No. 99-30776

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

GROOME RESOURCES, LTD.,

Plaintiff-Appellee

UNITED STATES OF AMERICA,

Intervenor

v.

PARISH OF JEFFERSON,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument would be helpful to the Court in this appeal.

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BRIEF FOR THE UNITED STATES AS INTERVENOR

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JURISDICTIONAL STATEMENT

This is an action by a private plaintiff to enforce the Fair Housing Act, 42 U.S.C. 3601 et seq. The district court had subject matter jurisdiction under 28 U.S.C. 1331. The district court entered final judgment and an injunction on June 21, 1999 (R.E. 3).[1/] Appellant filed a timely notice of appeal on July 16, 1999 (R.E. 2). This court has appellate jurisdiction under 28 U.S.C. 1291 and 1292(a)(1).

[1/] Citations to "R.E. __ at __" refer to documents in the Defendant's Record Excerpts by Tab and page number. Citations to "Pltff. Br. __" refer to pages in the plaintiff-appellee's brief. Citations to "Def. Br. __" refer to pages in the defendant-appellant's brief. Citations to "Alz. Ass'n Br. __" refer to pages in the amicus brief of the Alzheimer's Association.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the application of the Fair Housing Act to a municipality's implementation of its zoning regulations was authorized by Congress's Commerce Power.

2. Whether the application of the Fair Housing Act to a municipality's implementation of its zoning regulations was authorized by Section 5 of the Fourteenth Amendment.

3. Whether the reasonable accommodation requirement of the Fair Housing Act, 42 U.S.C. 3604(f)(3)(B), is unconstitutionally vague.

STATEMENT OF THE CASE

A. The Fair Housing Act

In 1968, Congress enacted the Fair Housing Act, prohibiting discrimination in housing on the basis of race, color, religion, and national origin, and declaring it "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (1968) (codified at 42 U.S.C. 3601 et seq.). Section 804(a) of the Act, 42 U.S.C. 3604(a), prohibits discrimination in the sale or rental of housing, and also declares it unlawful to "otherwise make unavailable or deny, a dwelling to any person" on a prohibited basis. Congress amended the Fair Housing Act in 1974 to prohibit discrimination on the basis of sex. Pub. L. No. 93-383, 88 Stat. 83 (1974). In 1988, Congress again amended the Act to add handicap and familial status as prohibited bases of discrimination. Pub. L. No. 100-

430, 102 Stat. 1619.[2/] Section 804(f)(1) of the amended Act, modeled on Section 804(a), declares it unlawful (42 U.S.C. 3604(f)(1)):

> To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of --
>
> (A) that buyer or renter,
>
> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
>
> (C) any person associated with that buyer or renter.

Section 804(f)(3)(B) defines discrimination to include (42 U.S.C. 3604(f)(3)(B)):

> a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]

When Congress enacted the Fair Housing Amendments Act in 1988, it moved to end the exclusion of people with disabilities from the mainstream of the housing market throughout the United States. The House Report on the Act declared:

> Prohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice.
>
> The Fair Housing Amendments Act * * * is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of

---

[2/] The term "familial status" refers to families with children. 42 U.S.C. 3602(k).

> stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988) (House Report). The House Report found that people with disabilities had "experienced discrimination because of prejudice and aversion -- because they make non-handicapped people uncomfortable." Ibid. Citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), the House Report found that municipal officials had used zoning restrictions to make community-based housing unavailable to people with mental retardation "because of stereotypes about their capacity to live safely and independently." Ibid. The House Report explained that the Act would apply to zoning and other land use regulations that have the effect of limiting the rights of persons with disabilities to live in residences in the community. Id. at 24.

B. Proceedings Below

1. Plaintiff-appellee, Groome Resources, Ltd. (Groome) is a for-profit business that operates supportive group homes for Alzheimer's patients in the New Orleans metropolitan area (R.E. 4 at 1). This action involves Groome's efforts to obtain the Parish's consent to permit its purchase of a house in a single-family residential district of Jefferson Parish (Parish) and its use as a group home. The Parish zoning ordinance permits no more than four unrelated persons to live together in a single-family residential district, and then only on a "non-profit, cost-

sharing basis" (R.E. 5 at 3-6; see R.E. 5 at 7A-1). The ordinance, however, also allows a "reasonable accommodation for handicapped persons as defined by the Federal Fair Housing Act" and provides that application for such a reasonable accommodation "shall be submitted to the Department of Inspection and Code Enforcement for review and approval" (R.E. 5 at 20-25).

On February 8, 1999, Groome executed a contract to purchase the house at issue here, contingent upon obtaining an accommodation from the Parish permitting the operation of a group home for five persons with Alzheimer's (R.E. 4 at 3). Groome had obtained financing to purchase the house, and planned, once the sale was closed, to apply to the State of Louisiana Department of Social Services for a license to operate the group home (R.E. 4 at 2). The seller of the house was Cendant Mobility Services Corporation (R.E. 6), a national employee relocations assistance business (see Pltff. Br. 3). Groome applied to the Parish for a reasonable accommodation on February 11, 1999 (R.E. Tab 4 at 3). The district court found that, by March 16, 1999, both the Parish Attorney's Office and its Department of Inspection and Code Enforcement had recommended approval of the application (R.E. 4 at 3). The Department of Inspection and Code Enforcement found that "the requested accommodation would not affect the density of the neighborhood, [and] that the home had ample space to accommodate five persons" (R.E. 4 at 3). The court found, however, that because of objections from residents of the area and intervention by the district councilman, the Parish failed to

act on the application, causing the closing on the house to be delayed several times (R.E. 4 at 3, 5-6). By June, the district court found, "the assistant parish attorney supposedly in charge of the review process[] could not say what the current status of the application was, what if anything remained to be done to complete the process or when it might be done, and could not say who the ultimate decision maker would be (although the zoning ordinance clearly gives that authority to the Department of Inspection and Code Enforcement)" (R.E. 4 at 7).

2. Groome brought this action, alleging, inter alia, that the Parish had violated the Fair Housing Act by failing to grant its application for a reasonable accommodation. The district court held an evidentiary hearing on plaintiff's motion for a preliminary injunction and consolidated it with trial on the merits (R.E. 4 at 1). On June 18, 1999, the district court issued its Order and Reasons, concluding that the Parish had violated the Fair Housing Act, and ordering it to issue the reasonable accommodation (R.E. 4 at 9-10).

The district court first upheld the constitutionality of the Fair Housing Act, noting that three courts of appeals had held the Act to be a valid exercise of Congress's authority under the Commerce Clause (R.E. 4 at 5, citing Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996), cert. denied, 519 U.S. 816 (1996); Morgan v. Secretary of HUD, 985 F.2d 1451 (10th Cir. 1993); Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir. 1992)).

The district court next rejected the Parish's contention that plaintiff's action was premature, finding no justification for the Parish's delay in ruling on the application for a reasonable accommodation (R.E. 4 at 5-7). The court concluded that the accommodation was both reasonable and necessary to allow individuals with Alzheimer's an equal opportunity to live in a residential setting (R.E. 4 at 7-9). In particular, the court found "that the artificial limit of four unrelated persons living in a single group home will make it economically unfeasible for plaintiff to operate the proposed home" (R.E. 4 at 8). The court further found "absolutely no evidence that this proposed group home with five Alzheimer's patients would cause any problems or in any way impact the health, safety, welfare or character of the neighborhood" (R.E. 4 at 9). The court concluded that the Parish's zoning ordinance, as applied, and the Parish's failure to grant Groome's application for a reasonable accommodation violated the Act and had "the effect of discriminating against handicapped persons by unnecessarily restricting their ability to live in residences of their choice" (R.E. 4 at 9-10). The court issued an order enjoining the Parish from interfering with or withholding its approval of Groome's application for an accommodation for the house, but emphasized that its order "does not prohibit Jefferson Parish, the State of Louisiana, or any other regulatory agency from requiring compliance by Groome with all other ordinances and regulations that may apply and are not

the subject of this litigation" (R.E. 4 at 10). The court subsequently denied Groome's claim for damages.

This appeal followed.

SUMMARY OF ARGUMENT

The application of the Fair Housing Act to local zoning practices is authorized by Congress's power under the Commerce Clause. Congress had a rational basis to conclude that the sale and rental of residential real estate substantially affects interstate commerce, and that discrimination in the sale and rental market affects commerce. Congress is authorized to regulate and protect that market from discriminatory actions, including local zoning practices, to the extent that such practices make housing unavailable on the basis of disability.

The application of the Fair Housing Act to local zoning practices is authorized by Congress's power under Section 5 of the Fourteenth Amendment. Throughout the period in which Congress was considering amendments to the Fair Housing Act to prohibit discrimination on the basis of disability, it heard testimony and received reports detailing invidious discrimination against persons with disabilities, as well as information about unconstitutional conditions in institutions for persons with disabilities. The application of the Fair Housing Act to require reasonable modifications in local zoning practices where necessary to permit the operation of group homes is a congruent and proportional response to a problem of constitutional dimensions.

The reasonable accommodation requirement of the Fair Housing Act is not unconstitutionally vague. The concept of reasonable accommodation is a familiar one that has been applied in a variety of contexts, including land use practices, by this and other courts.

ARGUMENT

Jefferson Parish challenges the constitutionality of the reasonable accommodation requirement of the Fair Housing Act, as applied to the implementation of a local zoning ordinance. This Court's review of that question is de novo. United States v. Bailey, 115 F.3d 1222, 1224 (5th Cir. 1997), cert. denied, 522 U.S. 1082 (1998). That review begins "with the time-honored presumption that the [statute] is a 'constitutional exercise of legislative power.'" Reno v. Condon, 120 S. Ct. 666, 670 (2000), quoting Close v. Glenwood Cemetery, 107 U.S. 466, 475 (1883).

The Parish does not challenge the district court's ruling that it violated the Fair Housing Act. Nor does it challenge as clearly erroneous any of the district court's findings of fact.

I. THE FAIR HOUSING ACT IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE COMMERCE CLAUSE

A. Congress's Commerce Power Authorizes Legislation To Regulate And Protect Activities Affecting Interstate Commerce

Congressional power to regulate under the Commerce Clause extends not only to activities in interstate commerce but also to intrastate activities that have a substantial effect on interstate commerce. United States v. Lopez, 514 U.S. 549, 557-559 (1995); Heart of Atlanta Motel, Inc. v. United States, 379

U.S. 241, 258 (1964); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942); United States v. Darby, 312 U.S. 100, 118-120 (1941); United States v. Bird, 124 F.3d 667, 673, 676 (5th Cir. 1997). Once Congress rationally determines that an activity substantially affects commerce, Congressional authority to regulate and protect that activity is plenary. "The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection or advancement * * * to adopt measures to promote its growth and insure its safety * * * to foster, protect, control, and restrain. * * * That power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-37 (1937) (internal quotation marks and citations omitted). Moreover, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class. Perez v. United States, 402 U.S. 146, 152-154 (1971), quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968); Lopez, 514 U.S. at 557, quoting Wirtz, 392 U.S. at 197 n.27 ("'where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence'"); Bird, 124 F.3d at 676 (noting that, in Lopez, "[t]he Supreme Court reiterated that intrastate, noncommercial activities can,

in certain circumstances, substantially affect interstate commerce when considered in the aggregate").

The judicial role in reviewing legislation based on the Commerce Power is to determine whether there is a rational basis to conclude that the regulated activity substantially affects interstate commerce. Lopez, 514 U.S. at 557; Preseault v. ICC, 494 U.S. 1, 17 (1990); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). As the Court wrote in Katzenbach v. McClung (379 U.S. 294, 303-304 (1964)):

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

See also United States v. Bird, 124 F.3d 667, 673 (5th Cir. 1997). It is not necessary for Congress to make formal findings to substantiate its authority under the Commerce Clause. Lopez, 514 U.S. at 562-563; McClung, 379 U.S. at 299; United States v. Kirk, 105 F.3d 997, 999 (5th Cir. 1997) (en banc) (Higginbotham, J.), cert. denied, 522 U.S. 808 (1997).

B. There Is A Rational Basis To Conclude That The Sale And Rental Of Housing Has A Substantial Effect On Interstate Commerce

Before it enacted the original Fair Housing Act in 1968, Congress heard abundant evidence both that the housing market is interstate in nature and that discriminatory housing practices affect interstate commerce. In hearings before the Senate

Subcommittee considering fair housing legislation in 1967, the Attorney General testified that the legislation was independently authorized by both the Commerce Clause and Section 5 of the Fourteenth Amendment, and submitted a memorandum from the Department of Justice in support of that conclusion. Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 6-14, 23-24 (1967) (1967 Senate Hearings) (statement of Ramsey Clark, Attorney General of the United States). The Attorney General testified that "the housing business is substantially interstate and subject to the commerce clause" because of the interstate movement of building materials, mortgage funds, and advertising, as well as the interstate movement of workers and their families. Id. at 6; see also id. at 13-14, 23-24. The Department of Justice memorandum, which was later inserted into the record during floor debate in the Senate (114 Cong. Rec. 2534-2537 (1968)), cited data on the size of the housing industry ($27.6 billion in 1965 -- more than the agriculture, forestry and fisheries industries combined), the "large portion of housing materials * * * shipped in interstate commerce," the significance of interstate mortgage lending, and the movement of American families across state lines (1 family in 30 each year). The memorandum found that housing discrimination restricted the number of new homes built and thus affected interstate commerce by limiting the interstate movement of materials and financing;

and that discrimination inhibited the interstate movement of minority families and thus "the efficient allocation of labor among the interstate components of the economy." Id. at 2536.[3/]

The Subcommittee heard other evidence of the effect of housing discrimination on interstate commerce. Robert C. Weaver, Secretary of Housing and Urban Development, testified that "racial restraints upon the housing market inhibit the free enterprise system and the natural growth of the housing sector of the economy." 1967 Senate Hearings at 37. Weaver and others also testified that local fair housing legislation was inadequate, and that federal fair housing legislation was needed in order to impose uniform requirements throughout metropolitan housing markets, which generally crossed municipal and even state boundaries. Id. at 74-75.[4/] And the Subcommittee heard of difficulties individuals experienced due to housing

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[3/] The Subcommittee also heard testimony from legal scholars and fair housing advocates that the Act was authorized by the Commerce Clause. 1967 Senate Hearings at 130-132 (statement of Rev. Robert F. Drinan, Dean, Boston College Law School); 132-133 (statement of Jefferson B. Fordham, Dean, University of Pennsylvania Law School); 162-164 (statement of Louis H. Pollak, Dean, Yale Law School); 228-231, 249-269 (statement of Sol Rabkin, National Committee Against Discrimination in Housing (NCADH)). A legal memorandum, submitted to the Subcommittee by NCADH, and concluding that the Act was authorized by the Commerce Clause and the Fourteenth Amendment, was later inserted into the record during floor debate in the Senate. 114 Cong. Rec. 2699-2703 (1968).

[4/] See 1967 Senate Hearings at 102 (statement of Roy Wilkins, Executive Director, NAACP); 366-367 (statement of Marvin Braiterman, Counsel for Commission on Social Justice of Reformed Judaism in America); 431-432 (statement of James H. Harvey, American Friends Service Committee); 487 (statement of William J. Levitt).

discrimination after moving across state lines. Id. at 112, 120-126 (statement of Joseph L. Rauh, Jr., counsel for Leadership Conference on Civil Rights); 193-204 (statement of Lt. Carlos Campbell, U.S. Navy).[5/]

More recent information confirms the interstate nature and vast extent of the housing market. In 1993, for example, more than 15% of households that moved from one housing unit to another in the United States moved across state lines or from a different nation.[6/] Today, through the Internet, prospective homebuyers can access real estate listings and contact real estate agents and mortgage lenders throughout the United States.[7/] Even when a homebuyer obtains financing from a local institution, the funds are likely to move across state lines. According to the Federal Home Loan Mortgage Corporation (Freddie Mac), about half of all new single-family mortgages originated

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[5/] The Senate and House sponsors of the legislation argued during debate that it was authorized by the Commerce Clause and the Fourteenth Amendment. Senator Mondale, one of the Senate co-sponsors, submitted summaries of the constitutional arguments supporting the bill when he introduced it (114 Cong. Rec. 2273-2274 (1968)) and during floor debate (id. at 2698-2703; see also id. at 3421-3422). Supporters of the bill in the House argued that it was authorized by the Fourteenth Amendment and the Commerce Clause, both during hearings in the House Rules Committee and during floor debate.

[6/] U.S. Department of Commerce, Bureau of the Census, U.S. Department of Housing and Urban Development, Office of Policy Development and Research, Current Housing Reports, American Housing Survey for the United States in 1993, Table 2-10 (1995).

[7/] See, e.g., http://www.realtor.com (website of the National Association of Realtors) (last modified Feb. 22, 2000).

today are sold on the secondary mortgage market.[8/] The size of the housing-related industry is huge. Nationwide in 1997, single-family construction alone was valued at over $146 billion and employed over 570,000,[9/] while residential real estate lessors, agents, brokers, and managers had revenues of over $91 billion.[10/] As set forth in the amicus brief of the Alzheimer's Association, the market for assisted living facilities for Alzheimer's patients is increasingly interstate as well (Alz. Ass'n Br. 13-20).

Since the enactment of the Fair Housing Act in 1968, the Supreme Court has recognized the interstate nature of the housing market on at least three occasions. In Russell v. United States, 471 U.S. 858 (1985), the Supreme Court unanimously upheld a conviction under 18 U.S.C. 844(i) for the attempted arson of a two-unit apartment building. Section 844(i) prohibits the destruction or attempted destruction by fire or explosive of "any building * * * or other real * * * property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The Court concluded that this language

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[8/] See http://www.freddiemac.com/whatsnew/twlvquest.html (visited Feb. 22, 2000). Freddie Mac is one of three corporations chartered by Congress to ensure a flow of funds for residential financing. 12 U.S.C. 1451 et seq.; 12 U.S.C. 1717.

[9/] U.S. Department of Commerce, Bureau of the Census, 1997 Economic Census, Construction Industry Series, Single-Family Housing Construction, Table 1 (Nov. 1999).

[10/] U.S. Department of Commerce, Bureau of the Census, 1997 Economic Census, Real Estate and Rental and Leasing, Table 1 (Dec. 1999).

"expresses an intent by Congress to exercise its full power under the Commerce Clause." Id. at 858. The Court then declared (id. at 862 (footnotes omitted)):

> The rental of real estate is unquestionably [an activity that affects commerce.] We need not rely on the connection between the market for residential units and "the interstate movement of people," to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class.

The court reached similar conclusions about the interstate nature of the market for the sale of real property in Goldfarb v. Virginia State Bar, 421 U.S. 773, 783-786 (1975) (applying the Sherman Act, 15 U.S.C. 1 & 2, to minimum fee schedules for lawyers performing real estate title examinations), and McLain v. Real Estate Board, 444 U.S. 232 (1980) (applying the Sherman Act to price-fixing by real estate brokers in the New Orleans metropolitan area). In both cases, the Court relied upon the interstate nature of the market for financing and its connection to the activities at issue. See Goldfarb, 421 U.S. at 783 ("the transactions which create the need for the particular legal services in question frequently are interstate transactions"); McLain, 444 U.S. at 246 ("[u]ltimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title

insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce").

When Congress amended the Fair Housing Act in 1988 to prohibit discrimination against persons with disabilities and families with children, it acted against the backdrop of its earlier findings as well as the decisions in Russell, McLain, and Goldfarb. In light of those decisions, and Congress's determination in 1968 that discrimination in the sale or rental of housing on the basis of race, national origin, or religion affected interstate commerce, Congress had a rational basis to conclude that discrimination on the basis of disability also affected commerce.

As the district court noted (R.E. 4 at 5), three other circuits have reached this conclusion, including one after the Supreme Court's decision in Lopez. See Oxford House-C v. City of St. Louis, 77 F.3d 249, 251 (8th Cir. 1996) ("Congress had a rational basis for deciding that housing discrimination against the handicapped, like other forms of housing discrimination, has a substantial effect on interstate commerce"), cert. denied, 519 U.S. 816 (1996); Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030, 1034 (11th Cir. 1992) (holding that "Congress had a rational basis for amending the Fair Housing Act -- namely, the nationwide problem caused by familial status discrimination in the housing market" and that "the housing market affects commerce"); Morgan v. Secretary of HUD, 985 F.2d 1451, 1455 (10th Cir. 1993), quoting Heart of Atlanta Motel, Inc., 379 U.S. at 255

("The legislative record, when viewed against a backdrop of the legislative history of the 1968 Fair Housing Act, provides a rational basis for finding that the sale and rental of residential housing * * * concerns more than one state and 'has a real and substantial relation to the national interest'").

C. The Application Of The Fair Housing Act To Local Zoning Practices Is Within Congress's Commerce Power

The Parish erroneously contends that the Fair Housing Act's prohibition on disability-based discrimination cannot constitutionally be applied to local land use practices, "because the activity being regulated is inherently local and wholly non-economic in nature" (Def. Br. 33). This contention misconstrues both Congress's Commerce Power and the basis for its exercise of that power in the Fair Housing Act.

As set forth in part B., supra, Congress had a rational basis to conclude that there is a national market for the sale and rental of residential real estate. And, under the principles explained in part A., supra, Congress's authority to regulate and to protect that market is plenary, and extends to local, non-commercial activities. Lopez, 514 U.S. at 556; Jones & Laughlin Steel Corp., 301 U.S. at 36-37 (1937). As this Court held in Bird, "there can be no question that Congress is able to regulate noncommercial, intrastate activity that substantially affects interstate commerce." 124 F.3d at 676 & n.9, citing, inter alia, Russell. Thus, Bird upheld the criminal provision of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248(a)(1), which

criminalizes certain activities that obstruct access to reproductive health facilities. The holding in Bird was based upon Congress's finding of a national market for abortion-related services, and its finding that the obstruction of access to facilities in one state "substantially affects the ability of clinics in other states to provide abortion-related services." 124 F.3d at 677; see id. at 678-682; see also United States v. Kirk, 105 F.3d at 998, (affirming, by an equally divided en banc court, a judgment upholding the constitutionality of 18 U.S.C. 922(o), which criminalizes the possession of a machine gun acquired after 1986); ibid. (Higginbotham) (finding the requisite effect on interstate commerce in that the possession of machine guns facilitates the trade in illegal drugs, based upon "judicial experience and facts about machine guns and interstate criminal activity common to public discourse").

The interstate effect of a local zoning action is illustrated by the facts of this case. The sale of the house for which Groome sought a reasonable accommodation was an interstate transaction, with a local buyer and an out-of-state seller. Cf. United States v. Bailey, 115 F.3d at 1228 (child support obligation "is a thing of commerce that has acquired an interstate character * * * as long as the obligor and obligee reside in different states"). Because the sales contract was contingent on the Parish's approval of Groome's application for a reasonable accommodation, closing on this interstate sale was delayed (and, but for the district court's action, would have

been foreclosed entirely) by the Parish's refusal to act on the application. In addition, Groome is a commercial enterprise, which recruited its Operations Director from Colorado (Pltff. Br. 3-4).

Nor is there any basis for the Parish's contention (Def. Br. 45-54) that the application of the Fair Housing Act to its local zoning practices is foreclosed because land use policies traditionally have been matters of local concern. As the Court's decisions in McLain and Goldfarb illustrate, other traditionally local matters affecting real property are not exempt from federal regulation if they substantially affect interstate commerce. Similarly, in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), the Court upheld the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 et seq., which established detailed requirements respecting the use and reclamation of land for mining, as a valid exercise of Congress's authority under the Commerce Clause. And in Camps Newfound/Owatonna Inc. v. Town of Harrison, 520 U.S. 564 (1997), the Court invalidated, pursuant to the Dormant Commerce Clause, a state real estate tax exemption for non-profit institutions that was unavailable to institutions operated primarily for non-residents of the State. Cf. Lopez, 514 U.S. at 566 ("We do not doubt that Congress has authority to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process").

Finally, the application of the Fair Housing Act to the Parish's zoning actions does not violate the principles of federalism embodied in the Tenth Amendment. In Reno v. Condon, 120 S. Ct. 666, the Supreme Court upheld the Driver's Privacy Protection Act (DPPA), 18 U.S.C. 2721-2725, which restricts the States' ability to disclose personal information obtained from driver's license and automobile registration records. The Court first concluded that the information was "'a thing in interstate commerce,'" and that its regulation therefore was within Congress's Commerce Power. Id. at 671, quoting Lopez, 514 U.S. at 558-559. It then rejected a contention that the statute impinged upon the States' sovereign rights, because it "'regulated state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" 120 S. Ct. at 672, quoting South Carolina v. Baker, 485 U.S. 505, 514-515 (1988). Like the DPPA, the Fair Housing Act applies equally to public and private actors. 120 S. Ct. at 669. It is a statute of general applicability that regulates local governments, as well as private entities, to the extent that their actions make housing unavailable to persons with disabilities. It does not require local governments "to regulate their own citizens," "to enact any laws or regulations," or "to assist in the enforcement of federal statutes regulating private individuals." 120 S. Ct. at 672. The Fair Housing Act is therefore consistent with the Tenth Amendment.

II. THE FAIR HOUSING ACT IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

A. Congress Has The Authority To Enact Legislation To Remedy And Prevent Violations Of The Fourteenth Amendment

As the Supreme Court recently emphasized, Section 5 of the Fourteenth Amendment is "an affirmative grant of power to Congress. 'It is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference.'" Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 (2000), quoting City of Boerne v. Flores, 521 U.S. 507, 517, 536 (1997), (internal citations and quotation marks omitted).[11/] Section 5 does not give Congress the power to redefine the substantive prohibitions of the Fourteenth Amendment; "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." Kimel, 120 S. Ct. at 644, citing City of Boerne, 521 U.S. at 536. But "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's

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[11/] Section 5 provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

text." Kimel, 120 S. Ct. at 644, citing City of Boerne, 521 U.S. at 518. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" City of Boerne, 521 U.S. at 510, quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976).

In Kimel, the Supreme Court applied these principles in holding that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623, was not appropriate legislation to enforce the substantive protections of the Fourteenth Amendment. 120 S. Ct. at 645. First, the court concluded that the requirements imposed upon states and local governments by the ADEA were "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." Ibid. The Court noted that age is not a suspect classification, and that it had, on three occasions, upheld age classifications against Equal Protection challenges. Ibid., citing Gregory v. Ashcroft, 501 U.S. 452 (1991); Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam). Under rational basis review, the Court explained, States are not required "to match age distinctions and the legitimate interests they serve with razorlike precision," and "may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate

interests." 120 S. Ct. at 646; see id. at 648. The ADEA, on the other hand, permits employers to discriminate on the basis of age only when age is "a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1). This BFOQ defense, the Court held, was "'significantly different'" from the rational basis test. Kimel, 120 S. Ct at 647, quoting Western Air Lines v. Criswell, 472 U.S. 400, 421 (1985).

The Court made it clear, however, that its inquiry did not end with the conclusion "[t]hat the ADEA prohibits very little conduct likely to be held unconstitutional." 120 S. Ct. at 648. "Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination." Ibid. To answer that question, the Court turned to the legislative history of the extension of the ADEA to the States. It found the extension to be "an unwarranted response to a perhaps inconsequential problem" because "Congress never identified any pattern of age discrimination by the States, much less discrimination whatsoever that rose to the level of constitutional violation." Id. at 648-649.

B. Congress Had Abundant Evidence Of Invidious Discrimination Against People With Disabilities By State And Local Governments

In contrast to the legislative record of the ADEA, Congress had abundant evidence of unconstitutional discrimination against people with disabilities by public actors when it enacted the Fair Housing Amendments Act of 1988.

The House Report on the Fair Housing Amendments Act found that persons with disabilities had been denied housing "because of misperceptions, ignorance, and outright prejudice." House Report at 18. Citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), the Report found that municipal officials had used zoning restrictions to make community-based housing unavailable to people with mental retardation. House Report at 18, 24. (In Cleburne, the Supreme Court had unanimously declared unconstitutional, as invidious discrimination, an irrational decision by a city to deny a special use permit that would have allowed the operation of a group home for people with mental retardation.) Both the Senate and the House Subcommittees considering the Fair Housing Amendments Act heard testimony in 1986 and 1987 about the use of local zoning and other land use provisions to restrict the development of group homes. The Director of the Pennsylvania Human Rights Commission testified in 1987 that efforts to provide group homes were "routinely frustrated by municipalities which either have discriminatory zoning ordinances against such housing, or which discriminatorily interpret or apply non-discriminatory ordinances, or which use

other municipal authority to deny use of the facility to the mentally handicapped."[12/]

The Fair Housing Amendments Act of 1988 was but one of a series of federal statutes enacted to address the problems of discrimination faced by persons with disabilities, beginning with Title V of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. 791-794), and culminating in the enactment of the Americans with Disabilities Act (ADA) in 1990.[13/] When Congress enacted the ADA, just two years after the Fair Housing Amendments Act, it not only prohibited discrimination on the basis of disability in a wide range of activities, it also explicitly recognized segregation of persons

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[12/] Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 239 (1987) (statement of Homer C. Floyd); see also id. at 97 (testimony of Marca Bristo); Fair Housing Amendments Act of 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 582-583 (1987) (testimony of Edwards Roberts); Fair Housing Amendments Act: Hearings on H.R. 4119 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 102-103 (1986) (testimony of Bonnie Milstein).

[13/] Other statutes enacted during this period included the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. 1400 et seq.) and the Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975) (codified as amended at 42 U.S.C. 6001) in 1975, the Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified as amended at 42 U.S.C. 1973ee), the Air Carriers Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (1986) (codified as amended at 49 U.S.C. 41705), the Handicapped Children's Protection Act, Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified as amended at 20 U.S.C. 1415(e)(4)(B)) in 1986, and the Protection and Advocacy for Mentally Ill Individuals Act, Pub. L. No. 99-319, 100 Stat. 478 (1986) (codified as amended at 42 U.S.C. 10801).

with disabilities as a form of discrimination. See Olmstead v. L.C., 119 S. Ct. 2176, 2181 n.1 (1999). In the ADA, Congress made the following express findings regarding disability-based discrimination and segregation:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
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> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
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> * * * * *
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
>
> (6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;
>
> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such

> individuals to participate in, and contribute to, society[.]
>
> * * * * *
>
> (9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis * * *.

42 U.S.C. 12101(a). These findings were well-grounded in the legislative record, including documentation that was before Congress when it enacted the Fair Housing Amendments Act in 1988.

Congress had received reports and heard testimony concerning the need for group homes to enable mentally disabled persons to leave institutions and reside in the community, and about the use of local land use practices to exclude group homes from residential areas as far back as the late 1970's, when it first considered amending the Fair Housing Act to cover disability discrimination. A 1977 report to Congress from the General Accounting Office noted that, because of a lack of community facilities, mentally disabled individuals who were capable of living in the community either remained in institutions or were released without adequate community placements, and that "[i]nadequate housing is a critical obstacle to returning the mentally disabled to the community".[14/] In 1978, the Subcommittee considering amendments to the Fair Housing Act heard testimony from Dr. Robert L. Okin, Massachusetts Commissioner of Mental Health, regarding the use of restrictive zoning laws by local

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[14/] Returning the Mentally Disabled to the Community: Government Needs To Do More, Comptroller General of the United States 154 (Jan. 7, 1977); see id. at 9-25, 172.

governments to prevent the establishment of group homes for mentally disabled persons. Dr. Okin reported that one of the "major obstacles" to the establishment of community residences for persons with mental disabilities was community resistance:[15/]

> Local opposition typically crystallizes in the form of prohibitive zoning laws preventing or restricting the establishment of group homes for the mentally disabled. * * * The handicapped are told, in effect, at a time at which they are struggling to gain or regain their own self-esteem, that they are not worthy of living in a particular community, that they are second-class citizens, and that they might as well live in the institution where they won't be exposed to such animosity.

This testimony was echoed by other witnesses both in 1978,[16/] and in the next Congress in 1979.[17/]

In 1980, Congress enacted the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (codified at 42 U.S.C. 1997) (CRIPA), which authorized the Attorney General to bring a civil action based upon reasonable cause to believe that a State or a local government was "subjecting persons residing in or confined to an institution * *

[15/] Fair Housing Act: Hearings on H.R. 3504 and H.R. 7787, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 2d Sess. 245-246 (1978 Hearings).

[16/] See 1978 Hearings at 342-347 (Testimony of Rep. Christopher Dodd); id. at 266-267 (Testimony of Brian Linn).

[17/] See Fair Housing Amendments Act of 1979: Hearings on H.R. 2570 Before the Subcomm. On Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 515-523 (1979 Hearings) (Testimony of Willia Knighton); id. at 640-641 (Letter from Patricia Roberts Harris, Secretary of Housing and Urban Development).

* to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States[.]" 42 U.S.C. 1997a(a).[18/] The Senate Report on CRIPA described the conditions in Alabama's mental hospitals, and stated that "[t]he conditions documented in the Wyatt decision and subsequent suits dispel any doubt as to the existence, severity, or scope of institutional abuse. * * * Retarded persons were tied to their beds at night in the absence of sufficient staff to care for them. * * * One patient was regularly confined in a straightjacket for 9 years, as a result of which she lost the use of both arms. * * * The less than 50 cents per patient per day spent on food resulted in a diet 'coming closer to punishment by starvation than nutrition.' The court ultimately characterized conditions at the State hospital for the mentally retarded as 'conducive only to the deterioration and debilitation of the residents * * * and substandard to the point of endangering [their] health and lives.'"[19/] The subcommittees considering the CRIPA legislation heard testimony, in 1977 and 1979, about the appalling conditions in other States' institutions for persons with mental disabilities. One witness, a physician, described conditions at

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[18/] People with disabilities committed to the care of the States have a constitutional right to safe conditions, to freedom from unnecessary bodily restraint, and to such "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." Youngberg v. Romeo, 457 U.S. 307, 319 (1982).

[19/] S. Rep. No. 416, 96th Cong., 2d Sess. 10-11, quoting Wyatt v. Aderholt, 503 F.2d 1305, 1309 n.4, 1310-1311 (5th Cir. 1974).

a state hospital for the mentally ill in Pennsylvania where he had worked in 1974: "it became quite clear * * * that the personnel regarded patients as animals, and that group kicking and beatings were part of the program."[20/] Another described his colleagues' recent visit to an institution for the mentally disabled "where a number of the residents were literally kept in cages. A number of those residents who had been able to walk and who were continent when they were committed had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement."[21/]

[20/] Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 127 (1977) (statement of Michael D. McGuire, M.D.); id. at 191-192 (testimony of Dr. Philip Roos) (characterizing institutions for persons with mental retardation throughout the nation as "dehumanizing," "unsanitary and hazardous conditions," "replete with conditions which foster regression and deterioration," "characterized by self-containment and isolation, confinement, separation from the mainstream of society"); id. at 71-75 (testimony of Dr. Michael Wilkins) (describing conditions at Willowbrook State School in New York); see also, e.g., Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 10-11 (1977) (testimony of Drew S. Days III) (describing "dangerous and debilitating" conditions in Alabama State institutions for mentally ill and mentally retarded and "equally atrocious" conditions in New York institution); id. at 239 (testimony of Stanley C. Van Ness) (describing findings of "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary and anti-therapeutic living conditions" in New Jersey state institutions); id. at 42-43 (testimony of Charles R. Halpern); id. at 125-128 (testimony of Paul R. Friedman); id. at 163 (testimony of Abram Chayes); id. at 179-181 (testimony of Rep. Edward I. Koch).

[21/] Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,

(continued...)

In 1983, The United States Commission on Civil Rights published a report detailing the history and current extent of discrimination against persons with disabilities: Accommodating the Spectrum of Individual Abilities (Sept. 1983) (Spectrum).[22/] This Report concluded that "prejudice and discrimination are major causes of the disadvantages confronting handicapped people." Id. at 17. "Instances of ridicule, torture, imprisonment, and execution of handicapped people throughout history are not uncommon, while societal practices of isolation and segregation have been the rule." Id. at 18 n.5. Spectrum explained that, through the early 19th Century, it was the family's responsibility to care for members who had disabilities. Id. at 18. State facilities at first advocated protection of disabled persons from society, in large, rural institutions. But in the early 1900's, these institutions served the popular sentiment that it was society that needed protection from handicapped people. The eugenics movement, at its height in the 1920's, was based on the notion that mental and physical disabilities were the underlying source of society's problems.

[21/](...continued)
96th Cong., 1st Sess. 34 (1979) (testimony of Paul Friedman).

[22/] Congress also undertook its own extensive study and fact finding, holding 14 congressional hearings in Washington and 63 field hearings by a special congressional task force, in the three years leading up to the enactment of the Americans with Disabilities Act in 1990. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 24-28, 31 (1990); id., Pt. 3, at 24-25; id., Pt. 4, at 28-29; see also T. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the hearings).

Id. at 19; see also id. at 33-34 ("a desire to segregate handicapped people from the rest of society prompted the development of residential institutions"). Handicapped people were often referred to as "mere animals," "sub-human creatures," and "waste products" responsible for poverty and crime. Id. at 20. Even after the eugenics movement was discredited, States continued to use large institutions to provide minimal custodial care, often in horrible conditions, for those with mental and physical handicaps. Id. at 20-21. Spectrum quoted from a 1969 report from the President's Committee on Mental Retardation:[23/]

> [W]hether young or old; whether borderline or profoundly retarded; whether physically handicapped or physically sound; whether deaf of blind; * * * whether well-behaved or ill-behaved[,] [w]e took them all, by the thousands, 5,000 to 6,000 in some institutions. We had all the answers in one place, using the same facilities, the same personnel, the same attitudes, and largely the same treatment.

Although steps had been taken more recently to improve conditions for people with disabilities, their long isolation from American society had created both barriers to their full participation and the perpetuation of prejudice and stereotypes about their abilities. Spectrum at 21-22. Spectrum found that people with disabilities were still systematically placed in "substandard residential facilities, where incidents of abuse by staff and other residents, dangerous physical conditions, gross

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[23/] Wolf Wolfensberger, "The Origin of our Institutional Models," in Changing Patterns in Residential Services for the Mentally Retarded, ed. Robert B. Kugel and Wolf Wolfensberger, 143 (Washington, D.C.; President's Committee on Mental Retardation, 1969).

understaffing, overuse of medication to control residents, medical experimentation, inadequate and unsanitary food, sexual abuses, use of solitary confinement and physical restraints, and other serious deficiencies and questionable practices have been reported." Id. at 33. Even the "better institutions" segregated their residents from the mainstream of society. Ibid. Indeed, segregation remained one of the purposes of institutionalization. Id. at 33-34.[24/] The movement toward deinstitutionalization was not "problem free," since persons with disabilities were sometimes discharged from institutions without adequate community-based facilities, including housing, to serve their most basic needs. Id. at 35.

In 1984, Congress authorized the National Council on the Handicapped, an independent federal agency, to review all federal laws and programs affecting individuals with disabilities, and directed it to submit a report to the President and Congress with legislative recommendations for improving protections. See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, tit. I § 141(a), 98 Stat. 26 (1984). In February 1986, the Council issued its report: Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities — With

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[24/] Spectrum also found that discrimination continued to exist in education (id. at 27-29), employment (id. at 29-32), and medical treatment (id. at 35-36); that persons with disabilities were still subjected to forced sterilization, both pursuant to state law and without specific statutory authorization (id. at 36-37); and that architectural barriers made many buildings and modes of transportation inaccessible to persons with disabilities (id. at 38-40).

Legislative Recommendations (1986) (Toward Independence). This Report found that "[s]ecuring appropriate housing is a major prerequisite to social integration and living independently for persons with disabilities. The lack of appropriate housing opportunities for individuals with disabilities frequently results in the unnecessary and expensive institutionalization of such persons." Toward Independence at 37. It recommended federal legislation to prohibit housing discrimination against persons with disabilities, including a prohibition on the use of zoning ordinances to "prevent the establishment or operation of community residential alternatives for people with disabilities." Id. at 38.

The evidence of invidious discrimination against people with disabilities compiled by Congress has been confirmed by the courts. In Cleburne, a majority of the Court recognized that, "through ignorance and prejudice [persons with disabilities] have been subjected to a history of unfair and often grotesque mistreatment." 473 U.S. at 454 (Stevens, J., concurring) (internal citation and quotation marks omitted); see id. at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears, " id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed about people with disabilities in society-at-large and sometimes inappropriately infected government decision-making. See also Alexander v. Choate, 469

U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist"); J.W. v. City of Tacoma, 720 F.2d 1126, 1129 (9th Cir. 1983) (holding unconstitutional the denial of a use permit for a group home where denial was motivated, in part, by "prejudices concerning persons who have been institutionalized").

More recently, the Court has recognized that the unnecessary segregation and institutionalization of individuals with disabilities constitutes discrimination. Olmstead, 119 S. Ct. at 2185-2188; cf. id. at 2192-2194 (Kennedy, J., concurring). As the Court wrote, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." Id. at 2182 (1999).

C. The Fair Housing Act Is Appropriate Legislation To Remedy And Prevent Discrimination Against Persons With Disabilities

In Coolbaugh v. State of Louisiana, 136 F.3d 430 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998), relying upon Congress's statutory findings of disability-based discrimination, this Court concluded that application of the ADA to States and localities is authorized by Section 5 of the Fourteenth Amendment.[25/] Against the legislative background recited above, the Fair Housing Act is

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[25/] The constitutionality of the abrogation of Eleventh Amendment immunity in Titles I and II of the ADA is pending before the Supreme Court. Alsbrook v. City of Maumelle, No. 99-423, and Dickson v. Florida Dep't of Corrections, No. 98-829.

also appropriate Section 5 legislation. The Act enforces the established Fourteenth Amendment protection against governmental actions based on irrational stereotypes and prejudice against persons with disabilities, and it facilitates the movement of people with disabilities from segregated, often substandard, institutions to community-based living facilities. The reasonable accommodation requirement both prevents constitutional violations and remedies past violations.

In amending the Fair Housing Act to prohibit disability-based discrimination, Congress was acting within the constitutional framework laid out by the Supreme Court in Cleburne. Although a majority of the Court declined to deem classifications on the basis of mental retardation as "quasi-suspect," it did so in part because such heightened scrutiny would unduly limit legislative solutions to problems faced by those with disabilities. The Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals." 473 U.S. at 442-443. In that regard, the Court specifically discussed a number of federal statutes and rules that protect individuals with disabilities, including Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and expressed concern that requiring a legislature to justify its efforts under heightened scrutiny might "lead it to refrain from acting at all." Id. at 444.

Moreover, as the Court emphasized in both Kimel, 120 S. Ct. at 644, and City of Boerne, 521 U.S. at 518, 521, Congress's power under Section 5 of the Fourteenth Amendment is not limited to prohibiting that which is already prohibited by the Constitution. Thus, when it amended the Fair Housing Act, Congress was not limited to prohibiting invidious discrimination against persons with disabilities, such as the zoning action condemned in Cleburne. To remedy and prevent constitutional violations, it was also authorized to require local governments to make reasonable accommodations in their practices -- such as zoning restrictions -- when necessary to provide equal housing opportunities to persons with disabilities.

The reasonable accommodation requirement of the Fair Housing Act promotes the integration goals of both the ADA and the Fair Housing Act. See Olmstead, 119 S. Ct. at 2181 n.1. As the Supreme Court cautioned in Olmstead, a person with a disability should be released from an institution only when an appropriate community-based placement is available. Olmstead, 119 S. Ct. at 2188-2189 (Ginsburg, J.); id. at 2190 (Kennedy, J.). This Court and others have recognized that many individuals with disabilities are able to live in the community only in congregate living facilities or group homes, and that the availability of such facilities requires some accommodation in the application of local zoning ordinances. See Elderhaven, Inc. v. City of Lubbock, Texas, 98 F.3d 175, 179 (5th Cir. 1996); Smith & Lee Assocs., Inc.. v. City of Taylor, 102 F.3d 781, 795-796 (6th Cir.

1996). By its terms, the reasonable accommodation requirement of the Fair Housing Act requires only "reasonable" accommodations "necessary" to provide equal housing opportunities. 42 U.S.C. 3604(f)(3)(B). The district court here, for example, required only that the Parish permit five unrelated persons to live together in a group home in a district zoned to permit four unrelated residents. See also Elderhaven, Inc., supra (affirming summary judgment for City where it demonstrated willingness to apply ordinance with flexibility and granted permit for ten, but not twelve, persons to live in a group home); Smith & Lee Assocs., Inc., 102 F.3d at 794-796 (concluding that reasonable accommodation requirement required City to allow an additional three residents to live in a group home where it would not "fundamentally alter the nature of single-family neighborhoods"); Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1995) (finding no Fair Housing Act violation because City's limit of eight residents was "rational").

III. THE FAIR HOUSING ACT IS NOT UNCONSTITUTIONALLY VAGUE

The Parish argues (Def. Br. 55-59) that the reasonable accommodation requirements of the Fair Housing Act are unconstitutionally vague. This contention is baseless. A civil statute like the Fair Housing Act will be invalidated on vagueness grounds only "where 'the exaction of obedience to a rule or standard * * * was so vague and indefinite as really to be no rule or standard at all[.]'" Boutilier v. INS, 387 U.S. 118, 123 (1967), quoting A.B. Small Co. v. American Sugar

Refining Co., 267 U.S. 233, 239 (1925). The Parish's reliance on Grayned v. City of Rockford, 408 U.S. 104 (1972), is inapposite, since that case dealt with a criminal statute alleged to infringe upon an individual's First Amendment rights, raising special concerns not applicable here. See id. at 109.

The concept of reasonable accommodation is a familiar one, which has been applied and interpreted by the courts in a variety of contexts, including the Fair Housing Act. See e.g., Elderhaven, supra; City of Taylor, supra; Brennan v. Stewart, 834 F.2d 1248, 1261 (5th Cir. 1988) (defining reasonable accommodation in Section 504 case).

CONCLUSION

The district court's judgment should be affirmed.

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CERTIFICATE OF SERVICE

I certify that the brief of the United States as intervenor was served in both paper and electronic formats on the following counsel of record, by first class mail, this 22nd day of February, 2000:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

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