No. 14-56

In the Supreme Court of the United States

CITY OF NEWPORT BEACH, CALIFORNIA,
Petitioner,

v.

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

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

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, non-partisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, as well as state supreme and appellate courts.

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[1] Pursuant to United States Supreme Court Rule 37.2(a), IMLA provided timely notice to counsel of record for the parties of its intent to file this brief and requested their consent. Petitioner, City of Newport Beach, filed its consent to the filing of amicus briefs with this Court on July 28, 2014. Counsel for Respondents granted consent to IMLA by email on August 1, 2014, and consented to all amicus briefs by letter filed August 5, 2014. Pursuant to Rule 37.6, IMLA states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than IMLA or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

IMLA submits this brief to highlight the negative consequences of the opinion below for municipalities, elected municipal officials, municipal staff, municipal legal counsel, the public, and for democratic discourse at the local level.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Ninth Circuit panel's decision at issue creates a scenario wherein a plaintiff may challenge a facially nondiscriminatory ordinance as discriminatory and survive summary judgment merely by presenting evidence of an improper legislative purpose, without any evidence of any discriminatory effect. The decision will frustrate the administration of municipal government and the democratic process. It will chill the public comments of elected municipal officials, municipal staff, legal counsel and members of the public, for fear of creating the evidence necessary to support a challenge to any proposed municipal action. And it will allow opponents of a proposed municipal action to intentionally distort the record in an attempt to create evidence to facilitate legal challenges.

Perhaps most distressing, the decision will expose municipalities to the risk of significantly more litigation in virtually every area of municipal activity. The panel's decision has broad implications for local governments because disparate treatment actions under the Americans With Disabilities Act, the Fair Housing Act, and other anti-discrimination statutes, as well as the Equal Protection clause, largely employ the same legal analysis. If a plaintiff may proceed to trial when challenging a facially nondiscriminatory zoning ordinance based on the remarks of councilmembers or

members of the public, without ever having to show that he or she was treated differently from others or that the ordinance has any discriminatory effect at all, the same may be true for challenges to any number of municipal actions.

Finally, this Court has long noted that the judiciary is generally ill-suited to determine legislative motive. The decision at issue will force the courts not only to examine the motives of legislators, but also members of the public who advocate for or against municipal actions.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Will Frustrate The Democratic Process At The Municipal Level By Chilling Crucial Speech

According to the opinion below, a plaintiff is required to produce only "very little" evidence of discriminatory intent in order to create a triable issue of fact under a disparate treatment theory. Pet. App. 31a (citing *Schnidrig v. Columbia Mach, Inc.*, 80 F.3d 1406, 1409 (9th Cir. 1996)). As Judge O'Scannlain noted in his dissent from the denial of rehearing en banc, this low bar for surviving summary judgment, unchecked by a need to show some discriminatory effect, creates an unmanageable standard that will have serious, negative consequences for municipalities and their ability to enact facially nondiscriminatory legislation. Pet. App. 143a-144a (dissenting from denial of rehearing en banc).

Public input is uniquely important to democratic functions at the municipal level. *See White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("City

Council meetings…where the public is afforded the opportunity to address the Council…are the focus of important individual and governmental interests"). Each of the fifty states and the District of Columbia has some type of open meeting law requiring that debate and decisions of elected municipal officials be made in public. 2 John Martinez, *Local Government Law* §11:7 (2d ed. 2014); *see also*, W. Va. Code § 6-9A-1 *et seq*.; Wyoming Code § 16-4-401 *et seq.*; DC ST § 2-571 *et seq*. These laws also provide the public with the right to comment as part of the decision-making process. *Id*.

In this case, for example, Petitioner City of Newport Beach ("City") is subject to California's Ralph M. Brown Act (Cal. Gov. Code § 54950 *et seq*). The California legislature, in enacting the law, summarized the reasoning behind such laws:

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

Cal. Gov. Code § 54950.

Open meeting laws–and the interactions between local elected officials and the public that they facilitate–are crucial to the administration of local government and public participation in the democratic process. However, if the lower courts are instructed to allow any plaintiff showing evidence of discriminatory motive to proceed to trial without ever having to even

allege a discriminatory effect, then (1) elected municipal officials, municipal staff, legal counsel, and the public will withhold commenting on proposed municipal actions for fear of subjecting the city to civil liability and the risk of having the courts strike down the city's action, and (2) opponents of the proposed municipal action may comment in a disingenuous effort to distort the record and create evidence of purported discrimination, hoping to mire the municipality in litigation. A review of the factors relied upon by the court below reveals the extent to which this standard and mode of analysis are problematic.

A. *The Panel's Reliance On Public Comments As Evidence Of Municipal Discrimination Is Problematic, As Municipalities Rely On The Public For Crucial Input*

In reaching its conclusion, the court below considered the public comments made before the Newport Beach City Council on the issue of group homes to be evidence of the City's discriminatory intent. Pet. App. 40a, n. 26. The panel discusses the "angry" comments citizens made during public comment periods regarding group homes in the City. *Id.* The panel seems to have found that the City Council was "responsive to the public's views." *Id.* To be sure, the panel cites authority for generally conducting this inquiry, and neither Petitioner nor *amicus* disputes this authority; rather, *amicus* highlights the fact that the requirement for evidence of improper motive, without the need to show any discrimination at all, allows for the possibility that

such comments alone may be the basis for surviving summary judgment.

Specifically, the panel looked, *inter alia*, to public comments at a 2007 Planning Commission meeting, stating that "most public comments from City Residents expressed frustration" that the Commission had rejected an early version of what eventually become the Ordinance. *Id.* at 13a-14a. This analysis appears to be precisely the type of judicial inquiry that Judge O'Scannlain warns of. Pet. App. 143a-44a. This reliance on public comments as evidence of discrimination, without any limiting factor, greatly increases the risks discussed above–that citizens will either hesitate to provide crucial public commentary, or that the municipal democratic process will be skewed by those who wish to mire the municipality in litigation. Furthermore, in any one case it is virtually impossible to determine how representative any public comment is of the views of the public at large or of the officials who react to the comment.

Under the panel's analysis, a small group of concerned citizens could comment at a City Council meeting and posit that a proposed ordinance would have some discriminatory effect on some protected class of individuals. Such comments, now on the record, could later be used by a court to allow a plaintiff to proceed to trial, *whether or not* the law actually had the posited effect(s) and *whether or not* the legislative body actually intended to discriminate. Similarly, the views of citizens who speak in full support of a proposed municipal action for discriminatory reasons may be imputed to the legislative body *even when the legislative body has no*

intent to discriminate. Members of the public may have any number of motivations for commenting publicly at meetings of local government bodies, but allowing these comments to have such dramatic potential effects should not be endorsed by the judiciary.

The panel's reliance on public comments will encourage municipalities to make every effort to limit public input. In addition, citizens who support proposed municipal legislation for completely nondiscriminatory reasons may censor *themselves* and choose not to speak at public meetings, for fear of unintentionally saying anything that might hint at discriminatory intent. These chilling effects harm both the fundamental rights of members of the public and the public discourse crucial to a functioning democracy. *See White v. City of Norwalk*, *supra*, 900 F.2d at 1425 ("Citizens have an enormous first amendment interest in directing speech about public issues to those who govern their city").

B. *The Panel's Decision Will Encourage Public Agency Staff And Legal Counsel To Skew Their Advice To The Local Legislative Body*

In this case, legal counsel for the City advised the City Council that an early iteration of the proposed ordinance was of questionable legality, and was likely to be struck down by the courts. When the Council then decided to hire different legal counsel and draft a new, facially nondiscriminatory version of the ordinance, the Court below used this decision as evidence that the City had acted with improper legislative motive. Pet. App. 39a-40a.

The Court's approval of such evidence as the basis for striking down municipal legislation will serve to discourage the provision of honest and frank legal advice to municipal officials in public meetings. City attorneys and other municipal legal counsel will hesitate to point out or answer questions about potential problems with proposed legislation for fear of subjecting their clients to litigation–literally creating the evidence necessary for a successful lawsuit against the city–even though the very purpose of the attorney and staff is to provide information and recommendations and to answer questions from elected officials, often in public meetings.

Approving the panel's analysis would also discourage municipalities from seeking a "second opinion" on legal matters, for fear that doing so will create evidence of discriminatory intent. Unable to be challenged, the opinion of the municipal attorney would be elevated above that of the collective wisdom of the elected city council. Our entire system of jurisprudence implicitly recognizes that legal certainty does not exist, but the panel's decision penalizes a client who seeks more than one legal opinion.

C. *Elected Municipal Officials Will Hesitate To Candidly Comment On Proposed Municipal Actions*

The panel below also relied on the transcript of comments made directly by councilmembers themselves. Pet. App. 39a. Relying on the comments of local elected officials can certainly be illuminating as to legislative motive, but the problem remains that when such motive is the *only* element necessary to prove a challenger's case, elected municipal officials will be

heavily discouraged from candidly speaking about important public matters.

The panel here cites the City Council's efforts to defend the ordinance against citizens who wanted the Council to go further by explicitly prohibiting group homes in certain areas of the City. Pet. App 15a-16a. In particular, Councilman Henn attempted to show that his objective was to reduce the number of group homes, but that he endorsed only the method that, in his mind, was facially nondiscriminatory and would be applied on a case-by-case basis, rather than the complete prohibition advocated by some citizens. *Id*. This type of expression by individual council members is yet another unreliable factor that is applied by the panel without a manageable standard. It is unclear whether Councilman Henn's comments alone would present a triable issue of fact that must be determined by a factfinder. This is especially problematic because Councilman Henn was defending his and the Council's actions against constituents who wanted the City to go further by enacting an ordinance that actually was discriminatory.

It is also unclear whether comments made by individual councilmembers are enough to survive summary judgment. On a seven-member municipal body, like the Newport Beach City Council, would the comments of one member of the majority be enough to satisfy the panel's standard? Would the comments of a member of the minority denouncing a municipal action and warning of the allegedly discriminatory nature of the action be enough to give rise to a triable issue of fact? These unanswered questions only scratch

the surface of the potential problems for municipalities that the panel's opinion creates.

The panel's reliance on these types of comments will make elected municipal officials hesitant to speak on local matters, such as group homes, and local solutions designed to address these matters, such as the ordinance, if the consequence for doing so is to create significant legal exposure for the municipality. This puts elected officials in a precarious position. Even attempting to address constituent concerns in a facially nondiscriminatory way can create costly legal difficulties for their municipality and preclude timely resolution of such concerns due to years of delay in the courts.

This Court has long expressed concern about elected municipal officials being silenced for fear of potential legal action. *Cf. Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (expressing concern about "the hazard of a judgment against [legislators] based upon a jury's speculation"); *Spallone v. United States*, 493 U.S. 265, 300 (1990) ("Private lawsuits threaten to chill robust representation by encouraging legislators to avoid controversial issues or stances…"). Furthermore, this Court has declared that the views of one legislator cannot be controlling of judicial interpretation of a statute. *See Mims v. Arrow Financial Service, LLC.*, 132 S.Ct. 740, 752 (2012) ("the views of a single legislator, even a bill's sponsor, are not controlling").

D. *The Use Of Legislative Subcommittees Is Not Evidence Of Discrimination; The Panel's Decision Discourages Municipalities From Adopting New Procedures And Fully Investigating Local Issues*

The panel below also cites the procedural route the City Council took in enacting the ordinance as evidence of improper legislative motive. The panel specifically notes that the City, apparently for the first time, formed an ad hoc committee "that met privately and off the record." Pet. App. 41a. Second, the City conducted a survey to judge public support for regulating group homes in some manner. *Id*. at 41a-42a. Finally, the City formed a task force to enforce the Ordinance before the Ordinance itself was enacted. *Id*. at 42a. While each of these actions may have occurred for the first time in the City, they can hardly be labeled evidence of discriminatory intent sufficient to proceed to trial.

As the panel itself notes, ad hoc committees in California are allowed to meet privately and off the record by California's Brown Act, so long as they do not consist of a majority of the members of the governing legislative body. *Id.* at 41a n. 27 (citing Cal. Gov. Code § 54952.2); *Freedom Newspapers, Inc. v. Orange County Employees Retirement System*, 6 Cal.4th 821, 827-28 (1993). Moreover, conducting a survey can hardly be construed as an anomalous and improper action for a City to take. If the courts are instructed to permit review of every procedural route that allegedly discriminatory municipal action takes–even actions that a municipality is well within its legal rights to

take–then municipalities face great risks when utilizing any new or previously unused approach to solving the problems that local governments address.

Arlington Heights, as the panel notes, does explicitly approve of the use of procedural irregularities as an indicator of discriminatory intent. Pet. App. 30a (quoting *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977)). However, if such procedural "irregularities" as discussed above are considered evidence of discriminatory intent, local governments will hesitate to attempt new and creative methods for investigation of local issues, and for drafting, enacting, and enforcing municipal legislation.

This problem is exacerbated by the lack of any need to show or even allege unequal treatment. There are any number of reasons a municipality might, consistent with applicable state open meeting laws, wish to appoint ad hoc committees to further study issues of public importance and recommend action. The same is true for conducting public surveys and providing for enforcement of anticipated legislation.

II. The Panel's Novel Theory Impacts Not Only Local Zoning, But Many Of A Municipality's Most Important Duties

The decision of the court below allows a plaintiff proceeding under a disparate treatment theory to survive summary judgment merely by alleging a discriminatory legislative purpose. *See* Pet. at 19. The problems associated with this low standard for surviving summary judgment are made worse for

municipalities by the applicability of disparate treatment theory to numerous areas of the law.

Respondents here brought suit against the City of Newport Beach under the Americans With Disabilities Act (ADA) and the Fair Housing Act (FHA), alleging disparate treatment under the City's ordinance regulating group homes. Disparate treatment claims under these anti-discrimination statutes generally use the same analysis, which is largely borrowed from Title VII cases. Pet. App. 28a-29a, n.19. The *Arlington Heights* factors themselves, relied upon by the court below, were originally used in that case by this Court in a Fourteenth Amendment equal protection claim. *Id*. at 30a, n. 21. This use of the disparate treatment theory for a variety of claims makes the panel's decision a matter of great importance affecting nearly every facially nondiscriminatory municipal legislative enactment.

For example, the panel's reasoning appears to endorse the view that any comment in connection with any city action, whether by an elected official, city staff member, or member of the public, which implicates a class of persons protected by federal anti-discrimination laws or Equal Protection, can entitle a plaintiff to proceed to trial against a municipality. The broad consequences of such a standard are stunning. For example, a city may be rendered unable to adopt restrictions on the public smoking of cigarettes, for entirely legitimate health and safety reasons, if a group of citizens speaks in support of the restrictions because they "dislike [racial group X] who are always smoking too much." The same scenario could occur when a city attempts, for legitimate safety reasons, to adopt a new

rule closing all public parks at dusk. Supporters may comment that they support the new rule so "[racial group X] cannot have those loud late-night parties anymore." In both hypotheticals, under the Ninth Circuit panel's decision, a litigant could force the city to litigate a discriminatory treatment claim all the way to trial.

This dramatically affects the potential litigation that local governments will be forced to contend with, and will be costly to municipalities, such as the City, in both time and money. Such costs may arise directly from litigation, or from municipalities taking action to determine and minimize any potential liability.

As is the case here, all zoning ordinances are potentially affected as well. Zoning regulations are among the most important functions of municipalities like the City. If every zoning ordinance is potentially subject to the type of judicial review conducted by the panel, elected municipal officials will have a difficult time conducting the important business of zoning, which often requires a balancing of opposing interests, while also juggling the need to minimize the risk of litigation, even when the ordinances are not discriminatory on their face or as applied.

III. This Court Has Noted That Otherwise Valid Legislation Cannot Be Overturned Solely Based on the Motives of Individual Legislators

This Court has held that improper legislative motive cannot be the sole reason for striking down duly enacted legislation. But the panel below did exactly that by conducting the type of inquiry into legislative

motive that this Court has disfavored. In *Palmer v. Thompson*, this Court aptly pointed out that

> there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature…repassed it for different reasons.

Palmer v. Thompson, 403 U.S. 217, 225 (1971); *see also United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it."). Without requiring Respondents to make any showing that they suffered discrimination, the panel below has created an avenue for legislation to be struck down solely based on the enacting body's alleged discriminatory intent.

The panel's reliance on *Hunter v. Underwood* is misleading. The panel relies on *Hunter* for the proposition that improper legislative motive can be the basis for invalidating laws. Pet. App. 34a-35a. However, the panel ignores crucial language from this Court's opinion. Specifically, the Court states that the law at issue's "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that *effect*." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (emphasis added). To be sure, legislative motive was crucial to the Court's holding, but it was explicitly not

the sole basis for striking down the relevant portion of the Alabama Constitution.

Recently, in *United States v. Windsor*, this Court struck down a federal law based in part on the "bare congressional desire to harm" same-sex couples legally married under state law. *United States v. Windsor*, 133 S.Ct. 2675, 2691 (2013) (internal citations omitted). However, like *Hunter*, *Windsor* is distinguishable here because same-sex couples were actually treated less favorably than heterosexual couples under the federal law. As discussed above, group homes, under the panel's standard, are not required to allege any discriminatory effect at all.

CONCLUSION

The panel's opinion will have serious effects on the ability of municipalities, like the City, to enact facially nondiscriminatory legislation. The analysis undertaken by the panel involved combing through the record for comments made by elected officials and the public, legal advice given to a public body by counsel, and the procedural route taken by the particular piece of municipal legislation at issue. Such searching analysis, along with a very low standard to meet, allows a plaintiff to force a municipality to go to trial based on "very little" evidence of any one of the aforementioned factors. This represents a dramatic increase in liability risk and needless litigation expense for municipalities across the country. The panel's opinion will also allow plaintiffs seeking to delay municipal progress an additional avenue to cause delay and misuse already overtaxed judicial resources.

Accordingly, this Court should grant the petition for writ of certiorari to determine whether the type of judicial inquiry into legislative or public motive engaged in by the panel is an appropriate method of analysis in disparate treatment cases.

Respectfully submitted,

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