Appeal No. 22-56181

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE OHIO HOUSE, LLC,
Plaintiff-Appellants,
v.
CITY OF COSTA MESA,
A MUNICIPAL CORPORATION,
Defendant-Appellee

And
BRANDON STUMP, An individual, et. al.
Counter-Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE JAMES V. SELNA, JUDGE
CASE NO. 8:19-cv-01710-JVS-GJS

AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLEE CITY OF COSTA MESA

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DISCLOSURE STATEMENT

Amicus League of California Cities is a California non-profit corporation. There is no parent corporation or other corporation that owns more than ten percent of its stock.

DATED: October 13, 2023

Respectfully Submitted,

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LEAGUE OF CALIFORNIA CITIES

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INTEREST OF *AMICUS* CURIAE AND AUTHORITY FOR FILING

Amicus League of California Cities ("Cal Cities") is a nonprofit corporation and an association of 476 California cities. Cal Cities is dedicated to protecting and maintaining local control to provide for the public health, safety, and welfare of the municipal 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 national significance. The Committee has identified this case as having such significance.

Amicus has received the consent of all parties to the filing of this amicus brief pursuant to Federal Rule of Appellate Procedure Rule 29(a)(2). No counsel for a party authored the brief in whole or in part, and no party contributed monies to fund the preparation or submittal of this brief. No person other than the *amicus* contributed money to fund preparation or submittal of this brief.

ARGUMENT

I. Appellant's Proposed Per Se Rule of Facial Discrimination Would Eviscerate Cities' Fundamental Role in Land Use Regulation.[1]

A. Appellant's proposed *per se* rule of zoning invalidity.

Appellant The Ohio House LLC ("Appellant" or "Ohio House LLC") initially asserts it can establish facial discrimination is a matter of law *per se*. As Appellant puts it: "Had the district court engaged in the required statutory construction [of City code standards], it would have had to find in favor of Ohio House on its facial discrimination claims on summary judgment as well as after trial." **AOB 27.**[2]

Ohio House LLC's second position related to facial discrimination is that the City of Costa Mesa's ("City") claims regarding the benefits of its zoning regulation of sober living homes are "legally unsupportable"— meaning all evidence supporting such claims must be disregarded, without jury consideration. **AOB 38-39**.

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[1] Pursuant to FRAP 29(a)(4)(F) Amicus adopts the standard of review as stated by the Appellee. **AAB 16-18**.

[2] As to this first argument concerning a claim of facial discrimination, Amicus does not address that argument in this brief and respectfully refers to the arguments made by Appellee in its Answering Brief on this point.

Ohio House LLC argues that prior to, during, and in post-trial motions any evidence of a possible justification for a specific ordinance governing sober living homes is irrelevant as a matter of law—the City is essentially guilty once a plaintiff establishes its initial burden of showing a facially discriminatory ordinance. According to Appellant, if a city's zoning ordinance makes any distinction between sober living homes and all other uses—even a positive one that gives preferential treatment to sober living homes over boarding houses, then that distinction would be *per se* invalid.

Taken to its logical conclusion, Appellant's argument would effectively strip every California city of its ability to mount a legal or factual defense to a claim of intentional discrimination. This is not the law.

As this Court held in connection with a claim made on behalf of a facility housing homeless individuals, even if a plaintiff establishes some differential treatment, that does *not necessarily* equate to "discrimination" under the Fair Housing Act ("FHA"), 42 U.S.C. §3601, *et. seq*.. *Community House v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007) (*Community House*). Indeed, a prima facia showing of intentional

differential treatment "does not mean that intentional differential treatment can never be justified under the Fair Housing Act." *Id.* In *Community House* this Court articulated a two-part factual inquiry to evaluate whether differential treatment is discriminatory: whether (1) the restriction benefits the protected class, or (2) responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes. This phased inquiry is consistent with the multi-part burden shifting standard familiar in employment discrimination cases. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–04 (1973). That inquiry was properly applied by the district court here.

The Ninth Circuit has continued this approach in other decisions involving the regulation of sober living homes. In *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1164 (9th Cir. 2013), *cert. denied*, 574 U.S. 974 (2014), this Court held that evidence of a "differential" treatment under zoning ordinances may allow a plaintiff to sometimes survive summary judgment and then proceed to a jury trial (as happened here). *See id.* ("[I]t is clear that the Plaintiffs have met their burden *to create a triable issue of fact* as to whether the Ordinance was enacted with a discriminatory purpose of harming group

homes . . .") (emphasis added). This Court recently reached a similar conclusion in *Yellowstone Women's First Step House, Inc. v. City of Costa Mesa*, No. 19-56410, 2021 WL 4077001 at *2 (9th Cir. Sept. 8, 2021) where it held that a reasonable jury could find for the defendant City on the basis that the ordinance in question was "not more likely than not" to have a discriminatory purpose.

The position Appellant asserts here is not only contrary to Ninth Circuit jurisprudence, but would also eviscerate local government authority to create and protect residential uses from commercial ones. It effectively construes fair housing laws to eliminate all local regulation and control over commercial sober living homes in a city's residential zones. It would likewise impose a harsh regime of *per se* liability against local governments for attempting to regulate sober living homes. As discussed below, this was not the intent of the FHA or of the California Fair Employment and Housing Act, California Government Code §12900 *et. seq.* ("FEHA").

B. Congress expressly allowed for reasonable municipal regulation within FHA.

Appellant's *per se* approach starts with the FHA's broad definition

of a general policy of providing "fair" housing to disabled individuals. **AOB 23-24; StatAdd 6** (FHA); **id. at 16** (FEHA). These broad policy declarations must be evaluated together with the FHA's remaining specific statutory provisions, starting with the textual language. *BedRoc Ltd. LLC v. U.S.*, 541 U.S. 176, 183 (2004).

In the case of the FHA, Congress expressly amended the statute in 1988 to preserve the right for local governments to implement regulations like these—at least as to the number of occupants residing in a dwelling. While this numeric limitation is not at issue in this case, the statutory language, found at 42 U.S.C. § 3607(b)(1) is instructive as to Congressional balancing of the general rights of agencies to impose some local restrictions consistent with the overall statutory purposes.

> "Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."[3]

In *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 (1995) (*Edmonds),* the Supreme Court construed the above provision in its review of a slightly different city ordinance, one that regulated the

[3] This portion of the FHA was added as one of the amendments made in 1988.

definition of a "family."[4] In that case, Oxford House challenged the City of Edmond's zoning regulation limiting the number of (unrelated) occupants in the facility. Under the facts of the case, which hinged on occupancy limits that distinguished between family members and non-family members (which is not at issue here), the Supreme Court held the City was *not* entitled to the FHA's maximum occupant exception contained in Section 3607(b)(1) (above). The Court was careful to emphasize the values of municipal preservation of residential communities:

> In particular, reserving land for single-family residences preserves the character of neighborhoods, securing "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S.Ct. 1536,1541, 39 L.Ed.2d 797 (1974)

Edmonds, supra, 514 U.S. at 732-33.

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[4] Appellant cites and relies upon this Court's prior decision in *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994), *aff'd on limited grounds,* 514 U.S. 725 (1995). *See* **AOB 37, 44, 47**. This Court's opinion in that case must be read in light of the Supreme Court's subsequent opinion. Although the Supreme Court affirmed the Ninth Circuit's decision cited by Appellant, it neither addressed nor decided the issue of whether that municipal ordinance in fact violated the FHA—an issue it remanded back to the lower courts. *Edmonds,* 514 U.S. at 738.

The dissent, reiterated the majority's perspective on the utility and importance of local zoning regulations:

> Thus, we require that "'Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States.'" *Id.*, at 461, 111 S.Ct., at 2401 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989)). It is obvious that land use—*the subject of petitioner's zoning code—is an area traditionally regulated by the States rather than by Congress, and that land use regulation is one of the historic powers of the States*. As we have stated, "zoning laws and their provisions ... are peculiarly within the province of state and local legislative authorities." [citations omitted]

Edmonds, supra, 514 U.S. at 744 (emphasis added).

As the Supreme Court recognized in *Edmonds,* Congress in enacting the FHA recognized the right of municipalities to limit the total number of occupants of a particular building, *regardless* of whether the facility was used (as it was in *Edmonds*) as a sober living rehabilitation center. Critically, there is nothing in either the majority or the dissenting opinion suggesting reasonable local zoning ordinances are deemed "per se" illegal under FHA.

II. Sober Living Homes Are A Big Business That Require Local Regulation.

A. Sober living homes are a big business.

This case is really about Ohio House LLC's on-going business which it turns out, is quite profitable. Appellant suggests Costa Mesa's ordinance (and presumably others) violate the FHA (and FEHA) on the grounds they fail to reasonably accommodate operators of sober living home businesses. **AOB 26**. This is a complete misreading of the FHA and FEHA.

Sober living homes come in a variety of sizes and corporate ownership structures. *See Edmonds, supra,* 514 U.S. at 728-29 (described "group home" for 10-12 recovering addicts located in residential neighborhood). In this case, Ohio House LLC's Wilson Facility accommodated up to 45 all male residents (including resident managers). More recently, as experience with such facilities has grown, the difficulties local communities face in regulating sober living homes has become widely shared and well documented. *See* M. Gorman, A. Marincaccio, C. Cardinale, "Fair Housing for Sober Living: How the Fair Housing Act Addresses Recovery Homes for Drug and Alcohol

Addiction" 42 URBAN LAWYER 607, 608 (2010) ("[T]he sober living model can be easily abused by landlords seeking to maximize rents . . . This makes regulation of sober living homes by public agencies difficult, as they are forced to differentiate between legitimate homes and those abusing the system.") In Orange County, sober living homes are known to congregate in specific areas, developing into what some have labeled the "Rehab Riviera." *See "Rehab Riviera: An Investigation into the Southern California Rehab Industry,"* ORANGE COUNTY REGISTER (2017); "*Inside OC with Rick Reiff: Rehab Riviera-Part 1* (2018) PBS So-Cal, KCET; David Gorn, Doing the 'sober-living dance' on the Orange County coast, Cal Matters (April 24, 2018) available at: https://calmatters.org/health/2018/04/doing-the-sober-living-dance-on-californias-rehab-riviera/. These media reports are confirmed by statistical data relating to Costa Mesa, which in October 2017 had a total of 178 group homes. **SER 74-77**.

Nor are the challenges associated with regulating sober living homes unique or limited to California. For example, as of 2018 Arizona required state registration of businesses operating sober living facilities. City of Phoenix, "State Licensing Requirement for Sober

Living Homes" (available at: https://www.phoenix.gov/cityclerk/services/licensing/regbusinfo/structured-sober-living-homes). In Florida, commentators have noted that: "addiction treatment has become a big business." *See* H. Scharf, Note and Comment: "A Rising Florida Epidemic: Big Business Controls Florida's Recovery Residence Crisis" 44 NOVA L. REV. 91, 92 (2019). The same commentator observed in calling for state-wide action in Florida: "[A]ddiction treatments having the potential to generate fast money, those involved in Florida's one-billion-dollar market may not want government entities monitoring their actions." *Id*.

It is difficult to precisely measure the nationwide size of the sober living business, but it is clearly part of the $50 billion rehabilitation industry. *See* C. Wooten, "My Years in the Florida Shuffle of Drug Addiction," NEW YORKER (Oct. 14, 2019). Investigative articles on the subject emphasize there can be significant "economic rewards" to operating sober living facilities, as much as $40,000 per client per year to the owner. *See* K. Humes, *How Much Profit Can Be Made From A Halfway House?* (Apr. 4, 2021 updated) available at: https://www.openupahalfwayhouse.com/post/how-much-profit-can-be-made-from-a-halfway-house.

B. Ohio House LLC is a high cost facility in the big business of sober living homes.

California cities have traditionally regulated zoning rights for industry and commercial businesses differently than residential uses. Appellant seeks to have a *per se* rule limiting municipal zoning powers with respect to sober living homes but ignores the fact that these are in fact commercial enterprises in residential zones and merit specific regulation. In this case, the City attempted to implement such a regulation. **StatAdd 58, 68, 78-79, 92-93**. Contrary to what the Ohio House LLC seeks to portray this is less about the rights of individuals, and much more about turning a profit.

Ohio House LLC is not just part of the business of sober living homes, but at the high end of such homes. The Wilson Facility originally started as just one unit. It subsequently expanded and now consists of five separate units, each of which consists of a four-bedroom, three bath residence that can accommodate eight residents and a manager. **1 ER 0026; 17 ER 3948**. This equates to 45 individuals living adjacent units in neighborhood classified as a MFR or multi-family residential zone. Ohio House LLC was one of the largest facilities in

terms of total number of beds of any group home in Costa Mesa as of 2017. **SER 74-77**. At a monthly charge of $1,500 per resident and eight residents (besides the resident manager) per unit, that comes to $60,000 per month. **17 ER 3910-3911**; **1 ER 26-27** (district court findings of fact). That totals $720,000 per year, which brings it into what scholars term a "high cost" facility. *See* A Mericle, *et.al.*, "Distribution and Neighborhood Correlates of Sober Living House Locations in Los Angeles" 58 AM. JOURNAL COMM. PSYCHOLOGY 89 (Sept. 2016).

C. Congress and the State of California recognized the problematic nature of the unregulated sober living home businesses.

In 2018, Congress recognized sober living homes were a different type of a non-residential, commercial use that required regulation distinct from other uses. In September of that year, the House Judiciary Committee's Subcommittee on Constitutional Rights and Civil Justice held hearings to address issues raised by sober living homes. Testimony by Subcommittee Chair Representative King highlighted some of these issues noting evidence that sober living homes were "poorly managed,

or are run by operators who dangerously exploit their residents, and that is for profit . . .” Representative King went on to highlight a series of headlines suggesting abuses by such homes and concluded his initial remarks by noting: “But all of them [referenced articles] indicate that there is a very real problem that needs to be addressed. Indeed, many local governments have answered the call to regulate Sober Living Homes, but many have been sued under the Fair Housing Act and the Americans With Disabilities Act for doing so.”

In that hearing, Congressman Rohrabacher added that sober living home businesses are abundant in Costa Mesa: “Our Sober Living Homes are not actually homes, but businesses that operate out of single-family homes in residential neighborhoods zoned for families.” (**Hearings before House Subcommittee On Constitutional Rights and Civil Justice of the House Comm. on Judiciary, 115th Cong. 2nd Sess., Sept. 28, 2018**, pp. 1, 5 (Opening Remarks of Cong. King; Testimony of Cong. Rohrabacher).)

Congress later passed legislation directing the Substance Abuse and Mental Health Services division of the Health and Human Services Agency to prepare a set of best practices expressly for sober living

homes. 42 U.S.C. §290ee-5. The current list of best practices is now found on-line. *See U.S. Substance Abuse and Mental Health Services Administration, Recovery Housing: Best Practices and Suggested Guidelines* available at: https://www.samhsa.gov/resource/ebp/recovery-housing-best-practices-suggested-guidelines.[5]

Although recognizing the need for regulation, Congress chose not to apply any enforceable legislation States (or their political subdivisions). 42 U.S.C. §290ee-5(g).

The State of California separately imposes regulations but only as to formally licensed treatment facilities. *See* Cal. Health & Safety Code §11834.01, *et. seq.* Those regulations impose a raft of requirements on a licensed operator and require (as the federal "best practices" guidelines suggest) a certification process for such facilities. *See* Cal. Health & Safety Code §11832 (defining State as certifying entity).[6] The Ohio House however, is *not* a state licensed facility, as it concedes. **AOB 3**.

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[5] There is no evidence in the record as to whether Ohio House LLC complies with the federal list of best practices for sober living homes.
[6] The State licensed facilities also have the advantage of certain "safe harbor" provisions pre-empting some local regulations for homes of six or fewer residents. Cal. Health & Safety Code §11834.23. Appellant concedes that this state provision is inapplicable to its Wilson Street facility. **AOB 3, fn.2**.

Both federal and California state law regulate some types of facilities that provide for recovery of addicts but not all facilities. This incomplete regulatory regime leaves a gap for sober living home operators to exploit and thus requires efforts by Costa Mesa, like many other cities, to regulate otherwise unlicensed (by the state) sober living homes using their traditional tools—zoning regulations. *See* **AOB 3, fn.3** (*citing* Costa Mesa Municipal Code provision defining "sober living" differently than state-licensed treatment facilities).

III. Zoning Regulations Requiring a "Separation" between Similar Facilities are a Well-Recognized Municipal Tool.

A. The Supreme Court and this Court have long recognized the paramount role of local zoning.

For decades, the Supreme Court has recognized the sacrosanct role of municipalities in zoning regulation. *See Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71 (1976) ("It is not our function to appraise the wisdom of [a city's] decision . . . In either event the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable

opportunity to experiment with solutions to admittedly serious problems.").

This Court has also consistently recognized the paramount role of cities in enacting zoning ordinances. *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997) (moving to second prong in McDonald Douglas standard: "For the purposes of this examination, we move to stage two and conclude that the reason the City advances for its decision, concern for the character of the neighborhood, is legitimate and nondiscriminatory."); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1236 (9th Cir. 1994), *cert. denied*, 513 U.S. 870 (1994) (noting City's general plan including objectives of preserving its agricultural heritage and preserving the 'small town' character of the City; "Our circuit and others have established that these are legitimate objectives."); *Constr. Indus. Ass'n of Sonoma Cty. v. City of Petaluma*, 522 F.2d 897, 906-07 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976).

As it relates to group homes in various forms, the Supreme Court has long honored the authority of local governments to regulate them. In 1974, the Supreme Court upheld a municipal ordinance that limited the number of non-familial individuals in a particular residence against

a panoply of Constitutional challenges. Justice Douglas, writing for the majority, confirmed the legal issue caused by such group homes:

> The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds. A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, *supra*.

Village of Belle Terre v. Borass, 416 U.S. 1, 9 (1974).

Although he dissented from the majority's conclusion that the Village's ordinance met constitutional standards, Justice Marshall emphasized the importance of zoning laws in a modern world:

> I am in full agreement with the majority that zoning is a complex and important function of the State. *It may indeed be the most essential function performed by local government,* for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.

Id. at 13 (emphasis added).

Here, Appellant charges the City "discriminated" against sober living homes by virtue of its zoning ordinance, specifically one requiring a separation or dispersal of sober living homes from *other* such homes or similar state-licensed treatment facilities. **AOB 30-31**. This provision is contained in the City's municipal code, which provides that such

facilities can apply for conditional use permits subject to certain requirements, including that their location is some 650 feet distance from other facilities. **StatAdd 148** [Costa Mesa Municipal Code § 13-323(b)].

In many cities, zoning regulations establish standards, such as a distance separation standard as to a variety of land uses. In most cases, cities also provide for an applicant to waive a particular standard with one or more public hearings to consider such a waiver. The City's separation ordinance for larger group facilities is two decades old, dating back to 2000. **1 ER 0035**.

The Costa Mesa City Council and the City Planning Commission's findings on this need for separation were:

> The subject property consists of five units on five individual lots, which already contributes to an over-concentration of sober living homes in the area. The site's proximity to another sober living home serving more than six adults contributes to an over-concentration of sober living facilities in this neighborhood. Granting the [Ohio House LLC's requested] accommodation to consider this facility as a single housekeeping unit and/or waive the separation standard will result in an overconcentration of sober living facilities in this area that is in conflict with the intent of the City's zoning program.

1 ER 241.

This finding is supported by substantial evidence as to "group homes" or sober living facilities located on Wilson Street. **SER 74, 77** [showing four other facilities on Wilson Street East as of 2017]; **1 ER 0003** [noting Wilson Facility was within 550 feet of another such facility]. The City Council's finding as to an "overconcentration" of such homes in that area is entitled to deference by this Court. Although FHA modifies that general degree of deference in certain respects, in this case the City Council noted that any allowance for the Wilson facility would require an alteration in its basic zoning laws. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982) ("The zoning function is traditionally a governmental task requiring the 'balancing [of] numerous competing considerations,' and courts should properly 'refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality.')

B. Cities routinely utilize distance separation as a standard zoning tool.

Many cities and counties in California utilize separation of sober living facilities as a means to avoid an overconcentration of such facilities in residential areas. This includes the cities of Anaheim,

Huntington Beach, Orange, and Riverside and San Bernardino counties.[7] Outside of California, cities utilize space separation as a zoning tool to assist in regulating their neighborhoods. This includes Dallas, Dublin (Ohio), Fort Lauderdale (Florida), Lincoln (Nebraska), Springfield (Illinois) and Wilmington (North Carolina).[8] In Ohio, state legislation expressly permits space "limitations" among adult family homes, including licensed rehabilitation centers. Ohio R.C. Section 3722.03(d)(1); *see Harding v. City of Toledo*, 433 F.Supp.2d 867, 869-70 (N.D. Ohio 2006) [denying preliminary injunction against City of Toledo's ordinance requiring separation requirement of 500 feet between such facilities and citing Ohio state law].

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[7] Anaheim Muni. Code, Title 18 Zoning, Chapter 18.38, Section 18.38.123; Huntington Beach Zoning Code, Chapter 230, Art. 1, 230.28; Orange Mun. Code, Title 17 Zoning, Chapter 17.13.040; Riverside County Code of Ordinances, Title 17 Zoning, Chapter 17.272.10; San Bernardino Code of Ordinances, Division 4, Chapter 84.32.

[8] Dallas City Code Section 51A-4.209; Dublin Code of Ordinances Section 153.002; (definitions) and Section 153.073 (660 feet separation); Ft. Lauderdale City Ordinance No. C-18-11, sec. 6; Lincoln Municipal Code section 27.62.050; Springfield Code of Ordinances section 155.053; Wilmington. Code of Ordinances section 18-276.

C. The Supreme Court and courts of appeal have upheld use of space separation requirements.

The Supreme Court considered and approved the use of municipal separation requirements in the separate but similar context of distancing of adult film theatres from residential communities. In that case, the City of Renton Washington enacted Ordinance No. 3526. "The ordinance prohibited any "adult motion picture theater" from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, [or schools or churches] . . ." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 44 (1986) (*Renton*). The challenger alleged that the City lacked sufficient public justification for imposing this ordinance in light of the First Amendment protections for speech, and this Court held that the City had "to establish adequately the existence of a substantial governmental interest in support of its ordinance" in light of the paramount priority accorded to First Amendment rights. *See id*. at 46. The Supreme Court reversed, holding the Ordinance was not a direct regulation of protected content. As the Supreme Court put in in strikingly applicable words:

> At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into

> either the "content-based" or the "content neutral" category. *To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters.* Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the content of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community.

Renton, 475 U.S 47 (emphasis added to first sentence; emphasis in original as to "secondary effects").

The Supreme Court's decision in *Renton* is in accord with decisions from the Third, Eighth and Eleventh Circuits related directly to separation requirements applied to homes treating the disabled.

The Eighth Circuit affirmed summary judgment in favor of the City of St. Paul, which had a quarter-mile (820 feet) separation requirement for group facilities serving the mentally ill despite a challenge made pursuant to the FHA. *Familystyle of St. Paul, Inc. v. City of St. Paul, Minnesota*, 923 F.2d 91 (8th Cir. 1991) (*Familystyle).*

The Eleventh Circuit affirmed judgment in favor of the City of Ft. Lauderdale which had imposed a 1000-foot separation zoning requirement for sober living homes against a challenge based on both the FHA and the Americans with Disabilities Act. *Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, Florida*, 46 F.4th 1268 (11th Cir. 2022).

The Third Circuit affirmed a judgment against a drug rehabilitation facility which partly challenged based on the FHA a City's 500-foot separation ordinance. *RHJ Med. Ctr. v. City of DuBois*, 564 Fed. Appx. 660 (3rd Cir. 2014).

The Fifth Circuit affirmed a 300-foot separation requirement imposed by the City of Arvin, Texas as to a proposed low-income apartment complex. The developer challenged the ordinance as a FHA violation, claiming discrimination based on race (Hispanic). The Fifth Circuit rejected the claim that the separation ordinance constituted either intentional discrimination or had a prohibited discriminatory effect under FHA. *Artisan/American Corp. v. City of Arvin, Texas*, 588 F.3d 291 (5th Cir. 2009).

All of these cases are consistent with the Supreme Court's general admonition with respect to FHA and zoning laws: "The FHA is not an instrument to force housing authorities to reorder their priorities." *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.,* 576 U.S. 519, 540 (2015).

Appellant cites a contrary Court of Appeal case disapproving a state law separation provision as applied to an adult foster care facility

for handicapped adults, *Larkin v. State of Michigan*, 89 F.3d 285 (6th Cir. 1996). That case is easily distinguishable. The Court in *Larkin* expressly distinguished on its facts the Eighth Circuit's decision in *Familystyle* noting that: "In *Familystyle*, the plaintiff already housed 119 disabled individuals within a few city blocks. The courts were concerned that the plaintiffs were simply recreating an institutionalized setting in the community, rather than deinstitutionalizing the disabled." *Larkin, supra,* 89 F.3d at 291. In this case, and unlike in *Larkin*, Costa Mesa was confronted with a five-house collective complex that housed some 45 individuals and was deemed to be an institutionalized threat to the character of the community.

D. A separation of rehabilitation facilities is often a benefit to inhabitants of those facilities.

Sober living homes, also known as "recovery homes," are designed to allow recovering addicts the opportunity to re-integrate into the larger community. *See* S. Reif, *et.al.*, "Recovery Housing: Assessing the Evidence" 1, PSYCHIATRIC SERVICES IN ADVANCE (Oct. 21, 2013) ("Recovery housing aims to increase an individual's stability, improve his or her functioning, *and move the resident toward a life in the*

community by supporting abstinence and recovery.") (Emphasis added.) There is scientific evidence that demonstrates the value of "de-institutionalized" (or small separated home) living arrangements as part of achieving this rehabilitation goal. D. Polcin, *et. al.*, "Community Context of Sober Living Homes" at 10, ADDICT RESEARCH THEORY (Dec. 1, 2012 online publication)("Yet, *because there are separate houses, the residents do not have the feeling of being in an institution*; with one exception, the houses are approximately family-sized and offer the opportunities to build skills, develop social relationships and offer a degree of privacy.")(emphasis added).

The Eighth Circuit recognized the value of separation or "de-institutionalized" treatment of mentally disabled individuals. The Court of Appeals noted that Minnesota's policy was to locate handicapped individuals geographically in areas where they could take advantage of a broad array of community services. *Familystyle, supra,* 923 F.2d at 93 ("An integral part of the licensing process guarantees that residential programs are geographically situated, to the extent possible, in locations where residential services are needed, where they would be a part of the community at large, and where access to other necessary

services is available. [citation omitted] This licensing requirement reflects the goal of deinstitutionalization—a philosophy of creating a full range of community-based services and reducing the population of state institutions.").

This Court has adopted a similar position with respect to those disabled due to mental health problems under the Americans with Disabilities Act. *See Arc of Washington State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005) ("We have previously described the ADA as containing an "integration mandate." [citation omitted]. Under this mandate, states are required to provide care in integrated environments for as many disabled persons as is reasonably feasible, so long as such an environment is appropriate to their mental-health needs.").

CONCLUSION

Appellant's suggested *per se* rule against Costa Mesa's ordinance is premised on a narrow legal theory that any "differentiation" of sober living businesses from other businesses is an automatic "discrimination" violating FHA and FEHA. That suggestion ignores the body of scientific and legal literature showing that separation

requirements like the one at issue here serve to integrate sober living homes into the larger community, which is a significant benefit to recovering addicts. It also ignores the fact these businesses are *businesses*. *Amicus* League of California Cities respectfully requests this Court affirm the judgment entered by the district court.

DATED: October 13, 2023

Respectfully Submitted,

RING BENDER LLP

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on October 13, 2023, I electronically filed the foregoing BRIEF OF AMICUS IN SUPPORT OF APPELLEE CITY OF COSTA MESA with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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