No. 23-71

In The
Supreme Court of the United States

CITY OF COSTA MESA,

Petitioner,

vs.

SOCAL RECOVERY, LLC, et al.,

Respondents.

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

BRIEF IN OPPOSITION

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

Counsel for Respondents

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

QUESTIONS PRESENTED

1. Where a municipal zoning code defines a "sober living home" as a home occupied by persons who are considered disabled under the Fair Housing Act and Americans with Disabilities Act, and the municipality enforces zoning restrictions against a home it has so classified, must that sober living home present individualized proof that each of its current and future residents qualifies as disabled in order to invoke the protections of the Fair Housing Act and Americans with Disabilities Act?

2. If a municipality's stated reasons for adopting ordinances or denying land use permits reflect fears and stereotypes regarding the residents of sober living homes, may such statements be considered, along with other evidence, in deciding whether the municipality regarded residents of sober living homes as disabled?

CORPORATE DISCLOSURE STATEMENT

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

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

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INTRODUCTION

Petitioner City of Costa Mesa enacted zoning ordinances imposing a new permit requirement on "sober living homes," a residential land use it defined as one occupied by persons in recovery from alcohol or drug addiction "who are considered handicapped" under the Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.*, Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and California's Fair Employment and Housing Act (FEHA), Cal. Govt. Code § 12900 *et seq*. The City classified homes operated by respondents SoCal Recovery, LLC and RAW Recovery, LLC as sober living homes subject to the City's new permit requirement and both submitted the required permit applications. The City denied their applications, claiming that granting them would allow too many sober living homes within their neighborhoods, causing an "overconcentration" of such homes. The City subsequently ordered SoCal and RAW to close their homes and then cited, fined, and filed abatement actions against them for operating sober living homes without sober living home permits. The City never contested or questioned whether SoCal or RAW housed people with disabilities during the zoning application process, nor during its zoning enforcement process. After SoCal and RAW filed lawsuits challenging the City's zoning ordinances, the City moved for summary judgment on the grounds that neither SoCal nor RAW could demonstrate a triable issue of fact whether it served people with disabilities as defined under the FHA, ADA, or FEHA. The

district court granted the motions, but the Ninth Circuit Court of Appeals reversed.

The court of appeals' decision struck no new ground on proof of disability. It identified for the district court broad categories of evidence that may be relevant in the context of zoning discrimination in making the fact-specific determination whether a land use serves or will serve people with disabilities. Like other circuits, it followed this Court's direction to conduct an "individualized assessment" whether the respondents provided housing to persons who have an impairment that "substantially limits one or more major life activities." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198-99 (2002) (superseded on other grounds by ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553). Review is not warranted because the differences in opinions and outcomes in the cases cited by the City do not turn on disagreements about the applicable standard, but on the specific facts and evidentiary records presented in each case.

Nor should this Court grant review "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." Pet. 30. That commonsense rule has been the law for decades. Neither the Ninth Circuit in this case nor the other courts of appeals in the cases cited by the City attribute intent to municipalities based merely on statements made to it by the public.

At bottom, the petition asks the Court to reconsider the fact-specific application of established law. The interlocutory decision poses no unresolved issues for review and was correctly decided. The Court should deny the petition.

STATEMENT OF THE CASE

Applicable Statutes

The FHA, as amended by the Fair Housing Amendments Act of 1988 (FHAA), Pub. L. 100-430, 102 Stat. 1636, and the ADA forbid municipalities from discriminating in zoning and land use on the basis of "handicap" or "disability." 42 U.S.C. § 3601 *et seq.*; 42 U.S.C. § 12132; *see*, *e.g.*, *Tsombanidis v. West Haven Fire Dept.*, 362 F.3d 565, 573-74 (2d Cir. 2003) (FHA and ADA); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 257 n.6 (1st Cir. 1993) (FHA). California's FEHA, the state analog to the FHA, contains similar prohibitions. Cal. Govt. Code § 12955(*l*).[1]

Housing providers injured by discrimination based on disability have a direct remedy under both the FHA and ADA.[2] They are not limited, as the City

[1] California's FEHA must be construed to provide at least as much protection to people with disabilities as the FHA and ADA and their implementing regulations. Cal. Govt. Code §§ 12926.1, 12955.6. Unless otherwise noted below, FEHA applies the same legal standards as the FHA and ADA.

[2] *See*, *e.g.*, *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 407 (3d Cir. 2005) (ADA), *abrogated on other grounds*, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013);

claims, to bringing indirect claims based on injury to their residents. Pet. 17. The FHA allows suit by "any person" who "claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i) (defining "aggrieved person"); 42 U.S.C. § 3613 (authorizing suit). Title II of the ADA similarly provides a remedy for "any person" alleging discrimination on the basis of disability. 42 U.S.C. § 12133.

"Handicap" under the FHA and "disability" under the ADA,[3] are both defined as (1) a "physical or mental impairment which substantially limits one or more of [a] person's major life activities," (2) "a record of having such an impairment," or (3) "being regarded as having such an impairment." 42 U.S.C. § 3602(h) (FHA); 42 U.S.C. § 12102(1) (ADA). These three definitions of disability are often referred to as the "actual disability" prong, the "record of disability" prong, and the "regarded as disabled" prong.

Under the FHA and ADA, to establish "actual disability," an individual plaintiff must show that they have (1) an impairment that (2) "substantially limits

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Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 46 n.2 (2d Cir. 2002) (ADA and FHA); *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 335 (6th Cir. 2002) (FHA); *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998) (FHA).

[3] The FHA uses the term "handicap" instead of "disability." Both terms have the same legal meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the definition of "disability" in the ADA is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988"). This brief uses the preferred term "disability."

one or more major life activities." 42 U.S.C. § 3602(h) (FHA); 42 U.S.C. § 12102(1)(A) (ADA).[4] Alcoholism and drug addiction are "impairments" under the FHA and ADA. 24 C.F.R. § 100.201 (under FHA impairment includes "drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism"); 28 C.F.R. § 35.108(b)(2), (g) (under ADA "[p]hysical or mental impairment includes . . . drug addiction, and alcoholism," but term "disability" excludes "[p]sychoactive substance use disorders resulting from current illegal use of drugs").[5]

Under this Court's precedent, when an individual claims disability status under the "actual disability" prong, the individual cannot simply submit evidence showing that they have been diagnosed with an impairment and then rely on a presumption that the impairment substantially limits a major life activity. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. at

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[4] California's FEHA defines disability more broadly than the FHA and ADA, requiring only that an impairment "limit" a major life activity. Cal. Govt. Code §§ 12926(j)(1), (m)(1), 12926.1. Thus, persons whose impairments do not *substantially* limit their major life activities may still qualify as disabled under FEHA.

[5] The United States Department of Housing and Urban Development (HUD), the federal agency primarily charged with implementation and administration of the FHA, 42 U.S.C. § 3608, has promulgated rules interpreting the FHA. 24 C.F.R. § 100.1 *et seq*. The Attorney General has promulgated regulations implementing the ADA pursuant to the direction of Congress. 42 U.S.C. § 12205a; 28 C.F.R. § 35.101 *et seq*. Those agencies' reasonable interpretation of the FHA and ADA are entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

198-99. Proof that the impairment "substantially limits one or more of their major life activities" requires an "individualized assessment" of the effect of the impairment on a case-by-case basis. *Id.* at 198-99.

When an individual claims disability status under the "regarded as disabled" prong, the determination turns on how an individual is perceived by others. *See* 42 U.S.C. § 12102(1)(C); 24 C.F.R. § 100.201(d); 28 C.F.R. § 35.108(f)(1). After passage of the ADA Amendments Act of 2008, an individual may establish that they are "regarded as disabled" by showing that they have been subjected to a prohibited action "because of an actual or perceived physical or mental impairment," 42 U.S.C. § 12102(3)(A), "whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity," 28 C.F.R. § 35.108(f)(1). Under the FHA, being "regarded as disabled" means (1) having "a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation," (2) having "a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of other[s] toward such impairment," or (3) having "none of the impairments defined in paragraph (a) of this definition but is treated by another person as having such an impairment." 24 C.F.R. § 100.201(d).

Factual Background

1. SoCal Recovery was operating several sober living homes in Costa Mesa as of 2014. Pet. App. 9a. SoCal provides safe, comfortable, structured housing where persons in recovery from addiction can sustain their sobriety in a supportive environment, enabling them to avoid relapse. 20-55820 C.A. Doc. 25-5, pp. 39-42, 135-36. The risk of relapse is significant if a newly sober person returns home immediately after treatment. *Id.* SoCal's sober housing provides a necessary bridge between treatment and fully independent living.

SoCal's residents generally join the household after completing 90 days of addiction treatment and stay for a period of three to six months, strengthening their sobriety with the goal of returning to fully independent living. Pet. App. 28a; 20-55820 C.A. Doc. 25-5, pp. 39-40. To maintain its structured, sober environment, SoCal has a "zero drug & alcohol tolerance" policy, demands mandatory involvement in 12-Step recovery programs, performs randomized drug testing, and requires any resident who relapses to leave and go to detox. Pet. App. 27a. While living at SoCal, residents are required to work or attend school. 20-55820 C.A. Doc. 25-5, p. 40. Current SoCal employees testified in deposition regarding how SoCal enforced its house rules and zero-tolerance policies. Pet. App. 28a. Respondent Roger Lawson, then a resident and house manager of one of SoCal's homes, testified in deposition about his experience of addiction and relapse and explained that without the structured sober environment provided by

SoCal, he would relapse and likely overdose. Pet. App. 28a-29a.

RAW Recovery was operating sober living homes for persons in recovery from alcohol and drug addiction in Costa Mesa as of 2015. Pet. App. 12a. Most residents join a RAW sober living home immediately after completing a 30- to 90-day course of residential addiction treatment and typically remain residents for about a year. Pet. App. 27a-28a. RAW provides a structured sober environment, house managers who monitor residents, drug testing several times a week, and recovery coaching and life skills support. Pet. App. 26a. RAW prohibits the use of drugs or alcohol in its homes, and a resident who violates that rule is removed from the home. Pet. App. 26a, 27a-28a. RAW aids residents in staying sober by providing a basic structure within which to maintain their sobriety. 20-55870 C.A. Doc. 36-6, p. 102. RAW's residents are "in need of safe and sober housing because they cannot live independently without fear of relapse." Pet. App. 26a-27a. Former RAW residents testified before the City, describing their previous inability to function as employees, students, and family members because of addiction and explaining how living in RAW housing had enabled them to remain sober and rebuild their lives. Pet. App. 28a.

2. Between 2013 and 2017, the City enacted a series of ordinances amending its zoning code to regulate group housing for people with disabilities in the

City's residential zones.[6] The new ordinances defined two new land uses – "group home" and "sober living home." Pet. App. 6a (citing Costa Mesa Municipal Code [C.M.M.C.] § 13-6, C.A. Statutory Addendum, at 91-93). The ordinances defined 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." *Id.* They defined 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*." Pet. App. 2a, 30a-31a (citing C.M.M.C. § 13-6 [emphasis added], C.A. Statutory Addendum, at 93). The "state or federal law[s]" referenced in those definitions are further defined as the "Fair Housing Act, the Americans with Disabilities Act, and the California Fair Employment and Housing Act." C.M.M.C. § 13-6, C.A. Statutory Addendum, at 91.

Although the zoning ordinances apply to all group homes for people with all types of disabilities, the City's specific concern in enacting the ordinances focused on an increase in the number of sober living homes in certain residential neighborhoods. Pet. App. 6a; C.A. Statutory Addendum, at 85-90. The City believed that there existed an "overconcentration" of such homes that was "deleterious" to the residential character of those neighborhoods and could lead to the

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[6] *See* 20-55820 C.A. Doc. 24 (C.A. Statutory Addendum), at 85-135, reproducing Costa Mesa, Cal., Ordinance 14-13 (Oct. 21, 2014), Ordinance 15-06 (July 7, 2015), Ordinance 15-11 (Nov. 17, 2015), and Ordinance 17-05 (May 2, 2017).

neighborhoods becoming "institutionalized." Pet. App. 6a; C.A. Statutory Addendum, at 87. Instead of relying on its generally applicable police powers to enforce its existing nuisance laws against sober living homes that were disturbing a neighborhood's residential character, the City's ordinances imposed new land use permitting requirements on all existing and future households that met the definition of group homes and sober living homes. Prior to enactment of the ordinances, the uses that it redefined as "group homes" and "sober living homes" had been permitted as of right if they had six or fewer residents. Pet. App. 2a; *see also* C.A. Statutory Addendum, at 104, 109. After enactment of the ordinances, those homes became unlawful unless they obtained the necessary permits.

To obtain the newly required land use permit, the applicant was required to certify, under penalty of perjury, that its sober living home would "serve no more than six tenants who are disabled as defined by state and federal law" and that residency would be limited to such persons. Pet. App. 6a (citing C.M.M.C. § 13-311(a)(2), (a)(4)), Pet. App. 7a n.9 (citing C.M.M.C. § 13-311(a)(1)(viii)); *see also* C.A. Statutory Addendum, at 74-75; 20-55820 C.A. Doc. 25-10, pp. 6-7 (certification). The ordinances imposed certain operational requirements on sober living homes as a condition of permitting, including that the home have mandatory house managers who were present on a 24-hour basis, that any resident using drugs or alcohol be removed immediately from the home, and that all residents must be participating "in legitimate recovery programs,

including, but not limited to Alcoholics Anonymous or Narcotics Anonymous." Pet. App. 6a-7a & n.8 (citing C.M.M.C. § 13-311). In order to verify that the home operated in compliance with the mandated permit conditions, all sober living home applicants were required to submit copies of their home's written intake procedures, rules and regulations, and relapse policy with their applications. C.M.M.C. § 13-311(a)(1)(v-ix). Even if a sober living home satisfied every operational requirement, its application was automatically denied if the home was located within 650 feet of any other City-permitted group home, sober living home, or state-licensed alcohol and drug treatment facility. Pet. App. 6a-7a (citing C.M.M.C. § 13-311(a)(14)(i)). An applicant could seek a reasonable accommodation from that separation requirement but, as a rule, the City did not make exceptions. Pet. App. 6a-7a (citing C.M.M.C. 13-311(a)(15)); 20-55820 C.A. Doc. 25-8, pp. 69:4-70:12 (denying 49 of 52 reasonable accommodation requests).

Both before and after adopting the ordinances, the City kept a spreadsheet identifying residences that it regarded as group homes or sober living homes, tracking the contact information for the home, names of the property owners, and the number of beds in the home. 20-55820 C.A. Doc. 25-11, p. 158, ¶ 4. The City's spreadsheet included homes operated by both SoCal and RAW. 20-55820 C.A. Doc. 25-11, p. 180, line 23, p. 181, line 6.

3. After the City adopted the ordinances, both SoCal and RAW submitted timely applications to continue operating their sober living homes in their

existing locations. Pet. App. 9a, 13a. The City denied each application, determining that none qualified for a permit because each was located within 650 feet of another sober living home or state-licensed alcohol and drug treatment home. Pet. App. 9a-10a, 13a-14a. The City stated that granting permits to SoCal or RAW to enable them to continue operation in their existing locations would contribute to an "overconcentration" of sober living homes in the area, to the detriment of those neighborhoods. Pet. App. 9a, 31a.

Once their permit application denials became final, SoCal's and RAW's sober living homes became unlawful uses under the City's zoning code. Pet. App. 2a, 6a (citing C.M.M.C. § 13-311). The City then issued citations and imposed fines on SoCal and RAW for operating "Sober Living/Group Homes" without City approval. Pet. App. 3a, 32a. After SoCal and RAW initiated their lawsuits in federal court, the City filed nuisance abatement actions in state court against both SoCal and RAW, seeking to abate their operation of unlawful "sober living group home[s]." Pet. App. 32a-33a. The City's refusal to grant permits to SoCal and RAW was not an aberration. According to City records, as of 2019 it had received 63 applications from existing sober living homes but approved only 12. 20-55820 C.A. Doc. 25-8, p. 192:4-24; *see also* Pet. App. 5a & n.7 (2022 statistics reflecting 73 home closures).

Procedural History

SoCal and RAW filed separate lawsuits challenging the City's zoning ordinances and alleging that they had been directly injured by the City's discrimination against people with disabilities. The City filed identical motions for summary judgment in both cases claiming, for the first time, that neither SoCal nor RAW could establish that their current and future residents were people with disabilities under federal or state law. Pet. App. 45a, 61a. The district court granted the City's motion in each case, ruling that neither SoCal nor RAW had raised a triable issue of fact whether their residents were "actually disabled" or "regarded as disabled" under the FHA, ADA, or FEHA. Pet. App. 46a-47a, 62a-63a. In particular, the district court held that in order to show that their residents were "actually disabled," SoCal and RAW must produce evidence of an "individualized disability assessment" for each resident and "prove its clients have a substantial impairment to a major life activity, on a case-by-case basis." Pet. App. 46a-47a, 62a-63a. The district court further held that both SoCal and RAW had failed to raise a triable issue of fact whether the City "regarded" their current or future residents as disabled. To make that showing, the district court required them to prove that the City "subjectively believes that [SoCal's and RAW's residents are] substantially limited in a major life activity." Pet. App. 48a, 64a. The district court also found that neither SoCal nor RAW had shown that its residents have a "record of disability," although neither

SoCal nor RAW had relied on that method to prove disability. Pet. App. 17a & n.17.

SoCal and RAW appealed from the judgments, arguing that the district court had disregarded relevant evidence and utilized incorrect standards by which to assess whether they had established that they served and intended to serve residents who were "actually disabled" or "regarded as disabled." The United States appeared as *amicus curiae* in support of reversal.

The Ninth Circuit reversed and remanded. It began by citing the standard for proof of "actual disability" set forth by this Court in *Toyota*, 534 U.S. at 198, under which proof of the extent to which an impairment substantially limits an individual's major life activities must be made in a "case-by-case manner." Pet. App. 21a. The panel noted that in cases brought by individuals, proof that an impairment substantially limits a major life activity does not require medical evidence but may be based on the plaintiff's own testimony. Pet. App. 24a.[7] It found that the district court

[7] This is the general rule. *See*, *e.g.*, *Sugg v. City of Sunrise*, 2022 WL 4296992, *9 (11th Cir. Sept. 19, 2022) (unpublished); *Morrissey v. Laurel Health Care Co.*, 946 F.3d 292, 300-01 (6th Cir. 2019); *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 998-99 (10th Cir. 2019); *Mancini v. City of Providence by & through Lombardi*, 909 F.3d 32, 43-44 (1st Cir. 2018); *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 43 (2d Cir. 2015); *E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 643-44 (7th Cir. 2010); *E.E.O.C. v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 617, 620 (5th Cir. 2009); *Desmond v. Mukasey*, 530 F.3d 944, 956 (D.C. Cir. 2008). *See also* 29 C.F.R. § 1630.2(j)(1)(v) ("The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general

had erred when it "unnecessarily limited its inquiry to individualized medical evidence of the disability of current residents" in deciding that SoCal and RAW had failed to demonstrate a triable issue of fact as to whether they served or intended to serve residents who were "actually disabled." Pet. App. 29a.

The question before the Ninth Circuit, then, was what types of evidence may by used by a housing provider to raise a triable issue whether it serves or intends to serve persons whose impairments substantially limit their major life activities so as to meet the definition of "actual disability." Noting that its approach aligns with that of other circuit courts, the Ninth Circuit explained that

> "[i]n the context of zoning discrimination against a home that aims to serve people with disabilities, . . . courts must look at the evidence showing that the home serves or intends to serve individuals with actual disabilities *on a collective basis*, including the home's policies and the standards the municipality uses to evaluate the residence.

Pet. App. 34a-35a; *see* Pet. App. 24a (home may discharge burden by proof of "policies and procedures to ensure that they serve or will serve those with actual disabilities and that they adhere or will adhere to such policies and procedures").

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population usually will not require scientific, medical, or statistical analysis.").

The Ninth Circuit provided the district court with a non-exclusive list of evidence that it should consider on remand to determine whether SoCal and RAW had generated a triable issue of fact whether they served or intended to serve residents who are "actually disabled." Pet. App. 25a. That evidence, which had been submitted by SoCal and RAW but disregarded by the district court, included "admissions criteria and house rules, testimony by employees and current residents, and testimony by former residents." Pet. App. 25a. Evidence of the existence and enforcement of a zero-tolerance policy also may be relevant to show that the home is not occupied by persons who are currently using illegal drugs and thereby excluded from the definition of disabled. *See* Pet. App. 26a-28a. In reaching its conclusion, the Ninth Circuit emphasized that the City itself conceded at oral argument that a *proposed* group home could meet the "actual disability" definition by relying on "evidence of policies and procedures that the group home has a zero-tolerance policy [re drugs and alcohol], produced through declarations of individuals related to the group home." Pet. App. 25a (citing Oral Arg. at 29:45-30:30).

The Ninth Circuit also concluded that the district court had erred by using the pre-ADA Amendments Act standard of proof of "regarded as disabled" and had ignored substantial evidence that the City indeed "regarded" the persons SoCal and RAW served and intended to serve as disabled. It went on to identify evidence that the district court must consider on remand in assessing whether respondents had raised a

triable issue whether the City regarded the residents whom respondents served and sought to serve as disabled. Pet. App. 30a-33a.

The most important evidence identified by the Ninth Circuit for the district court to consider on remand was the City's own zoning code defining "sober living homes" as "group home[s] for persons who are recovering from a drug and/or alcohol addiction and who are considered handicapped under state or federal law." Pet. App. 30a-31a (citing Costa Mesa Municipal Code § 13-6). Additional evidence the panel identified for the district court to consider on remand included the City's repeated statements in its own resolutions and communications denying respondents' permit applications. Pet. App. 31a. Those statements include the formal findings by the City Council and Planning Commission that each applicant was operating a "sober living home" made in City resolutions denying respondents' permit applications. Pet. App. 31a-32a. As further support for denying respondents' applications, both the City Council and Planning Commission made findings that granting the requested permits would result in an "overconcentration" of sober living homes and drug and alcohol treatment facilities in the neighborhoods in question. Pet. App. 31a-32a. In other words, allowing respondents' sober living homes to continue operating would result in too many sober living homes in their neighborhoods. The district court also must consider on remand the City's repeated citations and fines against each respondent for operating "sober living homes" without the necessary permits

and subsequent state court nuisance abatement actions filed against each respondent for operating "sober living homes" without City approval. Pet. App. 32a-33a.

Only after summarizing that evidence directly bearing on whether the City regarded the residents as disabled did the Ninth Circuit suggest that "oral testimony given at public hearings and written statements submitted to the City by residents opposing the permit applications" that reflect stereotypes about the homes' residents was evidence that the district court should consider in its "regarded as disabled" analysis, but *only*

> if appropriately presented *and to the extent it appears in the City Council's stated reasons for adopting the Ordinances or denying permits and reasonable accommodation requests*.

Pet. App. 33a-34a (emphasis added).

The court of appeals remanded to the district court to consider "whether the record contains evidence sufficient to establish a genuine dispute of material fact on the 'actually disabled' *or* 'regarded as disabled' prongs of the disability definition." Pet. App. 35a (emphasis added). The panel later denied the City's petition for rehearing en banc after no active judge requested a vote on the rehearing petition. Pet. App. 70a-71a.

REASONS FOR DENYING THE WRIT

I. Review should be denied with respect to the court of appeals' decision on the "actually disabled" prong of the disability definition.

A. There is no inconsistency in the lower courts regarding the evidence that may be used to establish "actual disability" in land use cases.

It is undisputed that the City's zoning ordinances define sober living homes as residential uses occupied by persons considered disabled under the FHA, ADA, and state law and that the City regulated SoCal and RAW pursuant to those ordinances. The City nonetheless argues that review is necessary because of "confusion and inconsistency" in the lower court decisions on how to assess "actual disability" in land use discrimination cases and on a claim that the resulting jurisprudence "contradicts the principles this Court has laid down for discrimination suits brought by individuals." Pet. 14-15. The cases cited by the City show no such conflict. Each is consistent with the decision below and with this Court's precedent.

Contrary to the City's characterization, neither the Ninth Circuit in its decision nor any of the other circuits "simply presume" that group home residents in recovery from substance abuse have a disability that substantially limits their major life activities. Pet. 18, 21. In each "actual disability" case cited by the City, the court of appeals acknowledged that while alcoholism

and drug addiction may be "impairments" under the FHA or ADA, a finding of actual disability requires a case-by-case assessment of whether the current or future residents or clients suffer from an impairment that substantially limits their major life activities. Pet. 18-24 (citing *Harmony Haus Westlake, L.L.C. v. Parkstone Prop. Owners Ass'n*, 851 F. App'x 461, 464 (5th Cir. 2021) (unpublished); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46-47 (2d Cir. 2002) (*RECAP*); *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 336-37 (6th Cir. 2002)). Like the Ninth Circuit here, each court of appeals examined the unique facts and specific record in making the case-by-case determination whether the residents served by or intended to be served by a home were substantially limited in a major life activity. The evidence in this case would raise a triable issue of fact on actual disability under any of those decisions.

In *RECAP*, for example, the Second Circuit found that the record contained evidence establishing that the future residents of a proposed halfway house for recovering alcoholics would have qualified as "actually disabled" under the FHA, ADA, and Rehabilitation Act. *RECAP*, 294 F.3d at 47. RECAP's future residents qualified for the housing pursuant to New York regulations that limited residency to persons who, *inter alia*, were "'unable to abstain [from alcohol] without continued care in a structured supportive setting.'" *Id.* (internal citation omitted). The Second Circuit found that this residency requirement served to limit residency to persons in recovery who were substantially

limited in their ability to care for themselves, a major life activity. *Id.* at 47-48.

In *MX Group*, the Sixth Circuit also recognized that while drug addiction may be an impairment, proof of actual disability under the ADA required proof that the impairment substantially limits a major life activity. It found that the evidence supported the district court's judgment, after a bench trial, that the future clients of the plaintiff's proposed methadone clinic would have satisfied that requirement. 293 F.3d at 328-29, 336-38. That evidence included the clinic's requirement that all clients must provide proof that they had been addicted for at least one year, including physical dependence, and the testimony regarding the effect of drug addiction on the ability of its clients to engage in the major life activities of working, functioning socially and parenting and that the clinic planned to provide programs to address those issues. 293 F.3d at 337, 338 n.2, 339. The Sixth Circuit's decision also rested on alternative grounds – that the future clients of the methadone clinic qualified as disabled because they had a "record of a disability" and were "regarded as disabled" by the city when it denied the zoning permit. *Id.* at 338-42.

In *Harmony Haus*, an unpublished, non-precedential decision by the Fifth Circuit, the panel found no error in the district court's conclusion, after a bench trial, that current and future residents of a sober living home qualified as disabled under the FHA. 851 Fed. App'x, at 463-65. It upheld the district court's conclusion that the risk of relapse constituted a substantial

limitation on the current residents' ability to care for themselves. *Id.* at 464. The panel relied on record evidence, including that three current residents had testified regarding their inability to live alone and care for themselves without relapse, that residents typically came directly from inpatient treatment centers, and that living in a sober living home after treatment helps recovery. *Id.* at 463-64. As for future residents whose identities were unknowable, the panel looked to the home's admission criteria, coupled with current resident testimony as representative of the experiences of future residents, to conclude that the district court did not err in finding that future residents met the definition of "actually disabled." *Id.* at 464-65.

The other cases cited by the City did not address the issue presented here. In *United States v. Southern Management Corp.*, 955 F.2d at 916, a community drug and alcohol abuse treatment center sought to rent housing for a planned second phase of its recovery program. Contrary to the City's argument, the Fourth Circuit's decision in *Southern Management* did not rest on application of the "actual disability" definition and is unhelpful here. Pet. 18-19. Instead, the Fourth Circuit upheld the district court's summary judgment on the grounds that the proposed residents qualified as disabled under the FHA under the "regarded as" prong of the disability definition. 955 F.2d at 917-19 (discussing HUD final rule implementing the FHAA, codified at 24 C.F.R. § 100.201(d)(1), (2)).

Lakeside Resort Enterprises, LP v. Bd. of Sup'rs of Palmyra Twp., 455 F.3d 154, 155 (3d Cir. 2006), is even

more unhelpful. The City's contention that the Third Circuit "elected to ignore the 'substantially limits' requirement" of the disability definition, Pet. 20, rests entirely on a footnote in which the court of appeals simply "not[ed] that at least two other courts have held that recovering alcoholics and drug addicts are handicapped, so long as they are not currently using illegal drugs." 455 F.3d at 156 n.5. But that footnote did not comprise part of the holding; indeed the issue was not even in dispute. The case concerned whether the proposed facility qualified as a "dwelling" under the FHA. *Id.* at 154.

B. The decision below correctly applies an established rule of law to the evidence of record.

In the decision below, the Ninth Circuit faithfully applied this Court's precedent requiring an individualized assessment of whether the persons whom SoCal and RAW serve and seek to serve are "actually disabled." The issue to be decided determines what evidence is relevant to the inquiry. Here, at issue is whether the City 's regulation of *housing* violates the FHA and ADA. Thus the question is whether that *housing* was intended for persons meeting the definition of "actually disabled," not whether any particular *person* was substantially limited in a major life activity. Based on the unique facts of this case, therefore, the individualized assessment had to focus on the attributes of the intended occupants of SoCal's and

RAW's sober living homes collectively, not on the peculiar facts regarding any specific resident.

At no time in either SoCal's or RAW's two- to three-year permit application process did the City have any interest in the particular limitations on major life activities of any specific SoCal or RAW resident. *See*, *e.g.*, 20-55820 C.A. Doc. 25-10, pp. 6-8, 19-22; 20-55870 C.A. Doc. 36-10, pp. 34-51, Doc. 36-11, pp. 5-62. Nor should it have. An individualized assessment of the disability of current residents is merely a snapshot at a specific point of time. Had SoCal or RAW obtained a permit, its use would not have ended when any particular resident moved out, but would have continued into the future until the permit was surrendered by them or revoked by the City.

The Ninth Circuit's conclusion that the district court had erred in failing to consider all the evidence relevant to the assessment of "actual disability" is not the kind of decision this Court reviews. Whether evidence is relevant in any given case "is fact based and depends on many factors." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008) (citing Advisory Committee's Notes on Fed. Rule Evid. 401 ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.")).

Moreover, the Ninth Circuit's focus on the attributes of the housing, not the circumstances of specific individuals, fits with one of the purposes for which the Fair Housing Amendments Act of 1988 was enacted,

namely to counter the use of zoning and local land use laws that impose restrictions on "congregate living arrangements among non-related persons with disabilities." H.R. REP. No. 100-711, at 23-24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2184-85. The United States, in its *amicus* brief below, explained that requiring individualized proof that each resident of a proposed group home was substantially limited in a major life activity would impose an unsurmountable burden of proof, insulating even the most blatant discriminatory conduct from review. 20-55820 C.A. Doc. 30, p. 17 ("when a discriminatory zoning law prevents a group home from opening in the first place – and, thus, no current residents exist to put before the court – the group home could never satisfy the disability element of an FHA or ADA claim"); *see* Pet. App. 24a n.24 (same). Such a result contradicts the purpose of the FHAA to remove discriminatory restrictions on the housing choices of people with disabilities. H.R. REP. No. 100-711, at 23-24.

II. Review should be denied with respect to the court of appeals' decision on the "regarded as" prong of the disability definition.

The City identifies no error in the Ninth Circuit's correction of the district court's erroneous reliance on the pre-ADA Amendments Act standard to determine whether respondents' residents were "regarded as disabled." Instead, the City focuses on one particular piece of evidence that the panel suggested may be relevant

in deciding whether the City regarded the existing or future residents of respondents' homes as disabled and ignores the bulk of the evidence upon which the decision rests. Pet. 26-28.

A. The decision below correctly applied settled law to the facts of this case.

The City's assertion that the Ninth Circuit "expanded the reach of the 'regarded as' prong to include the perceptions of persons other than the entity accused of discrimination" by imputing to the City "opinions merely expressed by the public during forums" finds no purchase in the actual opinion. *See* Pet. 25-26. The court of appeals was careful to cabin the use of evidence of public statements in assessing how the City regarded sober living residents. Such evidence is relevant only if it "appears in the City Council's stated reasons for adopting the Ordinances or denying permits and reasonable accommodation requests." Pet. App. 34a. Conversely, if the public's stated fears and prejudices do not appear as part of the City's stated reasons for its decision, then they have no relevance in determining whether the City "regarded" sober living home residents as disabled.

Holding a city accountable for its own written statement of reasons for an action breaks no new ground. The general rule is that statements made by members of the public at public hearings are not imputed to government *unless* there is some additional evidence that the government entity acted because of

or in response to those public statements.[8] This Court does not grant review to reconsider the lower courts' fact-specific application of established law.

Even if the City's misreading of the Ninth Circuit's decision was correct (it is not), any mistake in identifying one small piece of evidence as relevant pales in the face of the overwhelming direct evidence that the City regarded SoCal's and RAW's residents as disabled based on the City's own statements in its ordinances and repeated in official resolutions, citations and court filings. The City's zoning ordinances defined sober living homes as home for persons in recovery from substance abuse "who are considered handicapped under state or federal law." Pet. App. 30a-31a (citing Costa Mesa Municipal Code § 13-6). In denying SoCal's and RAW's permit applications, the City Council and Planning Commission repeatedly characterized their operations as "sober living homes." Pet. App. 31a. Both legislative bodies made formal findings that SoCal and

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[8] *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269 (1977) (plaintiffs failed to prove that city zoning denial was motivated by a discriminatory purpose where the decision was based on standard zoning criteria even if some members of the public opposing project may have been motivated by discriminatory animus); *see also*, *e.g.*, *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196 (2003) (existence of discriminatory statements made by sponsors of a citizen-driven petition drive was insufficient to attribute either discriminatory intent or state action to the defendant city); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (evidence showed that the city's decision to require permit was based on its concern "with the negative attitude of the majority of property owners located [near the home], as well as with the fears of elderly residents of the neighborhood").

RAW were operating "sober living homes" when they denied respondents' permit applications Pet. App. 31a-32a. Both the City Council and Planning Commission further found that they could not approve respondents' permit applications because doing so would lead to an "overconcentration" of sober living homes and drug and alcohol treatment facilities in the affected neighborhoods. Pet. App. 31a-32a. The City also issued multiple citations and fines against each respondent for operating "sober living homes" without the necessary permits and filed state court nuisance abatement actions alleging that each respondent was operating a "sober living home" without City approval. Pet. App. 32a-33a.

B. The circuits are in agreement on application of that settled rule of law.

The Ninth Circuit's decision here and the circuit cases cited by the City consistently refuse to impute intent to municipalities based solely on statements made by members of the public at hearings or in written submissions. There is no conflict to correct. Each court concluded that such statements were relevant to determining the municipality's intent only in cases in which the evidence supported finding that the decision makers themselves acted for the same reasons or in response to those statements. There is no need for this Court "to bring the circuits into line." Pet. 25, 27-30.[9]

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[9] *See MX Grp.*, 293 F.3d at 341-42 (evidence showed that both local residents and city law enforcement officers expressed concerns that the methadone clinic clients would bring drug

There is no error on the part of the Ninth Circuit nor any inconsistency in the circuits' application of this settled rule of law. Even if the City were correct in its characterization of the state of the law, this case is not a suitable vehicle for close examination of the issue because of the overwhelming record evidence otherwise establishing that SoCal's and RAW's residents were

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activity and violent crime to the neighborhood *and* that the city's decision to deny clinic's permit application was based primarily on that same concern); *A Helping Hand, LLC v. Baltimore Cnty.*, 515 F.3d 356, 365-66 (4th Cir. 2008) (the record "contain[ed] abundant uncontroverted evidence that the County Council knew of and legislated in response to community opposition to the [methadone] [c]linic"); *RHJ Med. Ctr., Inc. v. City of DuBois*, 564 F. App'x 660, 664, 666 (3d Cir. 2014) (pre-ADA amendments case concluding there was insufficient evidence that city " 'regarded' the clinic's potential patients as substantially limited with regard to a major life activity" because there was no evidence that constituents regarded patients as substantially limited); *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 579-80 (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) (evidence supported finding intentional discrimination where the district court had "noted the history of hostility of neighborhood residents to [the plaintiff's group home] and their pressure on the Mayor and other city officials," and further, that evidence supported the district court's finding "that this hostility motivated the City in initiating and continuing its enforcement efforts" against the plaintiff); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 40, 41-42, nn.1, 3, 49 (2d Cir. 1997) (upholding finding that the center had a likelihood of success on the merits on its discrimination claims where "[t]here is little evidence in the record to support the [zoning board's] decision [to deny the land use permit] on any ground other than the need to alleviate the intense political pressure from the surrounding community brought on by the prospect of drug- and alcohol-addicted neighbors," and the zoning board had failed to follow its own zoning ordinance).

"regarded as disabled" by the City. Review should be denied.

III. Review should be denied because the decision below is interlocutory and rests on alternate grounds.

The petition should be denied because it seeks review of an interlocutory ruling. This Court generally awaits final judgment in the lower courts before exercising its certiorari jurisdiction. *Virginia Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring) (denial of petition for certiorari before final judgment rendered); *Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying petition for certiorari because "the Court of Appeals [had] remanded the case" and thus it was "not yet ripe for review by this Court").

The district court granted petitioner's motions for summary judgment against each respondent. No party has yet prevailed on respondents' claims or petitioner's defenses. The court of appeals remanded the case to the district court "to consider whether the record contains evidence sufficient to establish a genuine dispute of material fact on the 'actually disabled' *or* 'regarded as disabled' prongs of the disability definition." Pet. App. 35a. Interlocutory review is especially inappropriate here because the Ninth Circuit concluded that respondents had created triable issues of fact with respect to *both* the "actually disabled" and "regarded as disabled" prongs. Pet. App. 34a-35a. As discussed

above in Part II.A, the City must ignore the plain text of the Ninth Circuit's opinion to craft its question presented on the "regarded as disabled" issue. As a result, any decision by this Court on the first question presented by the City on the "actual disability" prong will not change the Ninth's Circuit's reversal of summary judgment and remand to the district court. There, Costa Mesa will have a full and fair opportunity to persuade the district court to reject respondents' claims in the first instance – a result that would moot the need for review by this Court.

IV. Petitioner and its *Amici* exaggerate the need for review and the effect of the Ninth Circuit's decision.

The City claims that this Court's guidance on proof of disability is needed because of the "tsunami of federal disability litigation" between sober living homes and municipalities. Pet. 12-14. Other than cases brought against the City of Costa Mesa challenging the same ordinances challenged here, few cases in the "tsunami" cited by the City touch on the issue of proof of disability in land use cases. *See* Pet. 13-14, nn.7-9.

Nor is there anything in the Ninth Circuit's decision that interferes with "traditional municipal control over local zoning laws." Brief of *Amicus Curiae* on Behalf of City of Mission Viejo, *et al.*, at 17. Petitioner's *amici* argue that Congress must make "its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States.'" *Id.*, at 14 (citing *City of*

Edmonds v. Oxford House, Inc., 514 U.S. 725, 744 (1995) (Thomas, J., with whom Scalia and Kennedy JJ. join, dissenting) (internal citations omitted)). But Congress manifested that intention clearly in the FHA. With narrowly enumerated exceptions not relevant here, *see* 42 U.S.C. § 3607, the FHA provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615. The ADA preempts state and local laws if they provide less protection for the rights of people with disabilities than the ADA. 42 U.S.C. § 12201(b). California law similarly preempts local land use law made unlawful by FEHA. Cal. Govt. Code § 12955.6. Thus, federal and state fair housing laws do not impinge on local zoning powers unless those local powers are exercised in a manner contrary to the anti-discrimination policies of the United States and California.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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

Counsel for Respondents

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