Nos. 11-55460 and 11-55461

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC SHORES PROPERTIES, LLC et al.,

Plaintiffs/Appellants,

v.

CITY OF NEWPORT BEACH,

Defendant/Appellee.

NEWPORT COAST RECOVERY LLC, et al.,

Plaintiffs/Appellants,

v.

CITY OF NEWPORT BEACH,

Defendant/Appellee.

On Appeal from the United States District Court
for the Central District of California
Honorable James V. Selna, Presiding
Case Nos. CV-08-00457-JVS and CV-09-00701-JVS

AMICUS CURIAE BRIEF FILED ON BEHALF OF THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLEE

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I.

INTEREST OF THE AMICUS BRIEF

The League of California Cities is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

The League submits this Amicus Brief[1] in direct response to the amicus brief submitted by the United States in support of Appellants. Specifically, the United States argues that a plaintiff alleging some evidence of discriminatory motivation in enacting a facially neutral ordinance need not present evidence that "comparators," or similarly situated individuals, received better treatment in order to prove intentional discrimination. US Amicus Brief p. 12-13. But, the position advanced by the United States, taken to its logical conclusion, is that evidence of a discriminatory motive in adopting a facially neutral ordinance is, standing alone,

[1] All parties have given their consent for this brief to be filed. FRAP 29(a). No counsel for any party authored this brief in whole or in part or contributed any money to fund its preparation or submission.

enough to invalidate an ordinance even without evidence of a discriminatory effect. That position encourages courts to make a searching inquiry into the motives of individual legislators in violation of established principles underlying the separation of powers doctrine. Further, if this Court holds in a published decision that plaintiffs can invalidate a facially neutral ordinance without the need to prove a discriminatory effect or impact, it will open the floodgates and a gush of meritless lawsuits against cities will result.

Evidence of arguably discriminatory intent or motive in adopting a city ordinance is not, standing alone, enough to invalidate a facially neutral ordinance. A holding to the contrary would have a significant impact on all cities that could find themselves facing a discrimination suit every time an individual decision-maker comments on an ordinance in a way that arguably suggests a discriminatory motive. In the absence of evidence of some discriminatory effect or impact, a facially neutral ordinance should be presumed to be just what it purports to be, neutral and non-discriminatory.

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II.

STANDING ALONE, EVIDENCE OF A CITY'S ALLEGED DISCRIMINATORY MOTIVE IN ADOPTING A FACIALLY NEUTRAL ORDINANCE IS NOT ENOUGH TO INVALIDATE THE ORDINANCE

The Fair Housing Act ("FHA") and Title II of the Americans with Disabilities Act ("ADA"), both at issue in the underlying case, are designed to prevent governmental entities from enforcing housing policies in a discriminatory manner. *Tsombanidis v. W. Haven Fire Dep't,* 352 F.3d 565, 573 (2d Cir. 2003). In its Amicus Brief, the United States appears to take the position that evidence of a discriminatory motive underlying a facially neutral housing policy establishes a prima facie claim of intentional discrimination, even in the absence of any evidence of discriminatory impact or effect. US Amicus Brief, p. 1-2, 10, 12-17. Essentially, the United States argues that if a housing ordinance was arguably adopted with a discriminatory motive, it must have had a discriminatory effect or impact. That position is not supported by authority, runs contrary to the purpose of the anti-discrimination statutes, and would, if adopted, allow a plaintiff to invalidate a neutral ordinance without the need to demonstrate an actual discriminatory effect or impact.

Generally, "disparate treatment" means being singled out and treated less favorably than others similarly situated on account of being in a protected class. *See Jauregui v. City of Glendale*, 852 F.2d 1128, 1134 (9th Cir. 1998) [describing

disparate treatment in context of race discrimination claim]. Discriminatory, or disparate, treatment claims under Fair Housing Act ("FHA") are analyzed under the *McDonnell Douglas* burden-shifting framework, which, in the housing context, requires that a plaintiff establish a prima facie case of discriminatory treatment by showing: (1) it is a member of a protected class; (2) it sought use and enjoyment of a particular dwelling and was qualified to use and enjoy the dwelling; (3) it experienced an adverse action with respect to the dwelling; and (4) similarly situated individuals outside of the protected class were treated more favorably. *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997) [citing *McDonnell Douglas Corp v. Green,* 411 U.S. 792 (1973)].

A plaintiff may establish its prima facie case using either direct or circumstantial evidence, but regardless of the type of evidence adduced, the analytical framework set out in *McDonnell Douglas* does not change. *McGinest v. GTE Serv. Corp.* 360 F.3d 1103, 1122 (9th Cir. 2002). Though this Court has held that a plaintiff may, as an alternative to the *McDonnell Douglas* framework, establish intentional discrimination by producing direct or circumstantial evidence that a discriminatory reason more likely than not motivated a particular action (*id.*), it has not held a facially neutral ordinance to be discriminatory in the absence of a discriminatory effect.

The United States cites several cases it claims eliminate the need for a plaintiff to "present evidence that similarly situated individuals received more favorable treatment" in order to establish intentional discrimination. Specifically, the United States relies upon *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 265-268 (1976), *Budnick v. Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008), *McGinest,* 360 F.3d at 1122, *Gamble*, 104 F.3d at 304-05, *Lowe v. City of Monrovia*, 775 F.2d 998, 1006-07 (9th Cir. 1985), and *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001). US Amicus Brief p. 12-17. None of those cases involve invalidation of a facially neutral ordinance, or a finding of intentional discrimination, in the absence of evidence of a discriminatory act or effect.

In *Village of Arlington Heights*, the Supreme Court found there was no intentional racial discrimination in a city's action denying a re-zoning request that would have allowed construction of low- and moderate-income housing. *Village of Arlington Heights*, 429 U.S. at 254. In explaining the proof requirement for an action based on intentional discrimination under the *Equal Protection Clause*, the Court found that a disparate impact or effect *and* discriminatory intent were required to establish a violation. *Id.* at 265-66.

In *Budnick*, this Court affirmed summary judgment in favor of a city sued for intentional discrimination under the Amendment to the FHA, based on the

city's denial of a special use permit requested by a continuing-care retirement community. *Budnik*, 518 F.3d at 1111. The arguably discriminatory act at issue was the city's denial of the permit, which the plaintiff could not demonstrate was based on a discriminatory motive. *Id.* at 1114-15. The plaintiff also failed to demonstrate that the city treated other similarly situated parties differently. *Id.* at 1116.

McGinest was an employment action for, among other things, disparate treatment based on intentional racial discrimination. *McGinest*, 360 F.3d at 1106. In *McGinest*, the plaintiff supplied ample evidence that his employer intentionally discriminated against him by refusing to promote him, denying him overtime, and taking other negative employment actions against him based solely on his race. *Id.* at 1108-09, 1123.

In *Gamble*, this Court affirmed summary judgment in favor of a city that denied a building permit to the builders of a proposed home for physically disabled individuals because the proposed building was too large for the lot and not in conformity with other buildings in the neighborhood. *Gamble*, 104 F.3d at 303-04. The builders sued claiming the city's action constituted intentional discrimination under the FHA, among other things. *Id.* at 304. In affirming summary judgment, this Court noted that the builder's complaint failed because it did not allege the city granted a permit to a similarly situated party near the time it denied the builder's

permit. That is, the complaint did not present evidence that other similarly situated parties were treated better. *Id.* at 305. Further, this Court found that the builder failed to demonstrate evidence of a discriminatory motive or intent. *Id.* at 306.

Lowe involved an individual plaintiff claiming discrimination based on allegations that she was qualified to be hired by a city police department, but was not hired because of her race and gender. *Lowe*, 775 F.2d at 1002. The United States appears to cite *Lowe* for the general proposition that there is an "alternative method" of proving intentional discrimination (US Amicus Brief p. 16), and indeed, in reversing the grant of summary judgment in favor of the defendant city, this Court acknowledged that a plaintiff could establish a prima facie case of disparate treatment without satisfying the *McDonnell Douglas* test. *Id.* at 1006-07. But, a plaintiff's ability to establish a prima facie case in an "alternative" way does not lead to the conclusion urged by the United States, that evidence of discriminatory intention or motivation, standing alone, establishes a prima facie case. Even in *Lowe*, the plaintiff presented evidence of actual discrimination. Among other things, she produced evidence that the personnel manager for the defendant city told her the police force had "no women and no Blacks" and that it had "no facilities," while at the same time urging plaintiff to apply to a different city where the police force was "literally begging for minorities and especially females." *Id.* at 1003-04. Plaintiff was also treated as ineligible for a job even

though there were openings for the position she applied for during, and after, the period in which she filed an application. *Id.* 1003-06. *Lowe* does not stand for the proposition that a plaintiff can establish a prima facie case of discrimination without the need to demonstrate a discriminatory effect or impact.

Pyke v. Cuomo, like the other cases relied on by the United States, also does not concern a facially neutral ordinance that was voided without evidence of a discriminatory effect. *Pyke* concerned an equal protection challenge by a group of Native Americans that contended state law enforcement agencies would not provide them with police protection because of their race. *Pyke*, 258 F.3d at 108. In reversing the district court's decision to grant summary judgment in favor of the government, the court explained that a plaintiff alleging an equal protection claim based on discriminatory application of a facially neutral policy or statute need not always plead disparate treatment of other similarly situated individuals. *Id.* at 108-09. The court did not, as the United States does, conflate a showing of disparate treatment of other similarly situated individuals with a showing of a discriminatory effect. In fact, the court was clear to distinguish between proof that other similarly situated individuals were treated better than plaintiff, and proof of an adverse effect, stating: "[A] plaintiff who . . .alleges that a facially neutral law or policy has been applied in an intentionally discriminatory race-based manner, or that a facially neutral statute or policy with an adverse effect was motivated by

discriminatory animus, is not obligated to show a better treated, similarly situated group of individuals of a different race. . ." *Id.* at 110.

In all of these cases, a discriminatory *effect* is coupled with a discriminatory motive, and in the absence of both an effect *and* a motive, no court has found a facially neutral statute to be invalid. The United States incorrectly asserts that "evidence demonstrating that a discriminatory reason motivated the challenged action, without reference to comparators, is sufficient to prove intentional discrimination" (US Amicus Brief p. 12), and in doing so conflates the need to prove a discriminatory effect with the need to demonstrate other "comparators" were treated more favorably. Whether the case here requires comparator evidence or not, plaintiffs, in order to establish their prima facie case, must be required to provide evidence that the challenged ordinance has a discriminatory effect. *Hayden v. County of Nassau*, 180 F.3d 42, 50-51 (2d Cir. 1999).

If plaintiffs can survive summary judgment on an intentional discrimination claim brought under the FHA or the ADA based solely on evidence of an arguably discriminatory motivation for enacting a particular ordinance, they essentially have the power to void the ordinance without ever having to prove the ordinance was in fact discriminatory. As the Supreme Court has explained, legislative motive is not a proper basis for declaring a statute unconstitutional or invalid. *United States v. O'Brien*, 391 U.S. 367, 384-85 (1968). A court may not restrain the lawful

exercise of legislative power based on an assumption that power was wielded with an unlawful motive. *Id.* at 383. But, the United States urges this Court to adopt the position that some evidence of an unlawful legislative motive, even if not expressed on the face of an ordinance, and even if not coupled with any discriminatory effect, is sufficient to survive summary judgment and establish a prima facie case of intentional discrimination. That logic would require courts to examine every utterance by a decision-maker involved in enacting an ordinance to discern arguably discriminatory intent; it would directly invite courts to re-examine the legislative process and make assumptions about potentially discriminatory motives, and would improperly restrict local legislative authority. That position should be rejected by this Court, because it would have serious consequences for cities that could be held liable for intentional discrimination even in the absence of any actual discrimination occurring.

III.

CONCLUSION

The anti-discrimination statutes are intended to prevent discrimination; they are not intended to open a dialogue about legislative motivation. If a facially neutral, non-discriminatory, ordinance results in actual discrimination against a protected group then it should be invalidated. But, in the absence of any evidence

that an ordinance actually discriminates against a particular group, it must be presumed to be neutral and non-discriminatory even if there is arguably some evidence that a particular legislator had an improper motive. Assumed motivations are not actual effects, and this Court should not conflate the two as urged by the United States.

Dated: December 22, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1

I certify that:

In accordance with Rule 32(a) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that this Amicus Brief for the League of California Cities is in a proportionally spaced 14-point New Times Roman font; that the brief was produced on a computer using a word processing program; and that the program calculated that the brief contains 2,292 words.

Dated: December 22, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 22, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. My office has mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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