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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondents do not dispute that the nationwide proliferation of group housing for recovering alcoholics and drug abusers is generating widespread litigation.[1] Whether residents of these facilities are disabled within statutory definitions is a threshold question in such litigation. But Respondents urge this Court not to provide any guidance on how to resolve this issue, which has divided the lower courts.

The Ninth Circuit's decision lowers the standard a sober living home suing a municipality for disability discrimination must meet to prove its residents are disabled. Respondents maintain that the circuits align with the Ninth Circuit's approach, and that any differences in the opinions and outcomes are attributable to "the specific facts and evidentiary records presented in each case." BIO 2. Not so. The circuits apply inconsistent legal reasoning to the facts and records before them, deviating significantly from this Court's holdings.

Municipalities like Petitioner are on the front lines of these controversies, attempting to fulfill their zoning responsibilities while still complying with federal discrimination law. Here, the City, in legislating,

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[1] See the news articles and decisions cited in the Petition. *See* Pet. 11-12 nn.5-6; Pet. 13 nn.7-8. There are more decisions from the last few months: *Courage to Change Ranches Holding Co. v. El Paso Cnty.*, 73 F.4th 1175 (10th Cir. 2023); *City of Huntington v. Lifehouse, Inc.*, No. CV 3:22-0402, 2023 WL 4534618 (S.D. W. Va. July 13, 2023); *Hansen Found., Inc. v. City of Atl. City*, No. 1:21-CV-20392, 2023 WL 5994378 (D.N.J. Sept. 15, 2023); and *Chestnut Hill NY, Inc. v. City of Kingston*, No. 1:23-CV-01024, 2023 WL 6796622 (N.D.N.Y. Oct. 13, 2023).

took care to heed the discrimination laws and extended preferential housing opportunities to the disabled. 20-55870 C.A. Doc. 35 (C.A. Statutory Addendum), at 67, 78, 85-86, 88, 90, 93, 110-15, 122-25. The result was these lawsuits.

All parties would greatly benefit from guidance on what the law requires. Nothing in Respondents' brief in opposition counsels otherwise.

ARGUMENT

I. The Circuits Are in Disarray over the Proper Standard for an Entity Suing for Disability Discrimination on Behalf of the Individuals It Serves.

This Court has never addressed what an entity suing for discrimination on the basis of its clients' alleged disability must show to establish that disability, although it has made clear that individuals suing on their own behalf must provide individualized evidence that they qualify as disabled. *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. The circuits have repeatedly confronted the standard for entities. Their results have been inconsistent but, like the Ninth Circuit here, they have generally failed to follow this Court's direction that such proof must be on an individualized basis. Respondents focus attention on the underlying facts of these decisions while ignoring their flawed legal reasoning.

Respondents insist that the circuits "follow[] this Court's direction to conduct an 'individualized assessment' whether the [facilities] provided housing to persons who have an impairment that 'substantially limits one or more major life activities.' " BIO 2. However, to reach this conclusion they must rely on a contradiction: "[T]he *individualized* assessment had to focus on the attributes of the intended occupants of SoCal's and RAW's sober living homes *collectively*." BIO 23-24 (emphasis added). They attribute this contradiction to the "unique facts of this case" – facts common to all decisions in which a facility sues a municipality for alleged disability discrimination against its clientele.

The circuits have reached inconsistent resolutions. *See* Pet. at 18-23. Respondents unsuccessfully attempt to harmonize some of these decisions by focusing on their facts while ignoring the legal principles applied. They also incorrectly assert that other decisions cited in the Petition do not address the issue here.

For example, Respondents ignore that the Fourth Circuit in *United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992), eliminated the requirement of an individualized showing of disability. Pet. 18-20. Their cursory rejoinder is that the decision "did not rest on application of the 'actual disability' definition" and instead upheld summary judgment "under the 'regarded as' prong of the disability definition." BIO 22. Not so. The circuit expressly considered both the actual disability prong under 42 U.S.C. § 3602(h)(1) and the regarded as prong under § 3602(h)(3). 955 F.2d at 917, 919. Its circular reasoning was that defendant's refusal to rent housing to

plaintiff in and of itself satisfied the statute's actual disability prong because it limited plaintiffs' clients' "ability to obtain housing (a major life activity)." *Id*. The court thus found that disability flows automatically from discrimination, eliminating the need for a showing of disability.

In *Lakeside Resort Enterprises, LP v. Board of Supervisors*, 455 F.3d 154 (3d Cir. 2006), the Third Circuit adopted this holding. Pet. 20. Respondents try to dodge this observation by noting that the principal issue in *Lakeside Resort* was the definition of a dwelling under the Fair Housing Act, and that the decision cited *Southern Management Corp*. in a footnote. BIO 22-23. But Respondents ignore that the question of what constitutes a dwelling under the Fair Housing Act arises only if the persons to be housed fit within the Act's definition of handicapped – which the Third Circuit held to be established through the Fourth Circuit's circular reasoning.

The Second Circuit also eliminated the need for an individualized showing of disability in *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35 (2d Cir. 2002), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The court presumed disability by assuming compliance with a state-mandated residency requirement. Pet. 20. Respondents agree but maintain this is acceptable because "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." BIO 20-21. This pat rejoinder merely moves the evasion of the proof of disability to a differ-

ent level – it presumes that the Fair Housing Act criteria are satisfied by assuming that state law criteria are satisfied. Respondents also claim that "the Second Circuit found that the record contained evidence" of actual disability, BIO 20, but the court pointed to no evidence in the record and relied only on the state law criteria. 294 F.3d at 46-48.

Additionally, the Fifth Circuit in *Harmony Haus Westlake, L.L.C. v. Parkstone Property Owners Association*, 851 F. App'x 461 (5th Cir. 2021) (per curiam), the Sixth Circuit in *MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002), and the Ninth Circuit in the present case all allowed plaintiffs to show that their clients were substantially limited in major life activities through the presentation of selective, collective evidence rather than individualized evidence. Pet. 21-24. Respondents do not disagree; rather, they proceed on the assumption that such proof is all that the law requires. BIO 21-22.

Respondents do not explain how this assumption can be reconciled with this Court's holding that individuals bringing disability discrimination claims must provide individualized evidence that they qualify as disabled. *Sutton*, 527 U.S. at 483. Instead, they simply assert that their residents must be evaluated "collectively." BIO 23-24.

Respondents argue that facilities proposing to serve the disabled must necessarily be immune from this Court's holding that disability must be proved on an individualized basis. BIO 25. They do not explain the rationale for this two-tracked application of the law, other than to note that a sober living home that

has not yet begun operations would have no individuals as to whom to present individualized proof. *Id.* But when a group home is applying for a use permit, the operator must affirm to the City that only residents who are disabled as defined by federal and state law will reside there. C.A. Statutory Addendum 74. If the affirmation later proves to be false, the permit will be revoked. *Id.* at 76-77. That unique situation is not the circumstance presented in this case, and should not drive the interpretation of federal law.

II. The Circuits are in Disarray over When Expressions of Public Opinion Made to a Municipality Can Be Attributed to the Municipality.

The Ninth Circuit's other principal error was directing the district court to regard public statements to the City as evidencing how the City regarded Respondents' residents. This contravenes this Court's instruction that the regarded as prong of the statutory discrimination definitions refers to the views of the defendant, not of a third party.

Respondents concede that statements made by members of the public should *not* be imputed to a government entity unless the evidence shows the entity actually adopted those statements. BIO 2, 26-27. They assert that the circuits, particularly the Ninth Circuit, "are in agreement on application of that settled rule of law." BIO 28. This is incorrect.

Respondents acknowledge that the Third Circuit in *RHJ Medical Center, Inc. v. City of DuBois*, 564 F. App'x 660, 664, 666 (3d Cir. 2014), correctly recognized that public opinion should not be imputed to the government. BIO 29 n.9. They then camouflage the

circuits' disagreements by attempting to shoehorn the contrary decisions into the same category.

For example, Respondents' discussion of *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), BIO 29 n.9, ignores the critical holding: "[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*." 117 F.3d 37 (emphasis added). The Second Circuit imputed discriminatory statements to the City simply because there was "little evidence" to support the City's decision on another ground. *Id.* This is not a holding that the government is liable only for public statements it actually adopts.

Likewise, Respondents attempt to limit the Fourth Circuit's decision *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 365-66 (4th Cir. 2008), on the ground that the record contained "abundant uncontroverted evidence" the County Council knew of and legislated in response to community opposition. BIO 29 n.9. However, the "abundant uncontroverted evidence" the circuit cited for this proposition showed only that councilmembers knew or should have known of the public's opposition, not that the county adopted its views. 515 F.3d at 366. To fill this gap, the court held that the councilmembers' awareness of the public's sentiment "would be enough to find that the Council enacted the Bill in response to community opposition." *Id.*

Respondents similarly quote *Tsombanidis v. West Haven Fire Department*, 352 F.3d 565, 579-80 (2d Cir. 2003), *superseded by regulation on other grounds as stated in Mhany Management, Inc. v. County of Nassau*, 819 F.3d 581 (2d Cir. 2016), to the effect that evidence supported the district court's finding that public hostility motivated defendant city. BIO 29 n.9. They fail to observe that the decision identifies no evidence other than the public statements themselves, deeming these statements sufficient evidence by citing *Innovative Health Systems.* 352 F.3d at 580.

Finally, Respondents try to read the Sixth Circuit's decision *MX Group* as requiring evidence the government adopted the public's negative stereotypes. BIO 28-29 n.9. They thereby disagree with the Ninth Circuit here, which read *MX Group* to hold that "this type of public speech about sober living home residents was evidence that the government regarded the population under discussion as disabled." Pet. App. 34a. In fact, *MX Group* observed that the public's testimony "complained that a methadone clinic would attract violence and drug activity to the community." 293 F.3d at 341. It concluded 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.* at 342.

Automatically imputing the public's views to the government is the antithesis of what Respondents concede should be "the settled rule of law," BIO 28-29, but it is what the Ninth Circuit directed the district court to infer here. Instead of requiring the district court to examine whether evidence showed the City

adopted the views the public expressed, it held that "public speech," "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, should be considered in the 'regarded as disabled' analysis." Pet. App. 34a. Neither the Ninth Circuit nor Respondents point to any record evidence showing the City actually adopted the negative views some in the public expressed, rather than merely recording them in the Council's report.

The Court should grant review to resolve the lower courts' inconsistency and to clarify that the public's discriminatory statements do not satisfy the regarded as prong unless the government actually adopts them.

III. The City's Legislative Definitions Do Not Undermine the Need for Review.

Respondents contend there is "overwhelming direct evidence that the City regarded SoCal's and RAW's residents as disabled." BIO 27. This evidence is the uncontested but irrelevant fact that the City's enactments define group and sober living homes as facilities that serve persons "considered handicapped" under state and federal law. C.A. Statutory Addendum 49, 50, 91, 93.

Like the Ninth Circuit, Respondents deem this to be evidence the City regarded SoCal's and RAW's residents as disabled – a recurring theme of the opposition. Pet. App. 30a-31a; BIO 1, 9, 17, 19, 27, 30-31.

These definitions are irrelevant because the issue before the courts was not how the City defined sober living homes but rather whether SoCal and RAW can

sue the City for disability discrimination. They could proceed in court only if they were suing on behalf of persons who were disabled within the statutory definitions. These general enactments did not evidence how the City regarded SoCal's and Raw's residents specifically.

In their interactions with the City, SoCal's and RAW's residents' status as disabled derived not from how the City regarded them but from how those operators represented their residents to the City in applying for permits. They made this representation because the City afforded sober living homes preferential treatment – it allowed them to operate in more areas of the City and to house more residents than comparable facilities serving the non-disabled.[2]

In processing SoCal's and RAW's applications, the City did not determine how to regard their clientele; it accepted at face value their representations that their clients were disabled. In the lawsuits, in contrast, the district court necessarily had to determine whether SoCal and RAW actually served disabled persons to determine whether they could pursue a claim of disability discrimination. The district court held that neither plaintiff had made an adequate showing of this threshold fact and therefore granted

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[2] Respondents claim that the ordinances placed new restraints on where and how sober living homes could operate, a contention not supported by the references it cites. BIO 10 (citing Pet. App. 2a and C.A. Statutory Addendum, at 104, 109). In fact, the ordinances created the new categories of group homes and sober living homes specifically to afford the disabled housing opportunities that were not available to the non-disabled. C.A. Statutory Addendum, at 88, 90, 113.

summary judgment in the City's favor. Pet. App. 48a-49a, 66a.

The Ninth Circuit's instruction to consider the ordinances' definitions improperly conflates the City's acceptance of an operator's representations for purposes of the application process with how the City perceives the operator's clientele. These are distinct issues, as to which this Court's guidance is required.

IV. This Court's Review Is Urgently Needed.

The clash between zoning requirements and disability discrimination laws is a growing problem. As amici California cities explain, these controversies expose municipalities nationwide to repeated litigation. Cal. Cities' Amici Br. at 4-7. There are new decisions every month. *See supra* note 1.

Respondents insist the Petition should be denied because the underlying decision is "interlocutory." BIO 30. In fact, the district court's grants of summary judgment fully resolved plaintiffs' suits, and they are now interlocutory only because the Ninth Circuit reversed. This Court commonly reviews circuit court decisions that reverse summary judgment. *See, e.g.*, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023); *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 48 (2023).

Respondents also argue that certiorari is inappropriate because the Ninth Circuit reversed the district court on two different grounds – that plaintiffs' clients might be "actually disabled" or "regarded as disabled." BIO 30-31. However, the Petition presented substantial reasons for reviewing both parts of the

Ninth Circuit's decision; a grant of certiorari will provide valuable guidance to courts on both issues.

Respondents further maintain that Supreme Court review is not warranted because "few cases . . . touch on the issue of proof of disability in land use cases." BIO 31. However, whether persons on whose behalf it is claimed the defendant has discriminated are disabled is necessarily an issue in *every* disability discrimination case. The fact that the circuits cannot agree on the proper standard, which must be applied every time a sober living home claims disability discrimination, guarantees that the district courts will be addressing this question inconsistently.

Finally, Respondents insist that there is nothing in the Ninth Circuit's decision that interferes with "traditional municipal control over local zoning laws." BIO 31. But they then concede that, if SoCal and RAW are successful in their suits, the City's zoning ordinances and codes will necessarily be invalidated. BIO 32. If the Ninth Circuit erred in reversing summary judgment, the traditional municipal control over local zoning laws in this and similar cases will have been improperly interfered with.

CONCLUSION

The lower courts will be greatly served if this Court can definitively articulate the legal principles that the Ninth Circuit misapplied in this action and that have split the circuits. Respondents' arguments do nothing to refute the need for review.

Respectfully submitted,

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