No. 17-2773

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARY B. VALENCIA, *et al.*,

Plaintiffs-Appellees

v.

CITY OF SPRINGFIELD,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION
THE HONORABLE RICHARD MILLS, No. 3:16-cv-3331

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued) **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES: **PAGE**

RULE:

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INTEREST OF THE UNITED STATES

The United States files this brief as amicus curiae under Federal Rule of Appellate Procedure 29(a). This case presents questions regarding the proper application of the Fair Housing Act, 42 U.S.C. 3604(f), to the City of Springfield's zoning policies that restrict the placement of group homes for individuals with disabilities. The United States Department of Justice and the United States Department of Housing and Urban Development share enforcement authority

under the Fair Housing Act. See 42 U.S.C. 3610, 3612, 3614. Moreover, the United States has filed an action against the City of Springfield, alleging the same violations of the Fair Housing Act as in this private litigation. See *United States* v. *City of Springfield*, No. 3:17-cv-3278 (C.D. Ill.). The United States thus has a direct and substantial interest in the resolution of this appeal.

STATEMENT OF THE ISSUES

1. Whether the City of Springfield's Zoning Code violates the Fair Housing Act's ban on intentional disability-based discrimination by imposing a 600-foot spacing requirement on group homes with up to five unrelated individuals with disabilities but not on homes with up to five unrelated individuals without disabilities.

2. Whether the City of Springfield violated the Fair Housing Act by refusing to provide a reasonable accommodation to allow plaintiffs' group home for three individuals with disabilities to continue operating despite being located within 600 feet of another group home for individuals with disabilities.

STATEMENT OF THE CASE

1. Factual And Procedural Background

a. Plaintiff Individual Advocacy Group, Inc. (IAG) is a not-for-profit organization that provides in-home support services to individuals with intellectual

disabilities or physical impairments. Doc. 8-1, at 1; Doc. 8-3, at 2.[1] IAG receives funding to provide such services through Illinois' Community Integrated Living Arrangement program, which enables individuals with intellectual disabilities to live in integrated residential settings in lieu of large institutions or nursing homes. Unlike other service providers, IAG does not buy or rent houses for its clients. Doc. 8-1, at 2. Instead, the residents or their legal guardians own or rent the homes, while IAG provides in-home staffing and support services. Doc. 8-1, at 2. This service model furthers the goals of independent living and self-determination for individuals with disabilities.

Plaintiff A.D., who passed away pending this appeal, was a 62-year-old man with a severe intellectual disability, Parkinson's disease, a seizure disorder, and other disabilities. Doc. 8-2, at 1. He used a wheelchair and was mostly nonverbal. Doc. 8-2, at 1. IAG and Mary Valencia, A.D.'s sister and guardian, searched for a community placement for A.D. for nearly a year before finding the rental home at 2328 S. Noble Ave. (Noble home) in 2013. Doc. 8-1, at 3; Doc. 8-2, at 3.[2] The owners of the Noble home, Christine and Robyn Hovey, agreed to rent the home to

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[1] "Doc. __, at __" refers to the docket entry number and page number of documents filed in district court. "Br. __" indicates the page number of the City's opening brief.

[2] The district court has granted the plaintiffs' motion to amend the complaint to substitute Valencia as a named plaintiff following A.D.'s death and to add B.A., who replaced A.D. in the Noble home, as a plaintiff. Doc. 33.

A.D. and two other IAG clients, J.M. and J.D. Doc. 8-1, at 3. At that time, IAG and the Hoveys were not aware that a group home for individuals with disabilities operated by Sparc (Sparc house) was located on the same block as the Noble home. Doc. 8-1, at 3; Doc. 8-3, at 5, 8. The City of Springfield (the City) did not, and still does not, maintain a list of where such group homes are located. Doc. 8-3, at 10; Doc. 8-4, at 10.

Before the residents moved in, the Hoveys renovated the home to make it more accessible, including adding an accessible bathroom and roll-in shower, lowering kitchen countertops, installing flooring for wheelchairs throughout the house, and modifying thresholds to allow wheelchairs to easily move around the house. Doc. 8-1, at 3; Doc. 8-3, at 8. The Noble home looks like any other single-family house in the neighborhood. Doc. 8-1, at 3.

A.D., J.M., and J.D. moved into the Noble home in March 2014. Doc. 8-1, at 4. All three residents, individuals with intellectual and other disabilities, required assistance with daily living activities, including bathing, dressing, and eating. IAG provided around-the-clock support for the residents. Doc. 8-3, at 4. Two of the residents attended a day program away from the home, while A.D. stayed at the home during the day due to his advanced age. Doc. 8-2, at 1-2; Doc. 3, at 4. Usually, one IAG support staff member assisted A.D. during the day, and a second staff member worked at the Noble home when all three residents were

home and additional support was needed with bathing or other daily living activities. Doc. 8-3, at 4. The residents considered themselves a family. Doc. 8-3, at 4, 6, 10.

b. In August 2016, more than two years after the residents moved into the Noble home, the City informed Christine Hovey that the Noble home did not have the permit required to operate in the neighborhood. According to the City, the home's proximity (157 feet) to the Sparc house violated Zoning Code § 155.053, which prohibits a group home for individuals with disabilities that provides 24-hour support from being located within 600 feet of another similar facility. Doc. 8-1, at 4; Doc. 8-3, at 7.[3]

As the City instructed, the Hoveys and IAG submitted an application under Zoning Code § 155.211.1 for a Conditional Permitted Use (CPU) to continue operating the Noble home. Doc. 8-1, at 4. They also provided extensive documentation about the residents and the house, and a sample of studies finding that group homes do not adversely affect property values or turnover rates. Doc. 8-3, at 34-55. The petition stated that, before the City notified them about the zoning violation, IAG and the Hoveys believed that the Noble home residents qualified as a "family" under the Zoning Code and therefore the 600-foot spacing requirement

[3] Relevant provisions of the City's Zoning Code are included in the Appendix attached to the City's opening brief.

for group homes did not apply. Doc. 8-3, at 24-26, 34-70. The petition then requested a CPU to continue operating or, alternatively, a reasonable accommodation in the form of an exception to the 600-foot spacing requirement to allow the three residents to continue living in the Noble home with the necessary in-home support services. Doc. 8-3, at 2.

The Springfield-Sangamon County Regional Planning Commission reviewed the petition and recommended denying a CPU. Despite the extensive documentation attached to the petition, the regional commission stated that the petition did not provide "sufficient detail" for it to determine, among other things, the home's "adverse effects on the character of the surrounding area." Doc. 8-3, at 71-72. The regional commission also incorrectly stated that the petition did not specify the type of reasonable accommodation requested and therefore could not assess the request. Doc. 8-3, at 72.

Subsequently, the Springfield Planning and Zoning Commission voted 4-3 to adopt the regional planning commission's denial recommendation. Doc. 8-3, at 20, 78. At its hearing, five witnesses testified in support of petitioners, including Daniel Lauber, a land use and zoning expert, who stated that the Noble home's residents qualified as a "family" under Zoning Code § 155.001 and should not need to seek zoning approval to continue to operate. Doc. 8-3, at 11-15. He further testified that the City should grant a CPU or reasonable accommodation to

allow the home to continue to operate. Lauber stated that the home does not adversely impact the neighborhood's property values, home sales, crime rate, traffic, or the Sparc house (as residents of the two houses have almost no interaction), and that allowing the Noble home to continue operating would not fundamentally alter the City's zoning scheme or constitute an undue burden. Doc. 8-3, at 12-14; see also Doc. 8-3, at 5. Consistent with Lauber's assessment, neighborhood residents who opposed the petition spoke mostly about problems they had with the Sparc house, not the Noble home. Doc. 8-3, at 15-18. At the end of the hearing, one of the commissioners stated that he was concerned with setting a "precedent" if they granted a CPU for the home. Doc. 8-3, at 20. In its decision, the commission found that, despite the ample evidence provided by petitioners and their expert witness, the petition did not provide sufficient information about the Noble home's "adverse effects" on the neighborhood and residents of Sparc house. Doc. 8-3, at 32-33. The planning commission did not address the criteria for granting a CPU or petitioners' request for a reasonable accommodation.

The Springfield City Council then voted 8-2 to adopt the planning commission's recommendation and denied petitioners' CPU application. Doc. 8-4, at 31. At the hearing on the petition, the City Council and the Mayor heard testimony from the City that petitioners' expert witness, Daniel Lauber, who testified before the Springfield Planning and Zoning Commission that the Noble

home should be allowed to continue to operate, had previously taken the position that the 600-foot spacing ordinance complied with the federal Fair Housing Act. Doc. 8-4, at 22. They also heard testimony that since the inception of the 600-foot spacing requirement in 1990, the City had never granted a variance from that rule. Doc. 8-4, at 27-28. In addition, the police chief testified that there had never been any problems or disturbances at the Noble home. Doc. 8-4, at 26. Near the end of the hearing, the Mayor and a council member stated that granting a CPU would set a "precedent" that would lead to a proliferation of group homes. Doc. 8-4, at 13-14, 27. Other council members indicated that they should deny a CPU simply because the Noble home was in violation of the 600-foot spacing requirement. Doc. 8-4, at 21, 24. Like the planning commission, the City Council failed to address the requirements for granting a CPU or petitioners' reasonable accommodation request.

2. District Court Proceeding

On December 22, 2016, IAG and A.D., through Mary Valencia, commenced this action against the City, alleging, *inter alia*, violations of the Fair Housing Act (FHA) based on the spacing requirement in Zoning Code § 155.053 and the City's failure to provide a reasonable accommodation. Doc. 1, at 17-18. Plaintiffs also filed a motion for a preliminary injunction solely to prevent the City from evicting the residents from the Noble home pending resolution of this case. Doc. 8, at 1. In

support of their motion, plaintiffs provided evidence that was submitted in the prior zoning proceedings. The City challenged only plaintiffs' likelihood of success on the merits and did not dispute that plaintiffs met the other requirements for a preliminary injunction. Doc. 15, at 6; Doc. 21, at 17.

Following a hearing on the preliminary injunction motion, the district court granted plaintiffs' motion. At the outset, the court concluded that the "unambiguous language" in Zoning Code § 155.001 defines "family" to include up to five unrelated persons. Op. 11; see also Op. 4 n.2. Thus, a group home for three unrelated individuals with disabilities is subject to the 600-foot spacing requirement in Zoning Code § 155.053, but three unrelated individuals without disabilities may live together in a single-family home with no restrictions. Accordingly, the district court found that plaintiffs established a prima facie case of intentional discrimination under the FHA by showing that the Zoning Code is facially discriminatory, and that the City had the burden to justify treating individuals with disabilities differently from individuals without disabilities. Op. 10-12. Applying the standard used by the Sixth and Tenth Circuits that was adopted in *United States* v. *City of Chicago Heights*, 161 F. Supp. 2d 819 (N.D. Ill. 2001), the district court required the City to show that the 600-foot spacing requirement was warranted by the "specific needs and abilities" of individuals with disabilities. Op. 12 (quoting *City of Chicago Heights*, 161 F. Supp. 2d at 843

(citations omitted)). Concluding that the "City's focus" in enacting the ordinance was on whether homes for individuals with disabilities "affected residential environments 'through overconcentration or improper operation'" rather than concern for individuals with disabilities, the court found that plaintiffs would likely succeed on their intentional discrimination claim. Op. 12-13.

The district court further held that plaintiffs would likely succeed on their failure-to-accommodate claim. The court found that plaintiffs showed that the requested accommodation was "reasonable and necessary" and noted that the City never specifically addressed plaintiffs' reasonable accommodation request or whether plaintiffs had met the requirements for a CPU. Op. 14-15. Moreover, the court stated that to the extent that some city officials "suggested that the fact that the Noble home did not conform with the spacing rule warranted denial of the CPU," that reason for denying a CPU would violate the FHA's reasonable accommodation provision. Op. 15. Lastly, the court rejected the City's assertion that plaintiffs failed to show that the Noble home would not adversely affect the Sparc house. Op. 16. The court found that any such potential adverse impact was "speculative," considering that "there has been almost no interaction between the residences of the two homes over the course of three years." Op. 16.

Accordingly, because plaintiffs satisfied all the requirements for a preliminary injunction, the district court issued an order permitting the Noble home

to continue operating pending resolution of this lawsuit. Op. 18. The district court has stayed proceedings pending this appeal. Doc. 31.

SUMMARY OF ARGUMENT

This Court should affirm the district court's preliminary injunction prohibiting the City from evicting the Noble home residents pending resolution of this case. On appeal, the City challenges the district court's determination that the plaintiffs have a substantial likelihood of success on the merits. This argument is unavailing.

First, the district court correctly found that the City's Zoning Code is facially discriminatory under the FHA because it imposes a spacing requirement on group homes of up to five unrelated individuals with disabilities but not on homes containing up to five unrelated non-disabled persons. The City argues that the Zoning Code is not facially discriminatory because its definition of "family" requires that at least two people living in a single dwelling unit be related, so in no circumstance would up to five unrelated people without disabilities be allowed to live together. That argument is unsupported by the law and by the record. The plain language of the Zoning Code indicates that up to five unrelated persons are classified as a family under the code. Indeed, the City has in the past interpreted the definition of "family" under the code in precisely this way. The City has failed to rebut plaintiffs' prima facie case of intentional discrimination by invoking the

FHA's "direct threat" exception or by showing that the Zoning Code's differential treatment of people with disabilities is warranted to benefit or meet the unique and specific needs of such individuals. Accordingly, the City's Zoning Code violates the FHA's ban on intentional disability-based discrimination by imposing a 600-foot spacing requirement on group homes with up to five unrelated individuals with disabilities but not on homes with up to five unrelated non-disabled people. See 42 U.S.C. 3604(f)(1)-(2).

Second, regardless of whether the Zoning Code is intentionally discriminatory, the Court should affirm the preliminary injunction based on the alternative ground that plaintiffs established a substantial likelihood of prevailing on their failure-to-accommodate claim. The record shows the Noble home residents need this state-authorized communal living arrangement because of their disability and allowing them to live together in a single-family neighborhood is a reasonable exception that does not fundamentally alter the nature of the neighborhood or impose an undue burden on the City. The City's refusal to make a reasonable accommodation constitutes a separate violation of the FHA, 42 U.S.C. 3602(f)(3)(B), that independently supports affirming the preliminary injunction.

ARGUMENT

On appeal, the City challenges only the district court's determination that the plaintiffs would likely succeed on the merits. Br. 11-18. This Court should affirm the preliminary injunction because the district court did not commit any legal or factual errors that would render the preliminary injunction an abuse of discretion. See *Kiel* v. *City of Kenosha*, 236 F.3d 814, 815 (7th Cir. 2000) (in reviewing a preliminary injunction for abuse of discretion, legal conclusions are reviewed de novo, and factual findings will be upheld unless clearly erroneous).

I

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE CITY'S ZONING CODE LIKELY VIOLATES THE FHA BECAUSE IT INTENTIONALLY DISCRIMINATES IN ITS TREATMENT OF GROUP HOMES FOR UP TO FIVE UNRELATED INDIVIDUALS WITH DISABILITIES

The FHA makes it unlawful "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 person residing in or intending to reside in that dwelling after it is so sold, rented, or made available." 42 U.S.C. 3604(f)(1)(B). The statute also prohibits discrimination against such individuals in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling." 42 U.S.C. 3604(f)(2). These prohibitions apply to zoning actions that discriminate based on disability. As this Court has

recognized, "Congress explicitly intended for the [FHA] to apply to zoning ordinances and other laws that would restrict the placement of group homes" for people with disabilities. *Oconomowoc Residential Programs* v. *City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002); see also *Wisconsin Cmty. Servs., Inc.* v. *City of Milwaukee*, 465 F.3d 737, 748 n.4 (7th Cir. 2006) (en banc) ("The [FHA] is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of * * * individuals [with disabilities] to live in the residence of their choice in the community.").

A. The District Court Correctly Found That Plaintiffs Established A Prima Facie Case Of Intentional Discrimination Under The FHA

"[A] plaintiff makes out a prima facie case of intentional discrimination under the [FHA] merely by showing that a protected group has been subjected to explicitly differential * * * treatment." *Community House, Inc.* v. *City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007). Thus, statutes and ordinances are "facially discriminatory" if, on their face, they treat group homes for individuals with disabilities less favorably than similarly-situated group living arrangements for non-disabled people. See *Larkin* v. *Michigan Dep't of Social Servs.*, 89 F.3d 285, 290 (6th Cir. 1996); see also *Bangerter* v. *Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995) (stating that where an ordinance by its express terms, "single[s] out" individuals with disabilities and applies "different rules to them," its

"discriminatory intent and purpose" are "apparent on its face"). Where an ordinance is discriminatory on its face, a plaintiff need not show a discriminatory motive because "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

Here, the district court correctly found that plaintiffs established a prima facie case that the City's Zoning Code is discriminatory on its face. See Op. 11. Zoning Code § 155.053 expressly provides that "community residences" shall be located "more than 600 feet from the property line of any other such facility." Zoning Code § 155.053(a). By its terms, the spacing requirement applies only to "community residences," which are defined as "single dwelling unit[s] occupied on a relatively permanent basis in a family-like environment by a group of unrelated persons with disabilities, plus paid professional support staff provided by a sponsoring agency, either living with the residents * * * or present whenever residents with disabilities are present." Zoning Code § 155.001. Two types of community residences are "family care residences" and "group community residences." Family care residences are limited to "a group of no more than six unrelated persons with disabilities," while group community residences are defined as "a group of nine to 15 unrelated persons with disabilities." Zoning Code § 155.001. In contrast, Zoning Code § 155.001 permits groups of up to five

unrelated individuals without disabilities to live together in a single-family home with no restriction.

Because the Zoning Code imposes a spacing requirement on group homes for up to five unrelated individuals with disabilities, but not on group homes for up to five unrelated individuals without disabilities, it explicitly treats individuals with disabilities less favorably. The City's Zoning Code is similar to a statute that imposed a 1500-foot spacing requirement between homes for individuals with disabilities that the Sixth Circuit struck down under the FHA. See *Larkin*, 89 F.3d at 289-290. The *Larkin* court held that the spacing requirement amounted to intentional discrimination because it "single[d] out for regulation" group homes for individuals with disabilities, and did not apply to "other living arrangements" involving persons without disabilities. *Id*. at 290.

The City's contention that the Zoning Code does not violate the FHA because it actually "discriminates *in favor of*" individuals with disabilities lacks merit. Br. 13. The City points to the definition of "family" in the Zoning Code to assert that groups of unrelated persons without disabilities cannot live together in a single-family house under any condition. "Family" is defined as "[o]ne or more persons each related to one another by blood, marriage, adoption, or is a group of not more than five persons not all so related occupying a single dwelling unit which is not a boardinghouse or lodging house." Zoning Code § 155.001. The

City asserts that the phrase "not all so related" means that although not all members of the group need to be related by blood, marriage or adoption, at least two of them must be. Br. 12.

But no support exists for the City's reading of its Zoning Code's definition of "family." The City cites no court decision or other legal authority that has interpreted the Zoning Code's definition of "family" in the manner that it advocates. Nor has the City shown that, before this case, it ever interpreted "family" to require at least two related people. On the contrary, the record contains a 1995 letter in which the City's Corporation Counsel's Office took the contrary view. It explained to the representative of a group home for persons with disabilities that "it is the opinion of both [the Corporation Counsel's Office] and the zoning administrator that if there are five (5) or fewer residents then * * * the resident[s] should be considered a family and no zoning violation would exist," even if the home were closer than 600 feet to another group home. Doc. 8-3, at 24.

In any event, the interpretation the City advocates in this litigation conflicts with the code's plain language. Nothing in the provision requires that some of the residents be related in order for a group of up to five individuals to be permitted to live together in a single-family home. Indeed, the City's interpretation would lead to implausible (and potentially unlawful) results. Under the City's theory, an unmarried couple without children, two unrelated roommates, or a single adult

with foster children could not live in a single-family residential district. None of these households would qualify as a "family" under Zoning Code § 155.011, according to the City. The interpretation of "family" that the City advocates in this appeal may itself violate the FHA's prohibitions on familial-status discrimination by preventing single caregivers with unrelated children, such as guardians or foster parents, from living in residential neighborhoods. See 42 U.S.C. 3602(k) (defining "familial status" as "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individuals; or (2) the designee of such parent or other person having custody"). Significantly, the City has not presented any evidence that it enforces the code to prevent unmarried couples, unrelated roommates, or single guardians or foster parents from living together in single-family homes.

B. The District Court Correctly Found That The City Has Not Rebutted Plaintiffs' Prima Facie Showing Of Intentional Discrimination

The Zoning Code's differential treatment of five unrelated people with disabilities compared to five unrelated people without disabilities violates the FHA. Where disparate treatment is proved, as it was here by a finding of facial discrimination, the FHA's text does not provide an explicit exception or defense to

a finding of an FHA violation, aside from a "direct threat" defense that the City has not invoked and that the evidence here would not support. See 42 U.S.C. 3604(f).[4]

In any event, the City has not provided any appropriate justification for its Zoning Code's differential treatment of homes for up to five unrelated people with disabilities. The district court held that plaintiffs are likely to succeed on the merits of their intentional discrimination claim based on an application of a standard, used by the Sixth, Ninth, and Tenth Circuits, that allows FHA defendants an opportunity to justify differential treatment of people with disabilities in zoning laws as a defense to liability. Op. 12; see *Community House, Inc.* v. *City of Boise*, 490 F.3d 1041 (9th Cir. 2007); *Larkin*, 89 F.3d 285; *Bangerter* v. *Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995). The Ninth and Tenth Circuits hold that facially discriminatory restrictions on people with disabilities pass muster under the FHA only if the defendant shows either "(1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected rather than being based on stereotypes." *Community House*, 490 F.3d at 1050; *Bangerter*, 46 F.3d at 1503-1504. The Sixth Circuit applies a similar formulation, stating that "in order for facially discriminatory statutes to survive a

[4] The "direct threat" provision states that "[n]othing in [the FHA's ban on disability discrimination] requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. 3604(f)(9).

challenge under the [FHA], the defendant must demonstrate that they are warranted by the unique and specific needs and abilities of those handicapped persons to whom the regulations apply." *Larkin*, 89 F.3d at 290 (citation and quotation marks omitted).

The Court need not decide whether the standards adopted by the Sixth, Ninth, and Tenth Circuits apply because the City has not met any of those standards. The ordinance's text states that the purpose of the spacing requirement is "to ensure" that group homes for individuals with disabilities "do not adversely affect [residential] environments through over concentration or improper operation." Zoning Code § 155.053. In other words, the ordinance is concerned with the impact of group homes on residential neighborhoods, not the welfare of individuals with disabilities or their special needs or abilities. Indeed, when the spacing requirement was enacted, the assistant zoning administrator confirmed that its goal was "not allowing clustering" of group homes for individuals with disabilities to "avoid future problems with having too much traffic." Doc. 8-4, at 22-23.

Only the Eighth Circuit allows FHA defendants to justify laws that facially discriminate against individuals with disabilities under an equal-protection style rational-basis standard of review. See *e.g.*, *Familystyle of St. Paul, Inc.* v. *City of St. Paul*, 923 F.2d 91, 94 (8th Cir. 1991). But the Eighth Circuit imported the

rational-basis standard for constitutional claims into the FHA without any analysis or discussion. As other circuits have explained, the use of an equal protection analysis in this context is inappropriate. See *Bangerter*, 46 F.3d at 1503; *Community House*, 490 F.3d at 1050. A rational-basis test would require no more than the showing needed in similar contexts under the Fourteenth Amendment, even without the enactment of the FHA. Such a standard cannot be reconciled with the FHA's text, which evinces Congress's intent to provide more muscular protection for persons with disabilities in the housing context. Indeed, the FHA expressly makes individuals with disabilities "a protected class for purposes of a statutory claim—they are the direct object of the statutory protection—even [though] they are not a protected class for constitutional purposes." *Bangerter*, 46 F.3d at 1503; see also *Community House*, 490 F.3d at 1050.[5]

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[5] The City's reliance on *Oxford House–C* v. *City of St. Louis*, 77 F.3d 249, 252 (8th Cir.), cert. denied, 519 U.S. 816 (1996), and *Familystyle of St. Paul, Inc.* v. *City of St. Paul*, 923 F.2d 91, 94 (8th Cir. 1991), is misplaced. Br. 13-14. Moreover, as the City admits, *Oxford House–C* is factually distinguishable. Br. 13-14. The court in *Oxford House–C* found that the zoning code did not discriminate against individuals with disabilities because up to eight unrelated persons with disabilities may live together in a single-family house, while only three unrelated individuals without disabilities may do so. 77 F.3d at 252-253. By contrast, Section 155.053's spacing requirement applies to a home with three unrelated individuals with disabilities, but not to a home with three unrelated individuals without disabilities. See pp. 14-18, *supra*. *Familystyle* also involved unusual and distinguishable facts. In *Familystyle*, the provider sought to provide three new homes for 23 residents, even though it was already serving 119 persons within one and a half city blocks. 923 F.2d at 92. Thus, the court was concerned

(continued . . .)

Accordingly, the district court did not err in concluding that the spacing requirement is discriminatory on its face and that the City has not established an affirmative defense justifying that discrimination. The court thus correctly held that plaintiffs have a substantial likelihood of success on the merits on their intentional discrimination claim. Op. 10-13.

II

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE CITY'S DENIAL OF A REASONABLE ACCOMMODATION LIKELY VIOLATES THE FHA

Plaintiffs' likelihood of success on their failure-to-accommodate claim provides an independent ground for affirming the preliminary injunction. The FHA defines prohibited disability-based discrimination to include "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." 42 U.S.C. 3604(f)(3)(B). The FHA requires the City to waive the spacing requirement as a reasonable accommodation when doing so is "reasonable" and "necessary" to afford persons with disabilities "the equal opportunity to use and enjoy a dwelling." *Oconomowoc Residential Programs* v.

(. . . continued)
with whether the provider was "simply recreating an institutionalized setting in the community." *Larkin*, 89 F.3d at 290 (distinguishing *Familystyle*). No such concern exists here, where plaintiffs seek only to continue to operate a three-person home for individuals with disabilities.

City of Milwaukee, 300 F.3d 775, 783 (7th Cir. 2002); accord *Wisconsin Cmty. Servs., Inc.* v. *City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006). Once plaintiffs have made a prima facie showing that the accommodation sought is reasonable on its face, the City must "demonstrate unreasonableness or undue hardship in the particular circumstances." *Oconomowoc*, 300 F.3d at 783.

Regardless of whether plaintiffs met the requirements for obtaining a CPU under Zoning Code § 155.211.1, the City must grant plaintiffs a reasonable accommodation under 42 U.S.C. 3604(f)(3)(B) because they have carried their burden, and because the City has not rebutted their prima facie case. Plaintiffs have shown that their requested accommodation—to be allowed to continue to operate the three-person Noble home—is reasonable. An accommodation is reasonable if it is "efficacious and proportional to the costs" implementing it. *Oconomowoc*, 300 F.3d at 784. The undisputed evidence shows that the Noble home residents have intellectual and physical disabilities and with in-home support services, they are able to live on their own rather than in an institution. Doc. 8-2, at 1-2; Doc. 8-3, at 10. The record further shows that the residents have benefited from living in a small residential environment and that A.D. benefited developmentally (*e.g.*, he learned to feed himself and transfer himself in and out of his wheelchair) from living in a single-family home. Doc. 8-2, at 3; Doc. 8-3, at 10-11. The record also shows that the Noble home has not changed the character

of the residential neighborhood. On the contrary, the house looks like any other single-family house in the neighborhood. Doc. 8-1, at 3. The police chief testified that there have never been any problems or disturbances at the house. Doc. 8-4, to 26. In fact, the City has conceded that the Noble home "doesn't harm the neighborhood." Pr. Inj. Hr'g Tr. 39:16-20. Indeed, the record does not contain any evidence that the Noble home imposes any "financial and administrative costs and burdens" on the City. *Oconomowoc*, 300 F.3d at 784.

Plaintiffs have also proved that the requested accommodation is necessary. An accommodation is "necessary" if the individuals with disabilities "will be denied the equal opportunity to live in a residential neighborhood" without the accommodation. *Oconomowoc*, 300 F.3d at 784. "In this context, 'equal opportunity' means the opportunity to choose to live in a residential neighborhood." *Ibid*. As this Court has explained, "[o]ften, a community-based residential facility provides the only means by which disabled persons can live in a residential neighborhood," and, "[w]hen a zoning authority refuses to reasonably accommodate these small group living facilities, it denies disabled persons an equal opportunity to live in the community of their choice." *Ibid*. Here, it is undisputed that the Noble home residents have severe disabilities and are able to live in a residential neighborhood only with the aid of in-home support services. Doc. 8-2, at 1-2; Doc. 8-3, at 4, 10. In addition, the record shows that it took

nearly a year for plaintiffs to locate the Noble home (Doc. 8-2, at 3) and the residents have no alternative residential option in Springfield. Doc. 8-1, at 8; Doc. 8-3, at 6.

The City has not presented any argument—let alone evidence—to rebut plaintiffs' prima facie showing. Indeed, the City cannot argue that the three-person Noble home is "so 'at odds with the purposes behind the [spacing] rule that it would be a fundamental and unreasonable change.'" *Oconomowoc*, 300 F.3d at 784 (citation omitted). The only objection the City raises to plaintiff's reasonable accommodation request is its contention that plaintiffs "are seeking not an *equal* opportunity to enjoy a dwelling"; rather, they are "seeking an opportunity which would not be afforded to similarly[-]situated non-disabled persons under any circumstances." As explained above, however, the Zoning Code permits groups of up to five unrelated individuals without disabilities to live together in a single-family dwelling. See pp. 14-18, *supra*.

At any rate, the City's interpretation of "equal opportunity" in the FHA is incorrect. Br. 17-18. In *Oconomowoc*, 300 F.3d at 787, this Court rejected this argument that an accommodation to a spacing requirement is not necessary to achieve "equal opportunity" if other groups of unrelated persons are similarly restricted from a residential neighborhood. As the Court explained, such comparator evidence is irrelevant to a failure-to-accommodate claim, because

"group living arrangements can be essential for [individuals with disabilities] who cannot live without the services such arrangements provide, and not similarly essential for the non-disabled." *Ibid*. See also *U.S. Airways* v. *Barnett*, 535 U.S. 391, 397 (2002) ("The simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'").

To the extent that the City argues (Br. 17) that making any exception for the Noble home from the Zoning Code would render the "spacing requirement a nullity," this Court has explained that determining whether "a requested [reasonable] accommodation is reasonable or not is a highly fact-specific inquiry and requires balancing the needs of the parties." *Oconomowoc*, 300 F.3d at 784; accord *Wisconsin Cmty. Servs.*, 465 F.3d at 749. Thus, permitting plaintiffs to continue to operate the Noble home for three residents would in no way require the City to grant future requests for reasonable accommodations without performing the necessary fact-intensive review of the circumstances and interests of the parties involved in each specific request.

Accordingly, the district court did not err in finding that plaintiffs have "demonstrated a substantial likelihood of success on the merits" on their failure-to-accommodate claim. Op. 18.

CONCLUSION

This Court should affirm the district court's preliminary injunction to prevent the City from evicting the residents from the Noble home pending resolution of this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE:

(1) complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 29 because it contains 6189 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2010, in 14-point Times New Roman font.

s/ Teresa Kwong
TERESA KWONG
Attorney

Date: December 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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

s/ Teresa Kwong
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