limits" requirement when a facility serving alcoholics and drug abusers sues under the FHA. In *Lakeside Resort Enterprises, LP v. Board of Supervisors*, 455 F.3d 154 (3d Cir. 2006), the court reviewed a judgment as a matter of law the district court had entered in favor of a municipality and cited *United States v. Southern Management Corp.* for the proposition that "recovering alcoholics and drug addicts are handicapped, so long as they are not currently using illegal drugs." *Id.* at 156 n.5.

The Second Circuit took a different route to presuming disability in *Regional Economic Community Action Program*, *supra*. There, in reviewing a summary judgment granted in favor of a city sued for denying permits for halfway houses for alcoholics, the court presumed disability by assuming compliance with a state law. The court assumed residents of the halfway houses must be substantially limited because state regulations required that they be unable to live independently to be admitted to the facility in the first place. 294 F.3d at 46-48.

In this case, the Ninth Circuit paid lip service to the requirement of proving a substantial limitation on a major life activity. Pet. App. 20a ("To establish a disability under the 'actual disability' prong of the ADA, FHA, or FEHA, a plaintiff must show 'a physical or mental impairment' that 'substantially limits' their ability to engage in one or more 'major life activities' " (citations omitted)). But it then negated this

requirement by presuming that the clients of an entity claiming to serve alcoholics or drug addicts are disabled:

- "It is well established that persons recovering from drug and/or alcohol addiction are disabled under the FHA and therefore protected from housing discrimination." *Id.* (quoting *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1156 (9th Cir. 2013)).
- "We have stated that '[p]articipation in a supervised drug rehabilitation program, coupled with non-use, meets the definition of handicapped,' under the FHA." *Id.* at 25a (quoting *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 804 (9th Cir. 1994), *aff'd sub nom. City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995) (brackets in original)).

Through these devices, the Second, Third, Fourth, and Ninth Circuits have effectively written out of the discrimination statutes the requirement of showing a substantial limitation on major life activities. Nothing in the statutes or this Court's jurisprudence countenances this evasion.

C. Other circuits allow entities to make an incomplete and collectivized showing of substantial limitations on major life activities.

Other circuits have acknowledged that a suing entity must show that its clients are substantially limited in major activities, but these circuits have then opted to allow plaintiffs to proceed on selective and incomplete evidence. They have allowed entities to

establish discrimination by presenting only generalized collective evidence that some clients at some times were substantially limited in major life activities – not the specific evidence this Court requires of individuals.

For example, in *Harmony Haus Westlake, L.L.C. v. Parkstone Property Owners Ass'n*, 851 F. App'x 461 (5th Cir. 2021) (per curiam), the Fifth Circuit reviewed a decision enjoining a homeowners association from enforcing restrictive covenants that would have prohibited operation of a sober living home. The trial court held that the home had adequately demonstrated that its residents were substantially limited in major life activities by presenting the testimony of three of its 12 residents. *Id.* at 463-65. At trial, the three residents testified that their alcoholism or drug addiction rendered them unable to be alone for extended periods of time without relapsing, and that residents at the home typically come directly from an inpatient treatment center. *Id.* at 463-64. For the Fifth Circuit, this was enough to establish disability for all present and future residents: "Because future residents must be admitted to, and complete, an inpatient treatment program, they will be considered handicapped under the FHA." *Id.* at 465.[14]

[14] The Fifth Circuit ultimately vacated the injunction on a different ground. It found that the operators of the sober living home had not demonstrated allowing 12 residents to live at the home, as they proposed, was necessary to provide its residents an equal opportunity to use and enjoy the home. 851 F. App'x at 465, 468.

Similarly, some circuits allow a plaintiff facility to rely simply on the generalized testimony of its own representatives. For example, the Sixth Circuit in *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 328 (6th Cir. 2002), affirmed a judgment following a bench trial that required a city to issue permits allowing establishment of a methadone clinic. The circuit court held that the facility had adequately established, through restricted evidence, that its clients were substantially limited in major life activities. *Id.* at 338-40. It found that substantial limitation was adequately established because the facility's clients would have to show that they had been addicted for at least a year, and by the testimony of a single person affiliated with the facility that narcotics addiction necessarily includes impairments as to employability, parenting, and functioning in everyday life. *Id.* at 338.

The Ninth Circuit's decision here is to similar effect. It reversed summary judgments that had been granted in favor of a municipality sued for disability discrimination in denying permits to sober living homes, where the district court found the homes had not established actual disability by presenting individualized evidence that their clients suffered from a substantial limitation of major life activities. The circuit court held that plaintiffs "can prove the 'actual disability' of their current residents and any residents they seek to serve in the future through admissions criteria and house rules, testimony by employees and current residents, and testimony by former residents." Pet. App. 25a.

Thus, although this Court has consistently held that individualized proof is needed to establish substantial limitation, the Ninth Circuit – like the Fifth and Sixth Circuits – holds "that courts must look at the evidence showing that the home serves or intends to serve individuals with actual disabilities *on a collective basis*." Pet. App. 34a.

* * *

The circuit courts have thus adopted different standards for judging whether entities have established that alleged discrimination was directed against individuals who are disabled within the statutory definitions. Some simply presume that alcohol or drug dependency creates a substantial limitation on major life activities; others allow a discrimination claim to proceed on collective evidence that some addicted persons at some times are so limited.

The one consistency in the circuit decisions is that none of them is compliant with this Court's holdings in *Albertson's*, 527 U.S. at 567; *Sutton*, 527 U.S. at 483; and *Toyota*, 534 U.S. at 198, requiring individualized proof of such limitations. Certiorari is needed to bring the circuits into alignment, not only with each other, but with this Court as well.

II. This Court Should Grant Review to Resolve the Inconsistency Among the Lower Courts on When Expressions of Public Opinion Made to a Municipality Can Be Attributed to the Entity.

The other prong of the statutory definition of disability the Ninth Circuit examined here was: "being regarded as having such an impairment."[15] Pet. App. 29a-34a (citing 42 U.S.C. § 12102(1), (3)(A)). Here the Ninth Circuit, like other circuits before it, improperly went beyond examining how the City regarded the subject facilities' clients and attributed to the City opinions merely expressed by the public during public forums.

This Court has made clear that the "regarded as" prong refers to the belief of the person accused of discrimination, not of a non-party. For the "regarded as" prong to be invoked, "it is necessary that a *covered entity* entertain misperceptions about the individual." *Sutton*, 527 U.S. at 489 (emphasis added); *accord Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521-22 (1999). In those employment cases, the "covered entity" was the employer being sued for discrimination.

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[15] In context, "such an impairment" refers to the first prong of the statutory definition, which defines disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A). The ADA Amendments Act of 2008 clarified that a plaintiff claiming discrimination on the "regarded as" basis need not prove that the impairment limits or is perceived to limit a major life activity, 122 Stat. at 3555; 42 U.S.C. § 12102(3), but the FHA has not been so amended, 42 U.S.C. § 3602(h)(1).

Here, however, the Ninth Circuit expanded the reach of the "regarded as" prong to include the perceptions of persons other than the entity accused of discrimination. The Ninth Circuit held that the district court should have included, in its assessment of whether the City regarded the sober houses' clients as disabled, "[t]he oral testimony given at public hearings and written statements submitted to the City by residents opposing the permit applications for Appellants' sober living homes reflect[ing] stereotypes about the homes' residents." Pet. App. 33a.

Indeed, in the Ninth Circuit's view, mere acknowledgment of public comments in a municipality's decision can be used to prove that the municipality harbored the same beliefs. It concluded that on remand this type of evidence, "if appropriately presented and to the extent it appears in the City Council's stated reasons for" its actions, "should be considered in the 'regarded as disabled' analysis." Pet. App. 34a. But here, in denying a conditional use permit to allow a sober living house to continue operations, the City simply acknowledged that "[w]ritten and oral testimony documents the negative impacts of the existing sober living facility on nearby residents." 20-55870 C.A. E.R. 2262. The Ninth Circuit decision seems to suggest that this accurate summary of views the City had received in public forums can be used as evidence against it in a discrimination suit.

In concluding that public comment was evidence that could be used against the City in a discrimination suit, the Ninth Circuit agreed with the Sixth Circuit decision in *MX Group*, 293 F.3d at 341-42, on the proposition that "this type of public speech about so-

ber living home residents was evidence that the government regarded the population under discussion as disabled." Pet. App. 34a. In *MX Group*, the Sixth Circuit concluded from testimony given at a board hearing that, "based on fear and stereotypes, residents believed that the drug addiction impairment of Plaintiff's potential clients, at the very least, limited the major life activity of productive social functioning, as their status as recovering drug addicts was consistently equated with criminality." 293 F.3d at 342. This was "sufficient evidence to show that the reason the city denied Plaintiff the zoning permit was because the city feared that Plaintiff's clients would continue to abuse drugs, continue in their drug activity, and attract more drug activity to the city." *Id.*

Similarly, the Second Circuit in *Tsombanidis v. West Haven Fire Department* upheld a district court's finding that a fire code prohibiting a home for recovering alcoholics and drug addicts amounted to intentional discrimination. 352 F.3d 565, 580 (2d Cir. 2003), *superseded by regulation on other grounds as stated in Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016). The court noted that neighbors expressed their concerns and that it became apparent that there was significant community opposition to the home locating in the neighborhood. *Id.* at 571. The circuit court held that the district court had "used the appropriate factors" when it noted the history of hostility of neighborhood residents to the home and their pressure on the city officials, and that this evidence supported its findings. *Id.* at 580.

These holdings not only contradict this Court's interpretation of the applicable statutes in *Sutton*, 527 U.S. at 489, and *Murphy*, 527 U.S. at 521-22 – they

also create serious First Amendment problems for municipalities. A public entity cannot simply forbid the public to express opinions it disagrees with. "The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances." *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 464 (1979) (per curiam). When a governmental body accepts public expression, any "content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983). Thus, according to the Ninth, Sixth, and Second Circuits, a public body can be found to have discriminated on the basis of views the public expresses to it that it is powerless to prohibit.

The Sixth and Second Circuit decisions cited above (*MX Grp.*, 293 F.3d at 341-42, and *Tsombanidis*, 352 F.3d at 571, 581) show that the Ninth Circuit is not alone in lending credence to public comments as evidence of a municipality's discriminatory views. But overall the circuits have reached inconsistent results in addressing the issue.

Some circuits have held that discriminatory public comments should automatically be ascribed to the municipality that receives them. This is the result the Second Circuit reached in *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997), *superseded by rule on other grounds as stated in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). There, the court noted that "[t]he public hearings and submitted letters were replete with discriminatory comments about drug- and alcohol-dependent persons based on stereotypes and general,

unsupported fears." *Id.* at 49. It ruled that "a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter." *Id.*

In *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008), the Fourth Circuit likewise blurred the distinction between the beliefs held by a county and opinions expressed to it by "the community." There, a methadone clinic sued a county for enacting a zoning ordinance that made its methadone clinic unlawful. *Id.* at 358. The trial court granted judgment as a matter of law in favor of the clinic on some of its claims, holding that the county regarded the clinic's clients as significantly impaired in major life activities. *Id.* at 358, 367. The circuit court noted that "the record contains evidence that *some* members of the community did regard the Clinic's clients as unable to hold down legitimate jobs or interact normally with others." *Id.* at 368. It reversed the judgment as a matter of law because the jury could have reached different conclusions from this evidence, but it held that the jury was free to tag the county with the opinions expressed by the "community":

> [A]lthough we have no difficulty concluding that a reasonable jury could have found that the community regarded the Clinic's clients as significantly impaired in one or more major life activities, we cannot conclude that this is the only outcome a reasonable jury could have reached.

Id.

At the other end of the spectrum, the Third Circuit in *RHJ Medical Center, Inc. v. City of DuBois*, *supra*, affirmed a trial court's rejection of a hospital's claim that a city had violated the ADA by denying it permission to establish a methadone treatment facility. In doing so, the court held that community comments about the clinic increasing crime and violence did not show that the city regarded the clinic's clients as disabled. 564 F. App'x at 664-66.

Supreme Court review is needed to bring the circuits into line and to make clear, as this Court has held, that the "regarded as" prong of the disability discrimination statutes requires a showing of the actual perceptions of the body that allegedly discriminated (*Sutton*, 527 U.S. at 489; *Murphy*, 527 U.S. at 521-22) – not the perceptions the public expresses to it. This Court should take this case to establish that a municipality can be held to have regarded a facility's clients as disabled based only on its own beliefs reflected in its own statements and actions, and cannot be held responsible for statements made to it by the public.

III. This Case Is a Good Vehicle for This Court to Resolve Questions of Great Importance to the Federal Judiciary, Disabled Persons, and the Public at Large.

This case is an ideal opportunity to resolve the question of how disability must be proved in lawsuits brought to challenge regulations applied to sober living homes. Here, the Ninth Circuit issued a published opinion reversing summary judgments on the purely legal question of what evidence an entity claiming disability discrimination against its clients under either the ADA or the FHA must present.

The Ninth Circuit made in one decision two errors that have arisen repeatedly: foregoing a showing of substantial limitation on major life activities, and attributing to a municipality views expressed to it by the public. In a single case, this Court could resolve both issues and inform the judiciary as to what a plaintiff in such a suit must allege to state a claim, survive summary judgment, and ultimately prove at trial.

Congress has made clear that the ADA and the FHA are vital statutes that require uniform enforcement. Its purposes in enacting the ADA included "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1), (2). The policy that motivated the FHA is to similar effect: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." *Id.* § 3601.

The Ninth Circuit's decision reflects the confusion over how to assess disability claims made by entities in the circuits' varied decisions, most of which have departed from the teachings of this Court. For these reasons, Supreme Court intervention at this time would greatly aid the lower courts and the parties that litigate before them.

CONCLUSION

In light of the foregoing, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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