Nos. 20-55820, 20-55870

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOCAL RECOVERY, LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY; AND
ROGER LAWSON,
Plaintiffs and Appellants,
v.
CITY OF COSTA MESA,
A MUNICIPAL CORPORATION; DOES 1-100,
Defendants and Appellee.

RAW RECOVERY, LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY,
Plaintiff and Appellant,
v.
CITY OF COSTA MESA,
Defendant and Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE JAMES V. SELNA, JUDGE
CASE NOS. 8:18-cv-01304-JVS-PJW

AMICI CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, THE ASSOCIATION OF CALIFORNIA CITIES OF ORANGE COUNTY, AND THE CITIES OF NEWPORT BEACH, FOUNTAIN VALLEY, MISSION VIEJO, AND ORANGE IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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INTEREST OF *AMICI* CURIAE

Amici have received the consent of all parties to the filing of this amicus brief pursuant to Circuit Rule 29-2(a).

Amicus the League of California Cities (Cal Cities) is an association of 479 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. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Amicus the Association of California Cities of Orange County (ACC-OC) is an organization representing 21 cities in Orange County. ACC-OC advocates on behalf of the cities it represents on topics and issues relevant to cities in Orange County, with a particular focus on local control and governance issues.

Amicus City of Newport Beach ("Newport Beach") is a charter city located in coastal Orange County, California with a permanent population of approximately 86,000 residents. Newport Beach has a long history working with sober living homes to ensure the residents thereof are protected. Traditionally, it has had a significantly higher proportion of sober living homes in its jurisdiction than almost any other city in Orange County, and currently Newport Beach regulates 17 sober living homes within city limits.

Amicus City of Fountain Valley ("Fountain Valley") is a general law city in northern Orange County. Fountain Valley has seen group home operators purchase or rent homes in single family neighborhoods and populate those homes with up to 15 residents at a time, often for short periods, with a stated purpose of providing a supporting living environment for persons recovering from addiction.

Amicus the City of Mission Viejo ("Mission Viejo") is a general law city in southern Orange County with a current population of approximately 95,000 residents. Mission Viejo has formed an Orange County Sober Living Task Force that includes representatives of the State, Orange County Board of Supervisors, city staff and residents to consider local ordinance drafting and to protect residents of sober living facilities. It is drafting local ordinances regarding best practices for group living operators.

Amicus the City of Orange ("Orange") is a general law city operating under a council-manager form of government. Orange is located in north-central Orange County and consists of approximately 25.8 square miles with a population of approximately 137,676 residents. Currently, Orange regulates 13 sober living homes within its jurisdiction.

Collectively the Cal Cities, the ACC-OC and the cities of Newport Beach, Fountain Valley, Mission Viejo and Orange are the "*Amici.*"

LEGAL DISCUSSION

I. The Panel's decision that an individualized assessment of sober living home residents is not required to show they are "actually disabled" is contrary to the ADA

The nub of the Panel's decision disregards the long-standing requirement for an ADA (or FHA) claim — an individualized showing of disability, particularly a disability involving a claimed impairment by alcohol or drug addiction. The practical impact of this decision is it sets a lower bar for certain businesses to claim the protections under these two statutes than it would set for individuals who are themselves disabled. Under the rule established by the Panel, a sober living home (or other business) need only show an *intent* to serve the disabled. This is contrary to the ADA itself, and the legislative history shows this result was not what Congress intended.

The district court correctly granted the City of Costa Mesa's summary judgment motion and held Appellants failed to present sufficient evidence to establish residents of the sober living homes at issue were "actually" disabled (or handicapped) as contemplated by the statutes. The district court held that under both statutes, proof of a disability requires an individualized assessment confirming the individuals in question suffer from a disability as defined by the ADA and FHA. In reversing the district court, the Panel created a novel, lenient standard to establish that residents of Appellants' sober living homes meet the "actually disabled" prong of both statutes. The Panel's

opinion departed from the requirement of proof of an individual's disability and adopted a new standard applicable to sober living homes:

> We now hold that Appellants and other sober living home operators can satisfy the 'actual disability' prong on a collective basis by demonstrating that they serve or intend to serve individuals with actual disabilities. As discussed above, Appellants *need not provide individualized evidence* of the "actual disability" of their residents.

SoCal Recovery, LLC v. City of Costa Mesa, 56 F.4th 802, 814-15 (9th Cir. 2023) (emphasis added) ("*SoCal Recovery*"). The Panel held that Appellants—two businesses with multiple existing homes—instead can simply show that they have, "policies or procedures to ensure that they serve or will serve those with actual disabilities…" *SoCal Recovery*, 56 F.4th at 814-15.

This ruling effectively overturns relevant precedent. The ADA's statutory structure as to drug or alcohol-based impairments and case law interpreting it require an individualized assessment to establish an "actual disability," particularly in scenarios where the individuals claiming the disability have a significantly different and unique history of drug or alcohol abuse and recovery therefrom. The district court in both the *SoCal Recovery* and *RAW* cases properly applied these standards and found these two business entities did not have evidence to meet them.

The Panel credited as persuasive the *amicus* arguments of the United States noting, "state and local governments are prohibited from discriminating on the basis of disability through zoning and land use practices." *SoCal Recovery*, 56 F.4th at 814. This simply does not

address the issue at hand, *i.e.*, whether Appellants produced evidence to establish an actual handicap or disability to come within the ADA's aegis. Controlling authorities (including the ADA regulations and *Williams* line of cases, discussed in detail below) unequivocally hold there must be an "individualized assessment" to trigger the ADA's and FHA's protections under the "actual disability prong."

The legislative history of the FHA emphasizes the requirement for individualized assessments. The Panel relied on congressional deliberations in connection with amendments to the FHA in 1988 to suggest that such individual assessments were not required. *SoCal Recovery*, 56 F.4th at 814. However, the legislative history largely points in the opposite direction: "individuals who have a record of drug use or addiction but who do not currently use illegal drugs would continue to be protected if they fell under the definition of handicap," and "[i]ndividuals who have been perceived as being a drug user or an addict are covered under the definition of handicap if they can demonstrate that they are being regarded as having an impairment and that they are not currently using an illegal drug." H.R. Rep. No. 100-711, at 22 (1988). As this history shows, the focus on *individuals*—not groups or collectives—being able to establish their disability within the boundaries of the relevant statutory provisions is paramount.

The same focus is apparent in the text and in the legislative history concerning the 1990 amendments to the ADA:

> Section 510(b)(2) provides that a person cannot be excluded as a qualified individual with a disability if that individual is participating in a supervised rehabilitation program and

> is no longer engaging in the illegal use of drugs. *This provision does not permit persons to invoke the Act's protection simply by showing that they are participating in a drug treatment program*. Rather, refraining from illegal use of drugs also is essential. Covered entities are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem.

H.R. Conference Rep. No. 101-558 (1990) (emphasis added). Congress stated the ADA does not automatically extend its protections to persons merely participating in a drug treatment program, rather, it is "essential" the *individual* establish they are refraining from using illegal drugs. This proof cannot be accomplished *via* intent or mere policy.

There is no special exemption in the statute for sober living home operators to avoid making a showing that their "clients" are disabled. To the contrary, a disability determination cannot be made without an assessment of the individuals claiming to be disabled. This requirement squarely applies in the case of sober living homes where the residents will have varied backgrounds and experiences with illegal use of drugs, alcohol, and varying stages of recovery. *See* 42 U.S.C. § 12114(a).

Congress has articulated its "serious concerns" for sober living homes as part of separate legislation requiring a federal guideline for best practices at such homes. *See* 42 U.S.C. § 290ee-5 (2018 legislation). As the author of the bill that ultimately became enacted into this provision of law, Congresswoman Judy Chu of California expressed her concerns at a House Committee Hearing entitled "Examining Sober Living Homes":

> "Sober Living Homes, also known as recovery residences, offer a place to stay for those who have completed treatment and are trying to rebuild their lives. *However, the lack of regulation around the operation of these homes is of serious concern, which means that these facilities may be unequipped to handle patients at risk of overdose, or do not employ staff with specialty training*.
>
> In the worst cases, some bad actors do not encourage recovery at all, but exploit vulnerable individuals in order to collect insurance payments."

Hearing before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary, House of Representatives, 115th Cong. (Sept. 28, 2018) (statement of Judy Chu, Congresswoman at 2-3) (emphasis added).[1]

The new standard this Panel articulated will destabilize the delicate balance between disabled persons, the communities in which they live, and cities. Worse, the natural extension of a standard which requires mere "intent" to serve disabled persons will inevitably unravel land use and administrative processes at the local, neighborhood, and community level and result in less protection for residents of sober living facilities. And as Congresswoman Chu highlighted, the Panel's

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[1] There is academic literature and news coverage on the proliferation of sober living homes and the problems in the industry. *See e.g.,* Katrice Bridges Copeland*, Liquid Gold,* 97 Wash. U.L. Rev. 1451 (2020); Bess Greenberg, *Blind Spot in Plain Sight: The Need for Federal Intervention in the Sober Living Home Industry and the Path to Making It Happen*, 71 Emory L.J. 107 (2021); Teri Sforza "Addiction treatment: The new gold rush. 'It's almost chic'" Orange County Register (June 16, 2017).

departure from the ADA and settled caselaw will likely hurt those it is ostensibly designed to help—people struggling with sobriety in sober living homes—by dissolving cities' abilities to protect them.

II. The Panel's "proof in the aggregate" standard directly conflicts with the Supreme Court decision, *Toyota Motor Manufacturing, Kentucky v. Williams*

The Panel opinion is inconsistent with the leading Supreme Court precedent interpreting the ADA, *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198-99 (2002) ("*Williams*"), *overruled on other grounds by statutory amendment*.

In *Williams* the court held that to be deemed disabled, a person must "suffer from an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Because the ADA is clear in defining disability in relation to individuals, the Court further held that the existence of a disability must be determined in a "case-by-case manner." *Williams*, 534 U.S. at 198; *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999) (finding the ADA definition of disability mandates an "individualized inquiry"). Indeed, the Court emphasized that an individualized assessment of impairment is "particularly necessary when the impairment is one whose symptoms vary widely from person to person." *Williams*, 534 U.S. at 198.

Williams is binding precedent. The Panel's holding conflicts with it. Federal appellate courts including this Court have routinely applied

the "individualized assessment" rule to a variety of claimed disabilities including alcoholism.[2]

III. The Panel's decision conflicts with the ADA's statutory language requiring individualized proof of a drug/alcohol related disability

The Panel's opinion does not conform to the statutory requirements for those claiming disability based on alcohol or drug abuse. Section 12114 of the ADA, entitled "Illegal Use of Drugs and Alcohol" provides in part:

> "**(a) Qualified individual with a disability**
>
> For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> **(b) Rules of construction**
>
> Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who --

---

[2] *See, e.g., Brown v. Lucky Stores, Inc.,* 246 F.3d 1182, 1186 (9th Cir. 2001) *("Brown")* (scrutinizing individual claiming rehabilitation from alcoholism as a disability to excusing poor job performance); *Ristrom v. Asbestos Workers Loc. 34 Joint Apprentice Comm.*, 370 F.3d 763, 768 (8th Cir. 2004) (rejecting claim of disability based on ADD and depression); *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 222 (5th Cir. 2011)(claim of disability due to diabetes; "The ADA requires a case-by-case determination of the nature of the employee's impairment.")(citation to *Williams* omitted).

> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use;
>
> except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs."

42 U.S.C. § 12114 (a)-(b). The Panel's opinion, which relaxes the standard of proof as to individuals with a drug or alcohol addiction cannot be squared with the plain meaning of the statute—only a limited group of individuals who can establish one or more of the criteria in subpart (b) can qualify as disabled.

This is the universal construction of the statute in this Circuit. *See, e.g., Brown, supra* 246 F.3d 1186 (ADA's protections extend only to those no longer using illegal drugs for a significant period of time); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 831–32 (9th Cir. 1995) (ADA's protections do not cover "any employee or applicant who is currently engaging in the illegal use of drugs . . .").

Similarly, Section 12210, a portion of Title V of the Act referenced in the U.S. Code as "Miscellaneous Provisions," mirrors the language in

Section 12114, albeit with broader application to all portions of the statute:

> "**(a) In general**
>
> For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> **(b) Rules of construction**
>
> Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who--
>
> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use;
>
> * * * * ."

42 U.S.C. § 12210 (a)-(b). Having said so twice in two different sections of the ADA (one of which applied to the entire chapter), it is evident Congress meant what it said—an individualized showing is necessary to establish a disability. 42 U.S.C. § 12210 (a). If Congress intended something different, it would have said so.

For a sober living home operator to establish its residents are actually disabled, the business owner must present evidence of an individualized assessment that meets the criteria prescribed in the

ADA. This requires more than simply saying: "I enrolled in a rehabilitation program" or "I live in a sober living home facility." The Panel decision does not conform to the individualized inquiry set forth by Congress in the ADA. Likewise, it directly contradicts prior decisions of this Court interpreting 42 U.S.C. § 12210.

IV. The Panel decision conflicts with this Court's prior decisions, meriting *en banc* review

The Panel's decision contradicts other Ninth Circuit case law. In *E.E.O.C. v. United Parcel Service, Inc.,* 306 F.3d 794 (9th Cir. 2002) ("*United Parcel*"), this Court reviewed a claim against UPS, in which the EEOC alleging discrimination against a class of certain employee drivers under the ADA on the basis that UPS's vision protocol was discriminatory. 306 F.3d at 796 (9th Cir. 2002). Importantly, the court recognized at the beginning of its opinion that "the existence of a 'disability' is a gateway requirement for the ADA." *United Parcel*, 306 F.3d at 797. Acknowledging the *Williams* decision, the court noted "*Toyota* [*Williams*] sheds considerable light on what the Court believes a claimant must show in order to have a substantially limiting impairment of a major life activity, and in turn, to be 'regarded as' having such an impairment, for purposes of the ADA." *United Parcel*, 306 F.3d at 796-97. After conducting individualized disability assessments of the relevant UPS drivers, the Ninth Circuit affirmed in part and reversed in part the district court. *United Parcel*, 306 F.3d at 800-06.

One year prior to the *United Parcel* decision, this Court specifically addressed a claim of disability under the ADA based on alcohol impairment and a claim that the impaired individual was discharged despite her on-going rehabilitation. In *Brown v. Lucky Stores, Inc.* 246 F.3d 1182, 1186 (9th Cir. 2001) ("*Brown*"), the Court rejected that claim noting that a "disability" under the ADA is not established merely by asserting a claim that one is undertaking rehabilitation. *Brown*, 246 F.3d at 1186. This case does not directly address rehabilitation in the context of a sober living home, but it does mandate anyone making a claim of rehabilitation under the ADA must establish something more than just a naked claim that they are undergoing rehabilitation (somewhere).

V. The Ninth Circuit's holding in connection with "regarded as disabled" standard will be far-reaching, and have adverse consequences for cities beyond regulation of sober living homes

Sober living homes and addiction treatment are big business. In 2020, it was estimated to be a $42 billion-dollar industry. *See supra*, Sforza, "Addiction treatment: the new gold rush" at page 3. The Panel's decision has the potential to move big business into any residential zone in any city – merely by the business claiming it has a policy that will assist unidentified disabled individuals. *En banc* review is necessary to consider the national implications of a "deemed disabled" standard on the ability of cities to regulate commercial uses *via* local zoning laws.

The on-the-ground reality is that many sober living businesses are unregulated by either federal or state officials and are springing up in the middle of residential neighborhoods, often in close proximity to each other, which creates an institutional type of environment. This case threatens many cities' ability to separate different and incompatible land uses – *e.g.*, keeping the oil refinery away from the local school. This undermines a fundamental aspect of local government. *See Village of Bella Terra v. Borass*, 416 U.S. 1, 6 (1974) (affirming municipal ordinance limiting number of non-related individuals residing in individual home; "We do not sit to determine whether a particular housing project is or is not desirable. . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean…").

Sober living homes bring with them all the impacts and issues any other business would bring to a residential neighborhood: more cars and less parking, more trash cans, more noise, more calls for service, and a cycling of unknown people into and out of the house next door, or across the street. These impacts are reasons cities ban commercial businesses in residential zones.

To this point, cities have been able to thread the proverbial zoning needle between the needs of the communities where the sober living homes exist and the needs of the people struggling with addiction. One of the ways that cities such as Costa Mesa, Newport Beach, and others accomplish this is through distancing requirements, which avoids the creation of sober living campuses and allows for the healthy reintegration of sober living residents. These are bespoke solutions

tailored by the individual communities. For example, Newport Beach (which has some very densely populated neighborhoods) limits unlicensed sober living homes to avoid overconcentration in any one area, where the median block in the city is 617 feet. *See* City of Newport Beach Mun. C. §20.52.030 A.2 (regulating concentration of residential care facilities). Costa Mesa has a separation requirement of 650 feet between unlicensed sober living homes. Other cities have other rules that fit the character of their communities. *See Sailboat Bend Sober Living, LLC v. City of Ft. Lauderdale, Fla.*, 46 F.4th 1268, 1274 (11th Cir. 2022) (approving city ordinance requiring 1000 feet distance between defined "family community residences").

The rule articulated by the Panel, if allowed to stand, can be used to unravel the uniquely local character of the neighborhoods and upset the equilibrium struck between persons in recovery, the residential communities where they are located by the sober living businesses, and the cities that serve both.

As tragic as that outcome might be, it is only the first-order impact. The natural extension of the Panel's decision betokens a direct avenue for other "disability-serving" businesses to locate in an otherwise residential area.

The time will likely be measured in days, not months, before other uses such as "medical" cannabis businesses purchase homes and contend to city planners they have policies aimed at assisting the "disabled" addicted individuals. (Could they locate next to sober living homes?) Short-term rentals (*e.g.*, Vrbo and Airbnb) that may not currently be allowed in certain cities or areas could theoretically assert

they have a policy designed to serve disabled individuals and negate local zoning control of their businesses.

The list could go on, but the opportunity for businesses using the "presumed disabled" label to insert themselves into residential communities looms large. The Court should reconsider the Panel's decision in light of these impacts.

CONCLUSION

For all of the reasons set forth above, the *Amici* respectfully request this Court grant the City of Costa Mesa's request for an *en banc* rehearing.

DATED: February 9, 2023

Respectfully Submitted,

RING BENDER LLP

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LEAGUE OF CALIFORNIA CITIES, ASSOCIATION OF CALIFORNIA CITIES-ORANGE COUNTY AND THE CITIES OF NEWPORT BEACH, FOUNTAIN VALLEY, MISSION VIEJO, AND ORANGE

CERTIFICATE OF COMPLIANCE

[F.R.A.P. 29(a)(4)(G) and Circuit Rule 29-2]

I certify that, pursuant to Fed R. App. 29(a)(4)(G) and Ninth Circuit 29-2, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 3972 words.

DATED: February 9, 2023 RING BENDER LLP

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2023, I electronically filed the foregoing AMICI CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, THE ASSOCIATION OF CALIFORNIA CITIES OF ORANGE COUNTY, AND THE CITIES OF NEWPORT BEACH, FOUNTAIN VALLEY, MISSION VIEJO, AND ORANGE IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Laura T. Juarez
Laura T. Juarez