No. 14-56

**In the**

# Supreme Court of the United States

CITY OF NEWPORT BEACH, CALIFORNIA,

*Petitioner,*

v.

PACIFIC SHORES PROPERTIES, LLC, et al.,

*Respondents.*

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

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

MERIEM L. HUBBARD
RALPH W. KASARDA
JOSHUA P. THOMPSON*
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jpt@pacificlegal.org

*Counsel for Amicus Curiae Pacific Legal Foundation*

## QUESTION PRESENTED

1. Whether a disparate treatment claim under the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, can prevail in the absence of evidence that the plaintiffs were treated differently on a prohibited basis.

2. Whether the disparate treatment provisions of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, cognize a facial challenge to a neutral housing policy absent evidence the policy was selectively enforced.

## TABLE OF CONTENTS

**Page**

**TABLE OF CONTENTS—Continued**

**Page**

## TABLE OF AUTHORITIES

**Page**

### Cases

**TABLE OF AUTHORITIES—Continued**

**Page**

**TABLE OF AUTHORITIES—Continued**

**Page**

**TABLE OF AUTHORITIES—Continued**

**Page**



**Federal Statutes**



**Rules of Court**



**Miscellaneous**

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners.[1]

## IDENTITY AND INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, free enterprise, and equality under the law. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, Hawaii, and Washington, D.C. PLF has participated as amicus curiae in numerous cases relevant to this case. PLF addressed the cognizability of disparate impact claims under the Fair Housing Act in *Twp. of Mt. Holly, N.J. v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824, *cert. dismissed*, 134 S. Ct. 636 (2013); *Magner v. Gallagher*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012), and the unjustified applications of disparate impact theory in *Lewis v. City of Chicago, Ill.*, 560 U.S. 205 (2010); *Ricci v. DeStefano*, 557 U.S.

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

557 (2009), and *Alexander v. Sandoval*, 532 U.S. 275 (2001). PLF has also participated as amicus curiae in nearly every major racial discrimination case from *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) to *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014).

This case raises nationally important issues of federal law concerning whether a plaintiff alleging disparate treatment under the Fair Housing Act must show that she was actually treated differently on the basis of a protected attribute. Amicus believes its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Fair Housing Act (Act), 42 U.S.C. § 3601, *et seq.*, prohibits discrimination on the basis of a handicap[2] in housing decisions. 42 U.S.C. § 3604(f)(1). The Act specifically authorizes disparate treatment claims, and is silent on the availability of disparate impact claims. *Id.* This Court has twice granted certiorari on the issue of whether the Act cognizes disparate impact claims, but has yet to resolve the issue. *See Twp. of Mt. Holly*, 133 S. Ct. 2824, *cert. dismissed*, 134 S. Ct. 636; *Magner*, 132 S. Ct. 548, *cert.*

[2] Lower courts have construed this provision against discrimination on the basis of handicap to encompass recovery from addiction. *See City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 803 (9th Cir. 1994).

*dismissed*, 132 S. Ct. 1306. Nevertheless, nearly all circuit courts have construed the Act to permit both disparate treatment and disparate impact claims. *See Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-75 (6th Cir. 1986); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982). This case concerns the intersection between those two types of claims, and the elements plaintiffs must satisfy to prove a disparate treatment claim.

A plaintiff who brings a disparate treatment cause of action alleges she was intentionally treated differently on the basis of a prohibited category. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1002 (1988) (proving a discriminatory motive is "critical" in a disparate treatment challenge); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). There are two classes of disparate treatment cases. Either the plaintiff directly introduces evidence of discrimination, *see Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), or she indirectly rebuts any nondiscriminatory rationales offered by the defendant, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

Disparate impact, in contrast, involves facially neutral decisions that impact one or more discrete groups more harshly than others. *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15. There is no requirement that the decision involve a discriminatory motive; a plaintiff need only show that the defendant's conduct resulted in significant disparate effects. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971).

While the lower courts differ considerably on the test to apply to disparate impact claims under the Fair Housing Act, all would permit plaintiffs to challenge a facially neutral ordinance that has grossly disproportionate effects. *See Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898, 902-03 (8th Cir. 2005) (modified burden shifting framework); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977) (disparate impact under the Fair Housing Act involves a burden shifting framework similar to Title VII).

In this case, the City of Newport Beach enacted a facially neutral ordinance that plaintiffs allege discriminates on the basis of a handicap in violation of the Fair Housing Act. *See Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1147-48 (9th Cir. 2013) (*Pac. Shores I*). While the plaintiffs had alleged both disparate treatment and disparate impact claims in the trial court, they abandoned the latter before the Ninth Circuit and only pursued their disparate treatment claim. *Id.* at 1156. The Ninth Circuit held that the plaintiffs could pursue their disparate treatment challenge to the facially neutral ordinance. *Id.* at 1172-73.

The Ninth Circuit's decision directly conflicts with decisions from other circuits in two important ways. First, the court held that plaintiffs may succeed on a disparate treatment claim without requiring the plaintiffs to show that they were treated differently in fact. *Id.* at 1158. In contrast, every other circuit that has addressed the issue requires disparate treatment plaintiffs to prove that they were treated differently than someone or something similarly situated. *See*, *e.g.*, *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12,

20 (1st Cir. 1999); *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir. 1988).

Second, the Ninth Circuit held that plaintiffs can facially challenge a neutral ordinance under the Fair Housing Act even in the absence of selective enforcement. *See Pac. Shores I*, 730 F.3d at 1158. Two circuits have explicitly rejected the Ninth Circuit's approach. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1215 (11th Cir. 2008); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996). Other circuits have held that facial challenges to neutral policies can be brought only under a disparate impact theory. *See Larkin v. State of Michigan Dep't of Soc. Servs.*, 89 F.3d 285, 289-90 (6th Cir. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995).

The Ninth Circuit's unprecedented approach to analyzing disparate treatment claims raises serious equal protection concerns. The decision below allows Fair Housing Act plaintiffs to facially challenge neutral housing policies with no evidence that they were treated differently, or that the policy was selectively enforced. Instead, under the rule articulated by the court below, a plaintiff need only have some evidence—even conflicting evidence—that the policy's adoption was motivated by a discriminatory purpose. *Pac. Shores I*, 730 F.3d at 1158. This weak standard undermines the Fair Housing Act's prohibition on disparate treatment. If liability can attach to such innocuous practices, only by consciously making decisions because of a disability—or race—can municipalities be sure to avoid litigious plaintiffs keen on proving their discrimination claim under the Fair

Housing Act's lax standard. *See Watson*, 487 U.S. at 993 (plurality op.).

The Court should grant the Petition for Writ of Certiorari. *See* Sup. Ct. R. 10(a), (c).

## REASONS FOR GRANTING THE PETITION

### I

### THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM OTHER CIRCUIT COURTS OF APPEALS

#### A. The Decision Below Conflicts with Other Circuits Which Require That Plaintiffs Claiming Disparate Treatment Prove Differential Treatment

The Ninth Circuit held that the Fair Housing Act allows plaintiffs to facially challenge a neutral ordinance without having to show that they were treated differently from any other person or entity. *Pac. Shores I*, 730 F.3d at 1158. The court purported to reach that decision under a disparate treatment analysis. *Id.* In other words, according to the court below, plaintiffs need not show that any individual was actually treated differently to prevail on a disparate treatment challenge. *Id.* at 1158 ("[P]laintiffs who allege disparate treatment . . . need not demonstrate the existence of a similarly situated entity who or which was treated better than the plaintiff."). This holding directly conflicts with decisions from the First, Second, Third, Seventh, Eighth, Tenth, and Eleventh Circuits, all of which require disparate treatment

plaintiffs to prove different treatment according to a suspect criterion.

For example, in *Kosereis v. R.I.*, 331 F.3d 207, 209 (1st Cir. 2003), a teacher brought a disparate treatment challenge against a Rhode Island school that allegedly discriminated against him on the basis of his religion. The First Circuit held that to prevail on his disparate treatment claim he must show "that others similarly situated to him in all relevant respects were treated differently." *Id.* at 214 (quoting *Conward*, 171 F.3d at 20). Because the teacher could not show that other similarly situated persons were in fact treated differently, *id.*, the First Circuit affirmed summary judgment for the school. *Id.* at 216.

The Second Circuit reached a similar conclusion in *Huntington Branch*. There the plaintiffs challenged a local zoning ordinance, alleging disparate impact under the Fair Housing Act. 844 F. 2d at 928-32. The town defended the ordinance on the grounds that the plaintiffs failed to show that they were treated differently. *Id.* at 934. The court correctly noted that the town's defense tried to "collapse" disparate treatment into disparate impact. *Id.* Only disparate treatment analysis "involves *differential treatment* of similarly situated persons or groups." *Huntington Branch*, 844 F.2d at 933. The court held for the plaintiffs, because the town had tried to construe disparate impact cases as requiring differential treatment of similarly situated individuals. *Id.* at 934.

The Age Discrimination in Employment Act (ADEA) has a similar prohibition against disparate treatment to that which is found in the Fair Housing Act. In an age discrimination claim under the ADEA, the Third Circuit explained that a disparate treatment

claim requires plaintiffs to show that a particular action treats "'some people less favorably than others *because* of their [age].'" *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 726 (3d Cir. 1995) (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)). A former employee argued that a company's layoffs were "facially discriminatory," and thus he was not required to show disparate treatment. *Id.* at 727. The court agreed that a facially discriminatory policy may constitute "*per se*" disparate treatment. *Id.* at 726. On the other hand, to prevail on a disparate treatment claim against a facially neutral policy—like the employer's—requires a plaintiff "to *prove* both unequal treatment and intent to discriminate." *Id.* at 728. Because the employee could prove neither element, the court ruled for the company on the former employer's disparate treatment claim.[3] *Id.* at 730.

The Seventh Circuit has also held that disparate treatment plaintiffs must show that others similarly situated were treated differently. In a Fair Housing Act case, the Seventh Circuit held that "'[d]isparate treatment' means treating a person differently because of his race; it implies consciousness of race, and a purpose to use race as a decision-making tool." *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529-30 (7th Cir. 1990). The court specifically cautioned that disparate treatment is required, and that it does not suffice to show a differential outcome. *Id.* at 1530. Further, the

[3] Just like disparate treatment claims should be held distinct from disparate impact, *see DiBiase*, 48 F.3d at 728, disparate impact should not be collapsed into disparate treatment. *See Pac. Shores Props., LLC v. City of Newport Beach*, 746 F.3d 936, 941 (9th Cir. 2014) (*Pac. Shores II*) (denial of rehearing *en banc*) (O'Scannlain, J., dissenting).

Court warned that while intent in a disparate treatment case may be a "chimera," differential treatment is an unwavering requirement. *Id.*

The Eighth, Tenth, and Eleventh Circuits use a similar approach to evaluate disparate treatment claims under the Fair Housing Act. The Eighth Circuit and Tenth Circuit agree that a necessary element of any disparate treatment case is evidence that the plaintiff was treated differently. *See Oxford House-C*, 77 F.3d at 252; *Bangerter*, 46 F.3d at 1501 ("[A] plaintiff makes out a prima facie case of intentional discrimination under the [Fair Housing Act] merely by showing that a protected group has been subjected to explicitly differential—i.e. discriminatory—treatment."). The Eleventh Circuit articulated the same proposition even more bluntly: "As its name suggests, a disparate treatment claim requires a plaintiff to show that he has actually been treated differently than similar situated non-handicapped people." *Schwarz*, 544 F.3d at 1216.

In holding that a disparate treatment plaintiff need not demonstrate she was treated differently than others similarly situated, the Ninth Circuit departed from at least seven other circuits that have addressed the issue. The Court should grant the Petition for Certiorari to resolve this circuit split.

### B. The Decision Below Conflicts with Other Circuits by Allowing a Facial Challenge to a Neutral Ordinance Under the Fair Housing Act's Disparate Treatment Provisions Without Evidence of Selective Enforcement

The Ninth Circuit held that plaintiffs may facially challenge a housing policy under the Fair Housing Act's disparate treatment provisions, even if the challenged ordinance does not contain any suspect classifications and was not selectively enforced. *See Pac. Shores I*, 730 F.3d at 1158. No other circuit court of appeals has applied disparate treatment analysis to such claims, and some have explicitly rejected it. There is no precedent for approving "a claim of disparate treatment against a facially neutral law in the absence of selective enforcement." *Pac. Shores II*, 746 F.3d at 941 (denial of rehearing *en banc*) (O'Scannlain, J., dissenting).

At its core, disparate treatment involves treating individuals differently on the basis of some prohibited criterion. The court below undermined the structure and language of the law to apply that doctrine to a facially-neutral ordinance where the plaintiff has no evidence that the city treated individuals differently. In the employment context,[4] this Court has never held that disparate treatment analysis applies to the *enactment* of a facially neutral policy, but rather only

[4] Courts construing the Fair Housing Act have looked to Title VII's disparate treatment provisions for guidance. *See*, *e.g.*, *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997); *Kormoczy v. Sec'y, U.S. Dep't of Hous. & Urban Dev. on Behalf of Briggs*, 53 F.3d 821, 823 (7th Cir. 1995); *Dwivedi*, 895 F.2d at 1529.

to its enforcement. *See*, *e.g.*, *Watson*, 487 U.S. at 986 ("[A] prima facie case is ordinarily established by proof that the employer, after having rejected the plaintiff's application for a job or promotion, continued to seek applicants with qualifications similar to the plaintiff's"); *Int'l Bhd. of Teamsters*, 431 U.S. at 335 (describing the alleged disparate treatment as "the refusal to recruit, hire, transfer, or promote minority group members on an equal basis with white people").

Conversely, the Ninth Circuit held that disparate treatment can apply to the enactment of a policy "where the plaintiff presents direct evidence of discrimination." *See Pac. Shores I*, 730 F.3d at 1158 (quoting *Trans World Airlines*, 469 U.S. at 112). However, in *Trans World Airlines*, the policy in question was facially discriminatory. *See Trans World Airlines*, 469 U.S. at 112. Direct evidence of discrimination suffices to prove disparate treatment if the policy is facially discriminatory, because such a policy *necessarily* treats similarly-situated persons differently. *See DiBiase*, 48 F.3d at 726-30. Conversely, there is no reason to believe a facially neutral policy will lead to differential treatment without evidence of discriminatory enforcement. *See Schwarz*, 544 F.3d at 1216.

In a case with facts very similar to those here, the Eighth Circuit rejected a disparate treatment claim brought under the Fair Housing Act against a facially neutral zoning code that required single-family residences. *See Oxford House-C*, 77 F.3d at 251-52. Plaintiffs alleged that a facially neutral zoning ordinance violated the Act's disparate treatment provisions because it was adopted with animus towards recovering addicts. *Id.* The court explained

that animus is irrelevant without evidence that handicapped individuals were in fact treated differently. *Id.* ("[T]he City's enforcement actions were lawful regardless of whether some City officials harbor prejudice or unfounded fears about recovering addicts."). Accordingly, the Court held that the adoption of a neutral, nondiscriminatory housing policy cannot be facially challenged without evidence that it was selectively enforced. *Id.* at 251-52.

In *Schwarz*, the Eleventh Circuit relied expressly on *Oxford House-C* to reject the claim that evidence of discriminatory animus can doom the enactment of a facially neutral housing policy. 544 F.3d at 1205, 1216-17 (zoning ordinance limited occupancy turnover). The court explained that a facial challenge requires the plaintiffs to prove that it was selectively enforced. *Id.* "[E]vidence that neighbors and city officials are biased against recovering substance abusers is irrelevant absent some indication that the recoverers were treated differently than non-recoverers." *Id.* at 1216. Suspect thoughts do not suffice to prove a disparate treatment claim, because plaintiffs must prove that they were *treated* differently. *Id.* (plaintiff "utterly failed to establish that it was treated differently than anyone else.").

Other circuits reserve facial challenges to neutral ordinances for disparate impact claims. For example, in *Larkin*, 89 F.3d at 289, the plaintiff challenged a Michigan statute that discriminated against handicapped individuals on its face. *Id.* at 288. The Sixth Circuit held that normal disparate treatment analysis applied to facially discriminatory policies, *id.* at 289, but expressly noted that disparate impact analysis applies to neutral policies that are challenged

facially. *Id.* at 289-90. The Second and Tenth Circuits explicitly distinguish disparate treatment from disparate impact on the grounds that only the latter applies to facially neutral policies. "A disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group . . . . Disparate treatment analysis, on the other hand, involves differential treatment of similarly situated persons or groups." *Bangerter*, 46 F.3d at 1501 (quoting *Huntington Branch*, 844 F.2d at 933).

The Court should review the decision below to clarify when disparate treatment claims under the Fair Housing Act can impugn the legality of neutral ordinances that are enforced even-handedly, and resolve the circuit splits created by the Ninth Circuit opinion below.

## II

## REVIEW IS NEEDED TO ENSURE THAT THE FAIR HOUSING ACT IS NOT USED AS A TOOL TO ENCOURAGE UNCONSTITUTIONAL RACIAL QUOTAS

Unlike Title VII, the Fair Housing Act does not specifically authorize disparate impact claims. *Compare* 42 U.S.C. § 2000e-2(k) *with* 42 U.S.C. § 3604(a). Whether disparate impact claims are cognizable under the Fair Housing Act in the absence of specific congressional authorization is an issue that raises important separation of powers questions. This Court has twice granted certiorari to determine whether disparate impact claims are cognizable under the Fair Housing Act, *see Twp. of Mt. Holly*, 133 S. Ct. 2824, *cert. dismissed*, 134 S. Ct. 636; *Magner*, 132 S.

Ct. 548, *cert. dismissed*, 132 S. Ct. 1306, and now there is another petition for certiorari raising the same issue this term. *See Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275 (5th Cir. 2014), *cert. filed* (No. 13-1371).

This case takes on increased importance in light of the issues raised in *Inclusive Communities*.[5] If disparate impact claims are not available under the Fair Housing Act, lower courts need to be clear on the limits of disparate treatment claims. The latter should not simply subsume the former. Yet, the Ninth Circuit's analysis encourages plaintiffs to repackage disparate impact claims as disparate treatment claims, with the incentive that they would no longer have to show that the policy resulted in a statistically significant disparity. *See Pac. Shores II*, 746 F.3d at 939 (denial of rehearing *en banc*) (O'Scannlain, J., dissenting) ("The conceptual innovation introduced by the panel here threatens to collapse the doctrinal distinction between disparate treatment and disparate impact."). Thus, the lower court's decision could permit disparate impact-like claims under the Fair Housing Act even if this Court finds that such claims are not available.

While disparate impact theory was intended to combat employment practices that are the functional equivalent of intentional discrimination, in practice, the theory has the perverse effect of encouraging the

---

[5] Amicus has asked this Court to grant the petition for a writ of certiorari filed in *Inclusive Communities*. *See* Brief for Pacific Legal Foundation et al. as Amici Curiae Supporting Petitioner, *Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275 (5th Cir. 2014), *cert. filed* (No. 13-1371).

very behavior our civil rights laws are designed to prevent. If municipalities can be liable for even those housing disparities that result from neutral practices, the specter of disparate impact liability will steer them toward suspect criteria to prevent disparities from arising in the first place. *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 Cato Sup. Ct. Rev. 53, 63 (2009). Even where disparate impact is statutorily authorized, this Court has questioned whether the doctrine violates the Equal Protection Clause. *See Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652 (1989) (disparate impact liability can cause employers to adopt racial quotas); *Watson*, 487 U.S. at 993 (plurality op.) (same); *see also Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (disparate impact may violate equal protection).

Discrimination claims that do not require plaintiffs to prove that they were treated differently will exacerbate the tension between disparate impact and equal protection. If liability for neutral policies that result in statistical imbalances can force employers to make decisions because of "racial outcomes," *see Ricci*, 557 U.S. at 594 (Scalia, J., concurring), surely liability for neutral policies that *do not* result in statistical imbalances would have the same effect.

In *Watson*, this Court questioned whether disparate impact was overwhelming the individual right to equal protection of the laws. It warned that "[i]f quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted." *Id.* at 993. The Ninth Circuit's decision raises these same concerns.

## CONCLUSION

This Court has long held that "[d]isparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of . . . [protected characteristics.]." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (internal citations omitted). The decision below, however, confuses and complicates this "easily understood doctrine." The Ninth Circuit would allow disparate treatment plaintiffs to proceed without evidence that they were treated "less favorably," and would allow plaintiffs to upend neutral housing policies without any evidence that they are selectively enforced.

For the foregoing reasons, Amicus Curiae respectfully requests that this Court grant the petition for a writ of certiorari.

DATED: August, 2014.

Respectfully submitted,

MERIEM L. HUBBARD
RALPH W. KASARDA
JOSHUA P. THOMPSON*
*Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jpt@pacificlegal.org

*Counsel for Amicus Curiae Pacific Legal Foundation*