No. 23-71

In The
Supreme Court of the United States

CITY OF COSTA MESA, CALIFORNIA,

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

BRIEF *AMICUS CURIAE* ON BEHALF OF CITIES OF MISSION VIEJO, BEVERLY HILLS, DANA POINT, FILLMORE, NEWPORT BEACH, PLACENTIA, SANTA ANA, AND THE ASSOCIATION OF CALIFORNIA CITIES-ORANGE COUNTY IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*

Amici curiae[1] the California cities of Mission Viejo, Beverly Hills, Dana Point, Fillmore, Newport Beach, Placentia, Santa Ana, and the Association of California Cities-Orange County[2] are involved with the regulation of sober living homes like those operated by Respondents SoCal Recovery, LLC and RAW Recovery, LLC. This Court has long recognized that zoning and land use is the peculiar province of state and local government. Yet, *amici's* traditional role in setting density regulations in their communities is now under threat. One recent example is the City of Newport Beach which enacted rules to regulate the density or dispersion of sober living homes within residential-zoned neighborhoods and was challenged based in part upon alleged lack of compliance with the American Disabilities Act (ADA). This challenge resulted in litigation

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[1] This *amicus* brief is filed more than ten days before the due date of August 24, 2023. Pursuant to Supreme Court Rule 37.2, this filing date serves in lieu of notice to other parties of the intent to file. In accordance with Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici curiae* and their members made such a contribution.

[2] Regulation of sober living homes by municipal entities includes cities across the U.S. including those of Dublin, Ohio, Fort Lauderdale, Florida and Delray, Florida. (*See, e.g.*, NPR/Oregon Public Broadcasting, *Beach Town Tries to Reverse Runaway Growth of 'Sober Homes'* (Aug. 10, 2017). Time did not permit inclusion of these other cities in this *amicus* brief, although Fort Lauderdale's regulation was affirmed in a recent opinion from the Eleventh Circuit in *Sailboat Bend Sober Living LLC v. City of Fort Lauderdale*, 46 F.4th 1268 (11th Cir. 2022).

including a published decision of the Ninth Circuit Court of Appeals, *Pacific Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013), *cert. denied*, 574 U.S. 974 (2014). Other *amici* cities established ordinances or guidelines regulating the density of sober living home businesses within traditionally zoned residential neighborhoods. The ability to establish and enforce zoning laws, one of the most fundamental and traditional powers of local government, is imperiled by the decision of the Ninth Circuit below, which would allow businesses without any proven direct ties to disabled individuals to sue and survive summary judgment, contesting a local dispersal-based ordinance.

INTRODUCTION AND SUMMARY

The ADA was not designed or intended to supplant and supersede cities' local zoning authority. Yet under the Ninth Circuit's interpretation, a city's ability to maintain coherence of its residential-zoned communities will be effectively overrun by a relatively new form of big business seeking to locate in these same communities—sober living homes.[3] Purely traditional local decisions about dispersion of businesses within a residential-zoned area, land use, and "livability" will be removed from the purview of local elected officials and

[3] We adopt the nomenclature of the Petition—sober living homes—although others refer to these business locations as "group homes" or "recovery centers." (*See Pacific Shores Prop., LLC* 730 F.3d at 1147 & n.1.)

will instead be placed in the hands of businesses seeking to utilize residential neighborhoods in pursuit of profit.

Zoning and local land use controls are among the core responsibilities left to state and local entities. As this Court recognized in its only prior review of claims made by a sober living home under the FHA:

> As we have stated, 'zoning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities.' *Warth v. Seldin*, 422 U.S. 490, 408, n.18 (1975). *See also Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.)
>
> *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 744 (Thomas, J., with whom Scalia and Kennedy JJ., join, dissenting).

In other contexts, this Court has specifically approved the use of the specific zoning tool at issue here—the dispersion of business enterprises seeking to locate in or near residential communities.[4] (*Young v. American Mini Theatres, Inc.* 427 U.S. 50, 53-54 (1976)) (City of Detroit ordinance requiring 1000 foot dispersion of adult theatres from other 'regulated uses' and 500 foot distance from residential areas affirmed

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[4] The City of Costa Mesa's ordinance required 650 feet of dispersion between defined "sober living homes" and other such homes or other state licensed alcohol or substance recovery facilities. (Pet. 7-9).

against First Amendment and other constitutional challenges).

The tension between local zoning control and challenges to those controls by the businesses of sober living homes is a national problem. In 2017, the House Energy & Commerce Committee's Subcommittee on Oversight and Investigations explored concerns raised by sober living homes including the interstate shipment of potential patients in order to secure more payments. As Subcommittee Chair Harper noted in his opening remarks: "Florida and California [appear] to be the two states hit hardest by these practices [of luring patients to sober living homes]. *But that doesn't mean that other states aren't starting to face these challenges as well . . . this isn't just a state issue. It has become and is becoming a national issue*." (Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy & Commerce, 115th Cong. 1st Sess., Dec. 12, 2017, p. 2 (Opening Remarks of Rep. Harper) (italics added). Later, the House Subcommittee on Constitutional Rights and Civil Justice conducted hearings on sober living homes across the country. The Subcommittee Chair introduced the hearing by noting:

> . . . some Sober Living Homes, according to testimony submitted to this committee, are either poorly managed, or are run by operators who dangerously exploit their residents, and that is for profit. . . .
>
> Indeed, many local governments have answered the call to regulate Sober Living

> Homes, but many have been sued under the Fair Housing Act and the Americans With Disabilities Act for doing so.
>
> Hearings before House Subcomm. on Constitutional Rights and Civil Justice of the House Comm. on Judiciary, 115th Cong. 2nd Sess., Sept. 28, 2018, pp. 1-2 (Opening Remarks of Cong. King).

These Congressional concerns led to the passage of legislation instructing the federal Department of Health and Human Services' Substance Abuse and Mental Health Services Administration to prepare and publish a list of recommended "best practices" for sober living homes. 42 U.S.C. §290ee-5. A list of such practices was later published but it was only an advisory list that described itself as containing "suggested guidelines." More critically, the agency's guidance does not address the critical zoning regulation of sober living homes within a city's residential-zoned communities. *See U.S. Substance Abuse and Mental Health Services Administration, Recovery Housing: Best Practices and Suggested Guidelines* available at: https://www.samhsa.gov/resource/ebp/recovery-housing-best-practices-suggested-guidelines.

State regulation or registration of the business of sober living homes has also left most of the actual burden to municipal or county-wide government. In 2018, the Government Accountability Office (GAO) reviewed licensing standards for what it termed "recovery housing" in five states. Four of the five states surveyed (Florida, Massachusetts, Ohio, Texas and Utah) had

investigated and detected some fraudulent practices in patient referral "kickbacks" and the like. Of the five states surveyed, however, only three had state-based certification programs and of those three, only one state (Utah) reported its certification program was mandatory. *See GAO, Substance Use Disorder: Information on Recovery Housing Prevalence, Selected States' Oversight and Funding*, Rep. No. 18-315, p. 1, and pp. 14-15 (March 2018).

The burden of dealing with the challenges presented by sober living homes falls largely on the communities where they are located, which tend to cluster in the same areas. Many California cities and counties have ordinances regulating the business of sober living homes in residential communities. Of those ordinances, a number of cities and counties[5] have the same type of dispersion requirements that set minimum standards for separating one such facility from other similar facilities within a residential-zoned community.

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[5] In California, these include the cities of Anaheim, Huntington Beach, Orange, and the counties of Riverside and San Bernardino. [Anaheim Muni. Code, Title 18 Zoning, Chapter 18.38, Section 18.38.123; Huntington Beach Zoning Code, Chapter 230, Art. 1, 230.28; Orange Mun. Code, Title 17 Zoning, Chapter 17.13.040; Riverside County Code of Ordinances, Title 17 Zoning, Chapter 17.272.10; San Bernardino Code of Ordinances, Division 4, Chapter 84.32. Other cities in other parts of the U.S. which have similar dispersion zoning requirements include Dublin, Ohio and Fort Lauderdale, Florida. (*See Sailboat Bend Sober Living*, 46 F.4th 1268 (11th Cir. 2022).

Cities have also set up regional task forces to try and tackle the proliferation of the sober living home businesses in their communities, with the City of Mission Viejo taking the lead in forming the South Orange County Sober Living and Recovery (SOCSLAR) Task Force. City of Mission Viejo Press Release: *New regional task force will tackle issues with sober living and recovery homes* (Sept. 1, 2022).

The Ninth Circuit's decision in this case is of national importance and was recently highlighted by the Congressional Research Service in its update on cases of interest to lawmakers. Cong. Res. Service, Legal Sidebar: Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers, pp. 1-2 (Jan. 3–Jan. 8, 2023).

The Ninth Circuit's ruling, which allowed sober living homes to escape summary judgment motions filed by cities, potentially threatens the power of municipalities nationwide to withstand years of lengthy and expensive litigation.

More critically, the Ninth Circuit's allowance for corporate sober living homes to establish the requisite statutory element of individual disability on a "collective basis" is without textual or historical support. This stretches the law far beyond Congress' original intention.

ARGUMENT

The Americans with Disabilities Act (ADA) is intended as a broad statute to address discrimination against disabled individuals, but it is not without limits, including limits on individuals who use drugs or alcohol. *See Kincaid v. Williams*, 600 U.S. ___, 143 S.Ct. 2414, 2416 (2023) (Alito, J., with whom Thomas J., joins dissenting from denial of certiorari) ("The ADA is far-reaching, but like all other statutes, it has its limits. It expressly excludes coverage for a disparate group of traits, habits, and mental conditions, including sexual orientation, conditions arising from drug use, and gambling addiction.") [42 U.S.C.] §12211.

Respondents are two corporations (one now suspended by its home state, California) that have now expanded the standing requirement for corporate entities far beyond the ADA's traditional limits. They refused at the summary judgment stage to produce either testimony pursuant to Rule 30(b)(6) of designated representatives or to respond to document requests about individuals who qualify as "disabled" under the ADA. (Pet. App. 47a-48a). This evidentiary lacunae is completely inconsistent with both the express statutory limit in the ADA, which expressly excludes coverage for current users, including former addicts who have relapsed into again using drugs[6]

[6] The ADA excludes from the definition of "disability" an individual suffering from: "psychoactive substance use disorders resulting from current illegal use of drugs." (42 U.S.C. §12211(b)(3)). The ADA also excludes from the definition of an "individual with a disability" a person who is currently using

and with this Court's standard dating back to at least 1992, which requires that at the summary judgment stage a party produce not just averments but actual affidavits showing that he or she was directly impacted by the alleged improper regulation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).[7]

I. This Court Should Grant Review To Correct The Ninth Circuit's Ruling Which Obviates The Need For Any Entity To Show It Actually Serves Disabled Individuals.

As the Petition correctly notes (Pet. 10), the Ninth Circuit's decision obviates the need for a corporate entity suing under the ADA to demonstrate that *any* individual housed in their sober living home qualified as "disabled" under the ADA or the FHA. Pet. App. 23a ["Appellants' sober living homes and other dwellings intended for occupancy by persons recovering from alcoholism and drug addiction are protected from illegal discrimination against the disabled *without the need*

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drugs, although it excepts from this exclusion *former* drug users who have either "successfully completed a supervised drug rehabilitation program" or who is "currently participating in a supervised drug rehabilitation program." (42 U.S.C. §12210(a) and (b)). Thus, the application of the ADA to individuals who were addicted to alcohol or drugs is hardly a straightforward application of a previously observed and obvious medical condition. (*See New York City Transit Authority v. Beazer*, 440 U.S. 568, 591 (1979)) ("*New York City Transit*").

[7] We adopt the Petition's nomenclature of "disability" or "disabled" under the ADA to include the related statutory terms of "handicap" and "handicapped" under the Fair Housing Act. (Pet. at 15, n.12).

for Appellants to present individualized evidence of the "actual disability" of their residents.] [italics added]. This holding is a major departure from the statutory text and from this Court's Article III jurisprudence requiring actual injury from an alleged prohibited act dating back to at least *Lujan*.

A. The Statutory Language and Purpose of the ADA (and the FHA) focus on individualized showings of a disability. The Ninth Circuit's rule eviscerates this standard.

The ADA focuses on individuals. The original set of findings from 1990 uses the word "individuals" or "individuals with disabilities" in almost every subpart of its findings and policy. 42 U.S.C. §12101. This Court has emphasized that for such individuals the finding of a "disability" as defined by the statute must be an individual fact-specific determination. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999), *superseded by statute on other grounds* ("The definition of disability also requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.' § 12102(2). Thus, whether a person has a disability under the ADA is an individualized inquiry.").

The Ninth Circuit's decision eviscerates this individualized proof requirement with respect to a corporate entity. Instead, a corporate entity suing a

municipality under Title II of the ADA[8] need *not* establish that it in fact serves even a single "individual with a disability." Rather, under the Ninth Circuit's new expansive application, a corporation need only establish such evidence on a *collective basis*. As the Ninth Circuit held: "Appellants [the two sober living home businesses here] need not provide individualized evidence of the 'actual disability' of their residents." (Pet. App. 24a).

The Court of Appeal's decision to establish a novel "collective basis" standard of proof does not cite to a particular statutory section of Title II of the ADA for that standard. Rather, it started by stating that the corporate entities were entitled to sue because they were "aggrieved" by the City of Costa Mesa's zoning ordinance and its subsequent refusal to grant an exception to that ordinance upon request. (Pet App. 21a-22a). In doing so, the Court of Appeal cited to 42 U.S.C. section 12133, which does provide a general provision for enforcement. Section 12133 however, must be read in conjunction with the section it references as the basis for such enforcement, section 12132, which states: " . . . [N]o qualified individual with a disability shall, by reason of that disability, be excluded from participation . . . in or denied the services . . . of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. Although the Ninth Circuit correctly referenced a general statutory enforcement

[8] Title II of the ADA is the set of specific provisions dealing with potential discrimination by "public entities" including "any State or local government." 42 U.S.C. §12131(1)(A).

provision of Title II of the ADA, it ignored what was to be enforced—"discrimination" against an individual who qualified as having a "disability." Such proof of qualification by an individual under the ADA must be done on a case-by-case basis. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded on other grounds by* the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

The Ninth Circuit recognized that at least part of the statutory basis for determining a disability—the "regarded as" provision for disability (42 U.S.C. §12102(3)(A))—is specifically fact dependent and requires a "case-by-case" adjudication. (Pet. App. 30a). The Court of Appeal did not attempt to reconcile this statutory provision requiring an individualized approach with its "collective basis" approach for a subdivision of the same statute (42 U.S.C. §12102(1)). While words in the same statute may, in context, have different meanings, that potential difference is not apparent here.

B. The New "Collective Basis" standard of proof ignores the real difficulties in determining whether an addict is indeed "recovering" or is still abusing the restricted substance(s).

The Ninth Circuit allowed Respondents to evade the City of Costa Mesa's discovery request for any medical evidence about the individual residents in light of its new *collective basis* standard. This new standard

does not mean that the business entity can obtain medical information about individual residents and then submit it on some "collective" group format. Rather, the Court of Appeals specifically allowed these corporations to merely prove that they "have policies and procedures to ensure that they serve or will serve those with actual disabilities . . . " (Pet. App. 24a). That standard ignores the real possibility that a professed recovering addict has in fact relapsed and is in violation of the ADA provision which *limits* coverage for someone who is "currently engaged in the illegal use of drugs." (42 U.S.C. §12210(a)). This Court has recognized the possibility of drug relapse in the context of a prohibition of hiring former addicts by a public entity, then New York City Transit Authority. *See New York City Transit*, 440 U.S. at 591 ("The uncertainties associated with rehabilitation of heroin addicts which precluded it from identifying any bright line marking the point at which the risk of regression ends.").

Medical science supports this legal observation. The National Institutes of Health estimate that between 40-60% of all abusers of substances relapse. National Institute of Drug Abuse, "Drugs, Brains, and Behavior: The Science of Addition, Treatment and Recovery" p. 23 (Revised June 2020). Thus, the suggestion that a person in a recovery center can be somehow "collectively" deemed to be within the statutory definition of a former abuser who is now recovered ignores the law and the real-world challenges associated with treating addiction.

II. The Ninth Circuit's Standard of A "Collective Basis" Allowing Corporate Business Entities To Sue Municipalities Intrudes On Traditional State And Local Constitutional Authority.

In the one case involving a sober living/group home decided under the FHA, members of this Court recognized that:

> [T]he power of Congress to "legislate in areas traditionally regulated by the States" is "an extraordinary power in a federalist system," and "a power that we must assume Congress does not exercise lightly." 501 U.S., at 460, 111 S.Ct., at 2400. Thus, we require that "'Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States.'" Id., at 461, 111 S.Ct., at 2401 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989)). *City of Edmonds* at 743-744 (Thomas, J., with whom Scalia and Kennedy JJ. join, dissenting).

As Judge Batchelder observed in a recent Sixth Circuit opinion involving municipal regulation in the context of an FHA challenge:

> Health and safety concerns are at the very heart of local police powers, and our respect for ordinances controlling uses of land for these reasons extends far back into our jurisprudence. *See*, *e.g.*, *Tower Realty v. City of Detroit*, 196 F.2d 710, 722 (6th Cir. 1952) (quoting *Fischer v. City of St. Louis*, 194 U.S. 361, 370,

> 24 S.Ct. 673, 48 L.Ed. 1018 (1904)) ("The power of the legislature to authorize its municipalities to regulate and suppress all such places . . . as, in its judgment, are likely to be injurious to the health of its inhabitants, or to disturb people living in the immediate neighborhood . . . , is so clearly within the police power as to be no longer open to question"). *Fair Housing Advocates Ass'n, Inc. v. City of Richmond Heights, Ohio*, 209 F.3d 626, 638 (6th Cir. 2000) (Batchelder, J., concurring in judgment).

The Costa Mesa City Council highlighted these exact concerns, noting the [Knox Street] location [of RAW Recovery] would "contribute to the overconcentration of drug and alcohol treatment facilities and sober living homes in this neighborhood, which could lead to negative impacts in the neighborhood." (Pet. App. 31a-32a). The Ninth Circuit observed this statement was among the type of "additional evidence" the district court must consider on remand but viewed it negatively—as an admission by the City that the RAW Recovery facility did in fact treat disabled individuals. (Pet. App. 31a). As explained in the Petition, the Court of Appeal's use of "evidence" in this regard is erroneous and inconsistent with this Court's prior rulings. (Pet. 26-30).

This "evidence" demonstrates the City of Costa Mesa, like many cities was attempting to exercise a basic local power—the right to regulate sober living home business in such a way as to avoid "injury" to residential-zoned communities.

The *amici* cities are holders of the traditional power of states and local governments to regulate zoning within their jurisdictions, particularly with respect to regulating residential-zoned communities. They are faced with legal challenges by sophisticated and wealthy corporate entities (not individuals) who seek to impose their own standards of what is sufficient "density" (or "dispersal") within such communities. The Ninth Circuit's new rule allowing corporate entities to sue municipalities based solely on "collective basis" evidence (such as their own plans or admissions criteria for a sober living home) opens a Pandora's box of litigation to be used against any municipal entity which imposes any restriction on a sober living home within a residential community. As to this imposition of federal power, there is clearly no "clear and manifest" intention of Congress to impose such a rule. It is rather, a rule of judicial construction unfettered by any of the Congressional concerns about sober living homes, concerns expressed as recently as 2017-18.

CONCLUSION

In light of the lack of any "clear and manifest" expression by Congress to expressly regulate traditional municipal control over local zoning laws in favor of corporate business owners, the undersigned *amici* urge that the Court grant the petition for certiorari and determine this important national issue.

Respectfully submitted,

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