No. 22-56181

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE OHIO HOUSE, LLC,
Plaintiff-Appellant,

v.

CITY OF COSTA MESA, a municipal corporation,
Defendant-Appellee

and

BRANDON STUMP, an individual; RYAN STUMP, an individual; KEITH STUMP, an individual; BUCKEYE RECOVERY TREE COLLECTIVE, LLC, a California limited liability company; BUCKEYE TREE COLLECTIVE, LLC, a California limited liability company; CHADWICK HOUSE, LLC, a California limited liability company; ASHBROOKE, LLC, an Ohio limited liability company,
Counter-Defendants

On Appeal from United States District Court
for the Central District of California
No. 8:19-cv-0171f0- JVS-GJS

BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS CALIFORNIA, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, AND TWENTY OTHER PUBLIC INTEREST ORGANIZATIONS IN SUPPORT OF PETITION FOR REHEARING EN BANC

Autumn M. Elliott
Zeenat Hassan
DISABILITY RIGHTS CALIFORNIA
350 S. Bixel St. Suite 290
Los Angeles, CA 90017
Tel: (213) 213-8000
Fax: (213) 213-8001
autumn.elliott@disabilityrightsca.org
zeenat.hassan@ disabilityrightsca.org
Attorneys for Amici Curiae

Michelle Uzeta
DISABILITY RIGHTS EDUCATION & DEFENSE FUND
3075 Adeline Street, Suite 210
Berkeley, CA 94703
Tel: (510)-644-2555
muzeta@dredf.org
Attorney for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 & 29(c), Counsel for Amici states that they are non-profit corporations; that none of Amici have a parent corporation; and that no publicly held company owns any stock in any of Amici.

/s/Autumn M. Elliott
Autumn M. Elliott
Attorney for Amici

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INTEREST OF AMICI CURIAE

Amici include 22 organizations working on behalf of individuals with disabilities. Amici have extensive experience with the implementation of the rights to reasonable accommodations that are necessary to ensure that disabled people are able to live independent lives in the community of their choice. Amici are also familiar with the housing needs of people with disabilities. A list of amici appears in the motion filed concurrently with this brief.

SUMMARY OF THE ARGUMENT

The panel's opinion contains errors that will cause confusion for district courts and parties who will need to reconcile the opinion with existing law. Despite acknowledging the well-settled principle that reasonable accommodation requests must be evaluated on a case-by-case basis, the opinion takes analytical steps directly in conflict with that principle. The opinion also reflects a misunderstanding of the nature and necessity of community-based housing for people with disabilities, compounding the errors.

ARGUMENT

I. The analysis upends decades of reasonable accommodation law.

Reasonable accommodation/modification[1] requirements are fundamental to

[1] Title II of the ADA uses the term "reasonable modification" to describe changes made to rules, policies, practices, or services, rather than the FHA's term "reasonable accommodation." However, these terms create identical standards.

disability nondiscrimination law. In addition to being required under the Fair Housing Act ("FHA"), they are contained in the U.S. Department of Justice's ("DOJ") ADA rules for public and private entities as well as other laws. *See, e.g.*, 28 C.F.R. § 35.130 (b)(7)(i) (ADA Title II regulation); 28 C.F.R. § 36.302 (ADA Title III regulation); 28 C.F.R. § 42.511 (DOJ regulation implementing Section 504 of the Rehabilitation Act); 24 C.F.R. § 8.11 (HUD Section 504 regulation); and 49 C.F.R. § 27.7(e) (Department of Transportation Section 504 regulation).

The panel's reasoning on fundamental alteration, which relies almost entirely on out-of-Circuit FHA cases and generally disregards relevant ADA Ninth Circuit precedent, is thus of significant concern. It vitiates the very concept of reasonable accommodation and conflicts with decades of precedent.

A. The reasoning on fundamental alteration contradicts established law.

The opinion, which allows a finding that modifying a 650-foot separation by 100 feet in one instance "fundamentally alters" Costa Mesa's zoning scheme to stand, is in conflict with established law.

"A municipality commits discrimination under the [FHA] if it refuses 'to make reasonable accommodations in rules, policies, practices, or services, when

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Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729, 738-39, n.4 (9th Cir. 2021) (quoting *McGary v. City of Portland*, 386 F.3d 1259, 1266 n.3 (9th Cir. 2004) (citation omitted). Here, these terms are used interchangeably.

such accommodations may be necessary to afford [the disabled] equal opportunity to use and enjoy a dwelling.'" *Budnick v. Town of Carefree*, 518 F.3d 1109, 1119 (9th Cir. 2008) (quoting *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1997)); *see* 42 U.S.C. § 3604(f)(3)(B). The duty to accommodate is "affirmative" and requires "modif[ication] of administrative rules and policies," including zoning ordinances. *McGary v. City of Portland*, 386 F.3d 1259, 1264 (9th Cir. 2004). Title II of the ADA provides similarly, mandating "[a] public entity [to] make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i). Like the FHA, the ADA also requires modifications to zoning ordinances. *See Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1157 (9th Cir. 2013) (citing *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730–32 (9th Cir.1999)). Because of the similarities between the FHA and ADA, the Court "interpret[s] them in tandem." *See Pac. Shores*, 730 F.3d at 1157 (quoting *Tsombanidis v.West Haven Fire Dep't*, 352 F.3d 565, 573 n.4 (2d Cir. 2003)); s*ee also Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1149 (9th Cir. 2003) (the Circuit generally applies ADA and FHA

caselaw interchangeably when examining FHA reasonable accommodation claims).

Under both the FHA and the ADA, "only *reasonable* accommodations that do not cause undue hardship or mandate fundamental changes in a program are required." *Giebeler v. M & B Assocs.*, 343 F.3d at 1154 (emphasis in original). Fundamental alteration is thus an affirmative defense. *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 845 (9th Cir. 2004).

The fundamental alteration inquiry is "highly fact-specific, requiring case-by-case inquiry." *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996); *see also United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997). The evidence must "focus [ ] on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1060 (5th Cir. 1997).

Amici are concerned that the reasonable accommodation analysis undertaken by the panel, and the panel's upholding of a finding of a fundamental alteration in this case, run afoul of the above Ninth Circuit precedent. Costa Mesa has a blanket policy of denying any reduction in the 650-separation requirement. 6-ER-1316-17, ¶39; 10-ER-2263:3-6. Use of a blanket ban flouts the obligation to engage in a case-by-case inquiry as to whether a requested modification will result in a fundamental alteration. Moreover, the panel did not limit its inquiry to Ohio

House's specific accommodation request. As explained below in Section I(B) of this brief, it inappropriately found that the fact that "more than 20" others requested accommodations could be a reason to deny Ohio House's individual request.

An alteration is fundamental under disability nondiscrimination laws if it would alter "the essential nature" of the program at issue. *Alexander v. Choate*, 469 U.S. 287, 300 (1985). Alterations that have a "negligible" or "modest" effect cannot meet this standard. *See. e.g., Fortyune v. Am. Multi-Cinema, Inc*., 364 F.3d 1075, 1084 (9th Cir. 2004) (holding that a modification to a seating policy at a movie theater would not fundamentally alter the theater's business.) The record in this case does not support a finding that allowing Ohio House to continue to exist would alter the essential nature of the City's zoning scheme. The record lacks any evidence demonstrating that Ohio House's request for a 100-foot reduction in the 650-foot separation requirement would cause any negative effects in the neighborhood. The City admitted that it conducted no study to set the 650-foot separation—confirming its arbitrariness—and its own expert testified that Ohio House neither "institutionalized" its neighborhood nor did the separation requirement benefit disabled residents. 22-ER-4880:7-4882:13; 22-ER-4890:3-18; 23-ER-5093:15-5094:8; *see also* 14-ER-3121 (municipal staff finding that Ohio House is compatible with the residential character of the neighborhood).

Instead, the strong form of the City's argument is that their 650-foot requirement is inviolate and insulates them from making otherwise reasonable modifications to prevent disability discrimination. It is "effectively a contention that it is exempt from [the] reasonable modification requirement." *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001). This cannot stand. Requiring public entities to make changes to program requirements to eliminate discrimination and address segregation and exclusion—even when those requirements are in the form of an ordinance, regulation, or statute—is exactly what disability nondiscrimination laws do. *See, e.g., McGary*, 386 F.3d at 1265 (requiring the district court to consider modification of municipal ordinances); *Crowder*, 81 F.3d at 1485 (requiring modification of state law); *Fry v. Saenz*, 98 Cal.App.4th 256, 264-66 (2002) (applying the ADA and Section 504 of the Rehabilitation Act to the CalWORKS program and finding that the statutory rule cutting off benefits when children reach age 18 discriminated against disabled children).

Consider *Crowder v. Kitagawa*—the go-to case in this Circuit for the principle that "the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry." 81 F.3d at 1486. *Crowder* concerned a challenge to Hawaii's regulation requiring all dogs to quarantine upon entering the state to prevent the importation of rabies. *Id.* at 1481–82. A group of blind people sued, arguing that the regulation discriminated against people who use

guide dogs. The Ninth Circuit reversed the district court's grant of summary judgment to Hawaii. The district court had erroneously deferred to the legislature's judgment that the restriction was necessary rather than conducting its own fact-finding. *Id.* at 1485–86. If courts decline to re-evaluate government decision-making, "any state could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the state authority considered possible modifications and rejected them." *Id*. at 1485. Courts have a responsibility to ensure "that the mandate of federal law is achieved"—a mandate that will sometimes require reasonable modifications to polices set by government actors. *Id.*

Disability nondiscrimination laws mandate individualized analysis of a requirement of a public program. Courts may not defer to government requirements or presume their essential nature. If the opinion in this case is allowed to stand, the class of policies subject to reasonable modification may be vanishingly small, and nearly all requirements for access to public services risk heretofore being considered non-waivable essentials.

B. Consideration of other requests conflicts with the case-by-case inquiry required by law.

The panel correctly recites that, when evaluating a reasonable accommodation request, public agencies are required to engage in a "'fact-specific . . . case-by-case determination.'" *Ohio House*, 122 F.4th at 1133 (quoting *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997). But the panel then upholds the City's denial of Ohio House's reasonable accommodation request based not on a "case-by-case" evaluation of Ohio House's *individualized* situation but on what might happen if the City were to grant additional reasonable accommodations to *other* housing providers. That is the antithesis of the "case-by-case" analysis.

The panel addresses *Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015), which properly applies the "case-by-case" requirement. There, a family requested an exemption from a city's ordinance restricting farm animals so that their disabled daughter could have a miniature horse. *Id.* at 346-49. The Sixth Circuit reversed summary judgment for the city because one such animal would not create the unsanitary conditions or devaluation of neighboring properties that the city was concerned about. *Id.* at 363. The *Ohio House* panel improperly distinguishes *Anderson* from this case by mischaracterizing Ohio House's request to make an exception for *one* group home as a request for many more. "Unlike the

one-off request in *Anderson* for an exception to an animal restriction, here Ohio House ultimately disputes as unlawful the City's denial of permits for over 20 existing group homes located in residential zones." *Ohio House*, 122 F.4th at 1135.

But Ohio House did not request reasonable accommodations for over 20 group homes. It requested an accommodation for itself only.[2] By insisting that Ohio House's request for one exception "ultimately" contained more than 20 requests by other housing providers, the panel improperly avoided the required "case-by-case" assessment of Ohio House's solitary request.

The panel appears to have reasoned that if the City granted an accommodation to Ohio House, it would have to do likewise for more than 20 others. This is utterly inconsistent with the "case-by-case" requirement, which necessitates an examination of the particular party's request, not ones that might be made by others. In *PGA Tour, Inc. v. Martin*, for instance, the Supreme Court held that golfer Casey Martin's request for an exception to the rule that tournament participants must walk rather than ride in golf carts required an examination of Mr. Martin's individualized situation. 532 U.S. at 689-91. Because Mr. Martin (due to his Klippel–Trenaunay–Weber Syndrome) "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking," the "purpose of the

[2] Instead, Ohio House contended that the denial of other group homes' requests was evidence of the City's policy to "never grant[] a CUP if the spacing requirement was not met […]." 6 ER-1316-17, ¶ 39.

walking rule is therefore not compromised in the slightest by allowing Martin to use a cart." *Id.* at 687, 690. Other requests that might be made by other golfers did not enter the equation.

Here, a case-by-case analysis requires review of Ohio House's individualized situation. Because the stated purpose of the separation requirement is to avoid "deleterious" effects on the character of residential neighborhoods (*Ohio House*, 122 F.4th at 1111), a case-by-case evaluation requires an examination of the neighborhood where Ohio House is located as well as any impact that Ohio House specifically has on that neighborhood.[3] Costa Mesa is a city of 15.8 square *miles*. U.S. Census Bureau Profile for Costa Mesa, California, at https://data.census.gov/profile/Costa_Mesa_city,_California?g=160XX00US0616532 (last visited January 11, 2025). Whether or not there are 20 other group homes scattered elsewhere in Costa Mesa could not possibly have an impact on Ohio House's particular neighborhood, unless the individualized analysis showed both that one of the 20 were near Ohio House *and* that its proximity to Ohio House had a significant and deleterious impact—neither of which appears to be true here.

[3] The evidence showed that no such effects exist. *See, e.g.*, 22-ER-4880:7-4882:13 (City's expert testified that Ohio House's neighborhood is not an institutional environment); 22-ER-4898:1-19 (City's expert not aware of any area in Costa Mesa with an overconcentration of group homes); and 14-ER-3121 (staff finding that Ohio House is compatible with the residential character of its neighborhood).

Moreover, at this point, whether any of the 20 other group homes are even still around to make a reasonable accommodation request if one were granted to Ohio House is entirely hypothetical given that the ordinances at issue in this case came into effect around a decade ago. Justifications for denying reasonable accommodations—undue burden, fundamental alteration, and direct threat—must be based on existing facts and not on speculation, generalizations, or hypotheticals. *See e.g., Stone v. City of Mount Vernon*, 118 F.3d 92, 101 (2nd Cir. 1997) ("Each request for a reasonable accommodation under the federal disability statutes must be decided on the basis of the existing circumstances") and *Anderson v. Gen. Dynamics Convair Aerospace Div*., 589 F.2d 397, 402 (9th Cir. 1978) ("Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts" in the context of employer accommodation of religious practices). The case-by-case analysis of Ohio House's reasonable accommodation request therefore cannot take into account requests—hypothetical or otherwise—by 20 other group homes.

C. The statement regarding the entire reasonable accommodation ordinance's consistency with the FHA, when Ohio House challenged only a single subsection, should be removed.

The panel acknowledges that Ohio House "challenges only one specific subsection" of the City's reasonable accommodation regulation. *Ohio House*, 122

F.4th at 1130–31. However, the opinion contains a pronouncement regarding the City's *entire* ordinance: "Taken as a whole, the City's reasonable-accommodation regulation is not inconsistent with the FHA." *Id.* at 1130–31. Because this overbroad pronouncement goes beyond the matters at issue in the case or briefed by the parties, this statement should be removed.

"Judicial opinions are supposed to be different than legislation because we 'render a judgment based only on the factual record and legal arguments the parties at hand have chosen to develop.'" *Stein v. Kaiser Found. Health Plan, Inc.*, 115 F.4th 1244, 1253 (9th Cir. 2024) (Forrest, J., concurring) (quoting *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 426, (2024) (Gorsuch, J., concurring)). This is because it is difficult for courts to consider every circumstance, and "different facts and different legal arguments" can properly lead to different conclusions in a subsequent case. *Id.* at 1249, 1253. Municipal reasonable accommodation ordinances, even if limited to zoning code matters, are applicable to a wide range of parties, from homeowners with mobility impairments who need an exception to a zoning code to build a ramp or install an accessible parking space, to people with developmental disabilities needing permission to live in a group home together, to individuals who need extra time due to a disability-related impairment to comply with a City-imposed deadline pertaining to a zoning ordinance. An overly broad pronouncement about Costa Mesa's reasonable

accommodation ordinance that does not take into account their facts, or the legal arguments they may have, adds confusion and creates unnecessary barriers to the ability of future courts to resolve these kind of issues. This problem is particularly salient given that the Ninth Circuit "stand[s] out like a flamingo in a flock of finches in treating dicta as binding." *Id.* at 1250. Dicta with respect to "legal points," in particular, can do harm by being misleading. *Id.* at 1249.

The pronouncement regarding Costa Mesa's reasonable accommodation regulation "[t]aken as a whole" is overbroad and unnecessary to the panel's reasoning as to whether the only subsection challenged by Ohio House is discriminatory, and can only create problems in cases where parties with a different set of facts might have a valid challenge to a different section of Costa Mesa's ordinance, or an ordinance like it in another city. It should be stricken.

II. Institutionalization.

In rejecting Ohio House's reasonable accommodation and disparate treatment claims, the panel allows the City's "desire to avoid [the] institutionalization" that would purportedly result from an "overconcentration of group-living facilities in residential areas" to justify the denial of a reasonable accommodation for Ohio House as well as the underlying regulations. *Ohio House*, 122 F.4th at 1120.

The opinion never explains, however, what "institutionalization" means here. It cannot mean "institutions being in a residential neighborhood" because, as explained below in Section III(A), group homes like Ohio House are not institutions because they do not provide licensable services and do not have the structure that institutions do. Instead, they allow people with disabilities to live together and support one another.

If what "institutionalization" means instead is simply an increase in the *number* of people with disabilities in the neighborhood, that is a discriminatory goal in and of itself. There is no need to mandate that people with disabilities live 650 feet away from one another in order for a neighborhood to feel "residential."

And if what institutionalization means is the *effects* that the City assumes people with disabilities will have on the neighborhood when they share housing together, such as "excessive noise and second-hand smoke," the panel acknowledges that such effects can be addressed by municipal nuisance laws. *Ohio House*, 122 F.4th at 1120. There is no need for a special rule against people with disabilities sharing housing 650 feet away from where other people with disabilities live, and certainly no reason to deny Ohio House's reasonable accommodation request due to such proximity.

This Court should not allow the rights of people with disabilities to live in the community to be limited by concerns about "institutionalization" that are either

outright discriminatory or are indistinguishable from the kind of issues that can be addressed in nondiscriminatory ways.

III. The panel misunderstands the nature of, and necessity for, community-based housing for people with disabilities.

A. Community-based shared housing is, by design, different from institutional living and compatible with other residential uses.

Shared housing (like the group home at issue in this case) serves a different function and creates a different living environment from licensed facilities or large institutions.

Licensed facilities provide specialized services that are highly regulated, [4] like skilled nursing care or detoxification treatment. The living environment of an institution or licensed facility is restrictive in nature. Residents typically follow a regimented schedule and are subject to a high degree of monitoring and supervision. Licensed facilities do not provide the same level of freedom and autonomy as community living.

In contrast, shared housing for people with disabilities does not require a license and is not institutional in nature because it does not exercise the same degree of control over its residents. That is by design. Group homes like the one at

[4] For a list of services and facilities that require a license from the state, see Division 2 of the California Health & Safety Code.

issue in this case provide a supportive environment for people who do not need the specialized services of a licensed facility but do need a modest amount of peer support to live independently in the community. For example, sober living homes give people who are in recovery a drug-free space in which to solidify their sobriety. "Step-down" housing helps people with mental health disabilities get the community-based support they need to avoid having to stay in an institution. *See* Daniel Lauber, A Real Lulu: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988 (1996) 29 J. Marshall L. Rev. 369 (describing types of shared housing for people with disabilities and how they differ from institutional living).

To be effective, shared housing with no licensable services must be located in a residential neighborhood. Residents need the freedom to interact with their neighbors, participate in community events, and re-adapt to community living. Shared housing is compatible with other residential land uses precisely because it is *not* a smaller version of an institution; it is residential housing.[5] When localities treat shared housing as the same type of land use as hospitals and other institutions, they misunderstand the nature of shared housing and diminish its effectiveness.

[5] For more information on the compatibility of shared housing with other residential land uses, see the California Department of Housing and Community Development's Group Home Technical Advisory (2022), available at: https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/group-home-technical-advisory-2022.pdf

B. People with disabilities have different and greater needs for shared housing than people without disabilities.

Implicit in the panel's opinion that Costa Mesa's zoning ordinance benefits people with disabilities is the erroneous idea that barriers to sharing housing with other unrelated individuals affect people with and without disabilities in a similar manner. See *Ohio House*, 122 F.4th at 1121–22 (stating that "without any evidence related to how the City's revised regulations governing group-living facilities impacted disabled versus nondisabled *individuals* seeking group-living arrangements, there is no evidence upon which a jury could find that these regulations have had a 'significant, adverse, and disproportionate effect' on the disabled"). But sober living homes like Ohio House serve people who have a disability-related need for shared housing that others do not. These homes ensure a substance-free environment for people who want to practice the self-sufficiency skills necessary to remain sober (17-ER-3817-18, 3869) and "provide a communal living environment in which residents help each other to recover from their addictions." *Pac. Shores*, 730 F.3d at 1148. People who stay at Ohio House do so because they have a disability-related need to live with other people who are also in recovery and are committed to sobriety. 15-ER-3500, 3501, ¶ 8.

The panel acknowledges that "applicants seeking to operate group homes are adversely impacted" by the City's policies. *Ohio House*, 122 F.4th at 1121. People

who need the sober community provided in a group home are likewise adversely affected. Someone without a disability may *prefer* to live with a group of other unrelated people, but the individuals seeking to live in a place like Ohio House have a disability-related *need* for it. Contrary to the panel's opinion, the City's group home policies thus have a "significant, adverse, and disproportionate effect" on these disabled individuals sufficient to establish the second element of Ohio House's disparate impact claim. *See id.* at 1120-21 (holding that "Ohio House cannot prove that the disabled are suffering the type of 'significant, adverse, and disproportionate effect' that the FHA prohibits").

For the same reason, it is inappropriate to find that Costa Mesa's group housing ordinances benefit disabled people on the grounds that boardinghouses are treated worse. *Id.* at 1118. If the City charged $20 to use the elevator at City Hall but lowered the charge to $10 for people with a mobility impairment and the stairs were free, no one would buy the argument that the fee schedule was "beneficial" to people with disabilities. That is because someone without a disability who prefers the elevator to stairs is not similarly situated to someone who *needs* the elevator due to a disability. Likewise, anyone who simply prefers to live in a boardinghouse is not similarly situated to someone with a disability who needs a sober living home in order to successfully manage their recovery from addiction. *Cf. Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 787 (7th

Cir. 2002) (recognizing "that group living arrangements can be essential for disabled persons who cannot live without the services such arrangements provide, and not similarly essential for the non-disabled."). The panel's opinion, which relies on the erroneous assumption that those two groups *are* similarly situated, is therefore in error.

IV. CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court grant en banc review.

Respectfully submitted,

Dated: January 21, 2025

/s/ Autumn M. Elliott

Autumn M. Elliott
Zeenat Hassan
DISABILITY RIGHTS CALIFORNIA
350 S. Bixel St. Suite 290
Los Angeles, CA 90017
Tel: (213) 213-8000
Fax: (213) 213-8001
autumn.elliott@disabilityrightsca.org
zeenat.hassan@ disabilityrightsca.org

/s/Michelle Uzeta

Michelle Uzeta
DISABILITY RIGHTS EDUCATION & DEFENSE FUND
3075 Adeline Street, Suite 210
Berkeley, CA 94703
Tel: (510)-644-2555
muzeta@dredf.org

Attorneys for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify, I electronically filed the attached document 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 January 21, 2025.

/s/Autumn M. Elliott
Autumn M. Elliott
Attorney for Amici