IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-30776

GROOME RESOURCES, LTD., L.L.C., Plaintiff-Appellee	Appeal from the United States District Court, Eastern District of Louisiana, Civil Action No. 99-CV-1491-J
Versus	
PARISH OF JEFFERSON, Defendant-Appellant	The Honorable Carl J. Barbier District Judge

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BRIEF FOR ALZHEIMER'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND SUPPORTING AFFIRMANCE OF THE DECISION BELOW

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INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29, *amicus curiae* respectfully submits this brief in support of Appellees, Groome Resources Ltd., L.L.C. Consent to the filing of this brief has been granted by counsel for all parties.

The Alzheimer's Association is the national voluntary health agency, organized to promote research on Alzheimer's disease and to represent the interests of the four million people in the United States and their families who are living with the disease. The Association is organized through nearly 200 local chapters and 100 branch offices and over 2500 family support groups in the 50 states. The Association provides information, training, and direct support to people with Alzheimer's and related dementias, their families, and formal caregivers. The Association has been in the lead of efforts at the federal, state and local level to assure access to affordable high quality care for people with Alzheimer's disease and related dementias, with an emphasis on home and community based options for care.

SUMMARY OF ARGUMENT

Appellant Parish of Jefferson has challenged the constitutionality of the Fair Housing Act Amendments of 1988 ("FHAA") as applied to a discriminatory zoning decision barring a community home for persons with Alzheimer's disease. The Association files this brief to present information on the care of persons with Alzheimer's and the impact that discrimination against Alzheimer community homes has on the national market for Alzheimer care.[1]

Alzheimer's disease is one of the largest health problems facing the nation today, and the problem will escalate with the aging of the population. At the same time, the housing and care resources for this population are limited. Community homes are a growing and increasingly important alternative to in-home care and nursing homes, neither of which are sufficient to meet fully the demanding needs of many people with Alzheimer's. In some instances, the community home setting may provide a less costly and more therapeutic environment. Because of the appeal of community home settings, there is an expanding network of Alzheimer

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[1] Briefs filed by Appellee Groome, Intervenor Department of Justice, and Amicus Bazelon Center for Mental Health Law address the legislative history and application of pertinent law, and the Association will not repeat those arguments here. This brief is intended to provide specific information regarding Alzheimer's disease and the community home treatment option. Non-legal sources cited in this brief are available from the Alzheimer's Association, 919 North Michigan Avenue Suite 1000, Chicago, IL 60611, (202) 393-7737.

community homes in the United States. Much like the interstate health care market this Court previously addressed in *United States v. Bird*, 124 F.3d 667, 670 (5th Cir. 1997), the staff, residents, and funding for Alzheimer homes may move in an active interstate market.

Unfortunately, misconceptions and fears about persons with Alzheimer's have on occasion led neighbors to resist the creation of Alzheimer community homes. That is precisely the situation regarding Groome's proposed home. Discriminatory zoning practices against houses for people with disabilities are widespread. When directed at Alzheimer's houses, such practices create significant ripple effects in the national market for Alzheimer services by forcing families to seek alternative housing, sometimes in other states, and disrupting the expansion of services for persons with Alzheimer.

Congress enacted the FHAA[2] to remedy a long history of housing discrimination against persons with disabilities. The legislative history of the

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[2] Under the FHAA, it is unlawful to "discriminate in the sale or rental, or otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . any person associated with that buyer or renter." 42 U.S.C. § 3604(f)(1)(c). The Act defines discrimination as "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." *Id.* § 3604(f)(3)(B). On appeal, Appellant only challenges the constitutionality of the reasonable accommodation provision, 42 U.S.C. 3604(f)(3)(B).

FHAA, together with numerous Congressional hearings and published materials cited herein, document the facts supporting Congress's authority to enact the FHAA either under its Commerce Clause power due to the interstate impacts of local zoning decisions, or under the Fourteenth Amendment in order to remedy the segregation of persons with disabilities such as Alzheimer's. The "reasonable accommodation" standard is a rational and proportional congressional response to a national health care problem and must be upheld.

I. THE INTERSTATE COMMERCIAL MARKET FOR THE CARE OF PERSONS WITH ALZHEIMER'S SUPPORTS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE TO ENACT THE FHAA.

The Supreme Court has repeatedly upheld Congress's power to regulate activities that substantially affect interstate commerce. *See, e.g., United States v. Lopez*, 514 U.S. 549, 558-59 (1995). This Court has adopted and applied that standard to uphold such legislation as the Freedom of Access to Clinic Entrances Act, where proscribed intrastate conduct substantially affects the national market. *See Bird*, 124 F.3d at 670. A review of the national scope of Alzheimer's disease, the national market for the care of persons with Alzheimer's, and the interstate nature of community homes renders the constitutionality of the FHAA clear. As

demonstrated below, discrimination in housing for persons with Alzheimer's has interstate effects sufficient to justify congressional action.

A. Alzheimer Care Is a Major National Health Care Problem that Merits Congressional Action.

Alzheimer's disease is a significant national health care issue that has demanded a nationally coordinated response. Described as a "time bomb" in the nation's health care system,[3] Alzheimer's is a degenerative disease of the brain that primarily attacks the elderly. Currently, over four million Americans suffer from Alzheimer's disease, and that number is expected to swell to over fourteen million by mid-century unless a cure or prevention is found.[4]

As recognized by the National Institute on Aging, Alzheimer's "presents a major health problem for the United States because of its enormous impact on individuals, families, the health care system, and society as a whole."[5] One in every ten persons over 65 and nearly half of those over 85 have the disease. It

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3 *See Alzheimer's Disease: The Time Bomb in Our Health Care System: Joint Hearing Before the House Select Comm. on Aging and the Subcomm. on Aging of the Senate Labor and Human Resources Comm.*, 102d Cong. (1992).

4 *See* Denis A. Evans et al., *Estimated Prevalence of Alzheimer's Disease in the United States*, 68 The Milbank Q. 267, 289 (1990).

5 *See* National Institute on Aging, *1999 Progress Report on Alzheimer's Disease* ("*1999 Progress Report*"), at 2.

affects people of every socio-economic group, race, and ethnicity. Since 1985, Congress has held numerous hearings on Alzheimer's to comprehend its scope and address the massive impact it has on the nation.[6] During those hearings, scores of witnesses recounted their struggles to obtain appropriate housing and care for their loved ones who were afflicted with Alzheimer's disease, and the economic and emotional tolls that struggle exacted.

Because of the significant impact of Alzheimer's on the nation, the federal government has taken the lead in directing and funding nationally coordinated

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6 *See, e.g., Caring for America's Alzheimer's Victims: Hearing Before the House Select Comm. on Aging*, 99th Cong. (1985); *Alzheimer's Disease: Burdens and Problems for Victims and their Families: Hearing Before the House Select Comm. on Aging*, 99th Cong. (1986); *Alzheimer's Disease and Related Dementias: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 99th Cong. (1986); *Caring for America's Alzheimer's Victims: Hearing Before the House Select Comm. on Aging*, 101st Cong. (1989); *Alzheimer's—The Unmet Challenge for Research and Care: Joint Hearing Before the House Select Comm. on Aging and the Subcomm. on Aging of the Senate Labor and Human Resources Comm.*, 101st Cong. (1990); *Alzheimer's Disease: The Time Bomb in Our Health Care System: Joint Hearing Before the House Select Comm. on Aging and the Subcomm. on Aging of the Senate Labor and Human Resources Comm.*, 102d Cong. (1992); *Alzheimer's Disease in a Changing Health Care System: Falling Through the Cracks: Hearing Before the Senate Special Comm. on Aging*, 104th Cong. (1996); *Meeting the Challenges of Alzheimer's Disease: The Biomedical Research that Will Carry Us into the 21st Century: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 105th Cong. (1997); *Alzheimer's Disease: Hearing Before a Subcomm. of the Senate Comm. on Appropriations*, 105th Cong. (1998).

research to solve difficult medical and housing issues regarding the disease.[7] The federal government spent an estimated $400 million on research in 1999 alone, and is expected to spend $466 million in 2000.[8]

B. The Care and Housing of Persons with Alzheimer's Is a Commerical National Market.

The housing and care of persons with Alzheimer's is undeniably a nationwide commercial market. *Compare Bird*, 124 F.3d at 670 (upholding a federal statute because the proscribed conduct affected a national market for clinic services) *with Lopez*, 514 U.S. at 561 (striking the Gun-Free School Zones Act because the mere possession of a gun near a school was not sufficiently tied to any national commercial activity). An integral and substantial aspect of care for persons with Alzheimer's disease is housing. Given the degenerative nature of the disease and its accompanying symptoms, those who suffer from Alzheimer's

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7 *See 1999 Progress Report* at 4-5. The National Institute on Aging ("NIA"), part of the federal government's National Institutes of Health ("NIH"), has primary responsibility for research aimed at Alzheimer's prevention, treatment, and cure. Several other components of NIH also regularly undertake Alzheimer's research initiatives. The NIA also supports a number of research centers, currently 28, that conduct research known as Alzheimer's Disease Centers ("ADC"). ADCs have been responsible for much of the progress in Alzheimer's research over the past fifteen years. In addition to the research performed by the various NIH components, NIH has established an infrastructure that involves researchers from universities and medical centers around the country. *See 1999 Progress Report* at 40, 42, 44-45.

8 *See Alzheimer's Ass'n Statistics* (visited Feb. 18, 2000) <http://www.alz.org/facts/rtstats.htm>

typically cannot live alone. Accordingly, their families must choose among different housing options.

Taken together, the commercial housing decisions made by millions of families of people with Alzheimer's form part of an extensive national market for Alzheimer's care and housing. Traditionally, persons with Alzheimer's and their families had limited choices – either the person with Alzheimer's could be cared for in the home of a family member or be put in a nursing home.[9] Now, as the disease claims more people and knowledge of treatment regimes has grown, the housing options are increasing. For example, providers are increasingly offering various assisted-living accommodations.[10] For some people with Alzheimer's, the small community home, discussed in more detail below, is a valuable option if one is available.

Families who face these difficult housing choices are, in large part, making a commercial decision because of the enormous costs they must invest in long-term housing for their elderly relatives who have Alzheimer's. Overall, Alzheimer's

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9 Currently, almost half of all nursing home residents suffer from Alzheimer's. The average annual cost for nursing home care is $42,000 but can exceed $70,000 in some parts of the country. *See* D.P. Rice, *The Economic Burden of Alzheimer's Disease Care*, Health Affairs, Summer 1993, at 164.

10 *See* Program on Aging & Long Term Care Research Triangle Institute, *Family Members' Views: What Is Quality in Assisted Living Facilities Providing Care to People with*

(...continued)

disease costs an estimated $100 billion or more annually in the United States.[11] The cost of Alzheimer's care to American businesses is more than $33 billion annually – $26 billion is attributed to lost productivity of caregivers and another $7 billion to costs of health and long term care.[12] The average cost of caring for a person with Alzheimer's throughout the course of the disease is $174,000.[13]

Moreover, all of the housing options for persons with Alzheimer's are increasingly interstate in nature as more national providers enter the market.[14] As the elder care market grows, nursing-home operators are consolidating at accelerated rates so that most nursing homes are now owned by large interstate organizations.[15] The developing market for assisted living, furthermore, has

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Dementia? (1997); Harris Meyer, *The Bottom Line on Assisted Living*, Hosp. & Health Networks, July 20, 1998, at 22.

11 *See Agency on Aging* (visited on Feb. 10, 2000) <http://www.aoa.gov/factsheets/alz.html>

12 *See* Ross Kopel, *Alzheimer's Cost to U.S. Business*, A Study for Alzheimer's Ass'n (1998).

13 *See* Richard L. Ernst & Joel W. Hay, *The U.S. Economic & Social Costs of Alzhiemer's Disease Revisited*, 84 Am. J. of Pub. Health 1261 (1994).

14 *See* Lawrence J. Gordon & Andrew Bressler, *Banking: Financing Trends in an Acquisitive Health Care Market*, J. of Health Care Fin., June 22, 1998, at 39.

15 *See id.*

attracted such national developers as the Hyatt Corporation and Marriott International.[16]

Beyond the interstate nature of the care facilities, the national Alzheimer's care market is inherently interstate given the movement of staff, patients, and funds. In *Bird*, this Court looked to the interstate travel of care providers who performed services. *See Bird*, 124 F.3d at 679. Similarly, persons with Alzheimer's need specialized care that is different from the kind of care traditionally dispensed in nursing homes.[17] The care staff in long-term housing facilities is in fact a key determinant in the quality of long-term care for persons with Alzheimer's. Unfortunately, the number of properly trained caregivers is limited. Facilities therefore may need to recruit staff, particularly for supervisory positions, from out of state.

In the same vain, much the way the patients discussed in *Bird* travel interstate, persons with Alzheimer's may travel interstate to obtain proper housing and care. It is not unusual for families to move their loved ones who suffer from

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16 *See* John Greenwald, *Elder Care: Making the Right Choice*, Time, Aug. 30, 1999, at 52. In addition, at least 15 assisted-living firms have gone public in the last six years. *See* Meyer, *The Bottom Line.*

17 *See Alzheimer's Disease and Related Dimentias: Acute and Long-Term Care Services, 1996*, A Report to Congress of the Dept. of Health & Human Services Advisory Panel on Alzheimer's Disease, at 6; Alzheimer's Ass'n, *Key Elements of Dementia Care*, (1997), at 52-54.

Alzheimer's either to be closer to them or to take advantage of the most appropriate care facility, or both. Indeed, one psychologist who specializes in the area notes that "moves cannot be avoided [because] being near family is what's important for the elderly when they live alone in a distant city." Cathy Booth, *Taking Care of Our Aging Parents*, Time, Aug. 30, 1999, at 48. Tim Ryan, a witness at one of the congressional hearings on Alzheimer's, testified about finding care for his wife who was stricken with Alzheimer's at a relatively young age. After Mrs. Ryan's diagnosis, the couple moved from their New York home to Idaho in an effort to find the "best possible environment" for Mrs. Ryan's "comfort and safety." In Idaho, after in-home care became unmangeable due to Mrs. Ryan's worsening condition, Mr. Ryan embarked on a search for a residential care facility "with a staff well-trained in dementia care" and a "home-like environment." Unable to find a facility in his Idaho area, Mr. Ryan eventually had to move his wife to a small, specialized Alzheimer's residence in Santa Barbara, California.[18]

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18 *See Alzheimer's Disease in a Changing Health Care System: Falling Through the Cracks: Hearing Before the Senate Special Comm. on Aging*, 104th Cong. 12-15 (1996) (testimony of Tim Ryan).

Mr. Ryan's story is not unusual among families searching for appropriate residential care for a loved one with Alzheimer's disease.[19]

Finally, as noted above, Alzheimer's care is an extremely expensive proposition. The high cost of housing and care necessarily involves the interstate flow of money as bills are often paid by Medicaid or private insurance.[20] Medicaid, a program funded jointly by states and the federal government, pays for approximately half of all nursing home costs in the country, and two-thirds of nursing home residents receive some help from Medicaid.[21] Those payments are weighted heavily toward persons with Alzheimer's as about half of all nursing home residents suffer from Alzheimer's.[22] Persons with Alzheimer's also are the people who tend to have the longest nursing home stays, and thus exhaust their

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19 *See Hearing Before the Senate Aging Committee* 106th Cong. (1999) (prepared testimony of Colette Appolito) (recounting how, after exploring different options in both states, she moved her mother with Alzheimer's from California to a community home in Ohio); Booth, *Taking Care,* at 48 (describing how author moved her father with Alzheimer's from his home in Texas to California so that he could live in a community home near his daughter).

20 *See* Alzheimer's Ass'n, *Key Elements of Dementia Care* (1997), at 82.

21 *See* Henry J. Kaiser Family Foundation, *The Medicaid Program at a Glance* (1998); Alzheimer's Ass'n, *Last Chance for the Millennium* (1999), at 33.

22 *See* Alzheimer's Ass'n, *Last Chance*, at 33.

own resources to qualify for Medicaid.[23] For those who are not eligible for Medicaid, there has been an increase in long-term-care insurance to help cover the costs of residential care.[24] Even when the care is not covered by any type of insurance, moreover, out-of-state family members may pay for all or part of the costs, and the payments themselves may travel interstate within the organizations that operate nursing homes or other housing facilities.

C. Community Homes Are an Increasingly Important Part of the National Market of Alzheimer Care.

Community homes, located if possible in safe and attractive neighborhoods, are an increasingly vital component of the national housing market for persons with Alzheimer's. Although Alzheimer's homes are commercial operations, their benefits derive from their uniquely residential quality and family-like atmosphere which is beneficial for certain persons with Alzheimer's.

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23 *See id.* Although 80% of Medicaid long-term care dollars are spent on nursing home care, many states are trying to move resources into home and community-based care because it is less expensive and preferred by many families. *See id.*

24 *See* Kristen Hallum, *Medicaid: Another Foe for Nursing Homes*, Modern Healthcare, Nov. 29, 1999, at 64 (citing the increasing importance and visibility of long-term-care insurance).

1. Residential Community Homes Are a Beneficial Housing Alternative for Many Persons with Alzheimer's Disease.

Over the past several years, there has been an expanded focus on community homes as a viable and preferable long-term housing alternative for many persons with Alzheimer's.[25] Community homes offer many persons with Alzheimer's the opportunity to live in a residential neighborhood. Estimates of the current number of community homes for persons with Alzheimer's nationwide are not available but are believed to be in the hundreds and growing.

Caring for a person with Alzheimer's is a twenty-four hour a day, all-consuming job. The strain that the disease imposes on caregiving families is well-documented.[26] Caregivers frequently experience extreme stress, exhaustion, and depression. In-home care can also be expensive and may unnecessarily isolate the patient. Similarly, nursing home care is not an appropriate option for many persons with Alzheimer's who do not need the kind of medical care that most

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25 *See* Elizabeth Oliner, *When Smaller Is Better*, Washingtonian, Oct. 1999, at 104.

26 *See* Alzheimer's Ass'n & National Alliance for Caregiving, *Who Cares? Families Caring for Persons with Alzheimer's Disease* (1999); New England Research Institute, *Depression Among Caregivers of Impaired Elders* (1990); *1999 Progress Report* at 39.

nursing homes are equipped to handle.[27] Conversely, many nursing homes do not have staff specially trained in the care of persons with Alzheimer's or facilities that are conducive to their comfort. They can also be a more costly care option than small community homes.[28]

For many families, small community homes are a welcome alternative. In small community homes, the resident can experience a home-like environment while getting specialized, individual attention.[29] Community homes are based on a social rather than a medical model and operate as a family unit to provide residents the care and support that they need in a familiar, friendly atmosphere.[30] In many cases, community homes can also permit residents more dignity, allow for

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27 *Alzheimer's Disease in a Changing Health Care System: Falling Through the Cracks: Hearing Before the Senate Special Comm. on Aging*, 104th Cong. 45-46 (1996) (statement of Senator Prior).

28 *See* Joel Leon et al., *Alzheimer's Disease Care: Costs and Potential Savings*, Health Affairs, Winter 1998; Peter Uhlenberg, *Replacing the Nursing Home*, The Pub. Interest, June 22, 1997, at 73.

29 Mike Hendricks, *Providing a Place Like Home*, The Kansas City Star, Dec. 20, 1999, at B1.

30 *See* Daniel Lauber, *A Real Lulu: Zoning for Group Homes & Halfway Houses under the Fair Housing Amendments Act*, 29 J. Marshall L. Rev. 369, 383 (1996); Uhlenberg, *Replacing the Nursing Home.*

beneficial interaction with peers, allow the residents more privacy, and provide the greatest amount of normalcy for residents.[31]

A major component in the growing popularity of community homes is the evidence that many persons with Alzheimer's can thrive in the residential settings of community homes.[32] People with Alzheimer's can benefit from a small group residential setting because of the intimacy and family-like relationship with staff and other residents.[33] Locating a community home in a residential neighborhood is one way of ensuring the family-like surrounding that makes Alzheimer's homes successful.[34]

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31 *See* Oliner, *When Smaller Is Better*; Claudia Kalb, *Coping with the Darkness*, Newsweek, Jan. 31, 2000, at 52; Uhlenberg, *Replacing the Nursing Home*.

32 *See Alzheimer's Disease in a Changing Health Care System: Falling Through the Cracks: Hearing Before the Senate Special Comm. on Aging*, 104th Cong. 47 (1996) (statement of Jessie Jacques, R.N.); *Alzheimer's Facts* (visited Feb. 10, 2000) <http://www.Alzheimer.org/slides/Mod3/sld014.htm>

33 *See* Missy Turner, *New Braunfels Gains Assisted-Living Center*, San Antonio Bus. J., April 19, 1999.

34 *See* Lauber, *A Real Lulu*, 29 J. Marshall L. Rev. at 384; U.S. General Accounting Office, *An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled* App. I at 7-8 (Aug. 17, 1983).

2. Despite Their Family Model, Alzheimer Community Homes Are Commercial Entities.

Outwardly Alzheimer's homes appear usual function like any other home in a community. The financial component of a community home, however, has an undeniably commercial aspect, regardless of whether it operates as a for-profit or not-for-profit entity. Residence in a community home is a private transaction governed by contracts for rent, board and care and payment for those services. Staff members who attend to the residents' care and social needs either live in the home, or more commonly, work in shifts, and must be paid.[35] The home's managing organization may have to pay property taxes, utilities, repairs, and all the costs attendant upon any ordinary buyer of a house. If the home is to continue operating, whether for profit or non-profit, the management must ensure that its finances are in order and the home is not running at a persistent deficit.

Not only is the operation of a single home a commercial activity, but the aggregate of those operations is characterized by the same national commercial market traits as more traditional forms of care discussed above. Some community home providers are interstate organizations, with community homes in different

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35 *See* Lauber, *A Real Lulu*, 29 J. Marshall L. Rev. at 384.

states.[36] Some Alzheimer community homes also hire specially trained and skilled staff who must be recruited from the limited national pool of talent.[37] In fact, Groome itself, having been unsuccessful in finding an adequately qualified candidate in Louisiana, recruited its Operations Director from Colorado. (Trial Tr. At 119, 120-21). As with all Alzehimer's housing facilities discussed above, residents of community homes and their families frequently travel and move interstate to visit and/or locate a suitable home.[38]

II. DISCRIMINATION IN HOUSING FOR PERSONS WITH ALZHEIMER'S IS WIDESPREAD AND SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE.

The widespread and continued discrimination against community homes for persons with disabilities justifies congressional legislation under both the Fourteenth Amendment and the Commerce Clause. Alzheimer community homes have not been immune from such discrimination. The effects of this discrimination impact the national market in Alzheimer care services and readily merit the "reasonable accommodation" required by Congress.

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36 *See, e.g., Potomac Group Homes* (visited Feb. 17, 2000) <http://www.potomacgrouphomes.com>

37 *See id.*

38 *See Hearing Before the Senate Aging Comm.* 106th Cong. (1999) (prepared testimony of Collette Appolito); Booth, *Taking Care of Our Aging Parents.*

A. Community Homes Such as Alzheimer's Homes Have Been and Continue to Be Subjected to Local Discrimination.

As discussed in more detail in the brief of the Bazelon Center for Mental Health Law, community homes have been, and continue to be, the subject of repeated instances of discrimination in the form of zoning ordinances for residential areas. Alzheimer's homes are not immune from this discrimination. *See, e.g., Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993). As in this case, communities often employ restrictive definitions of "family" to exclude unwanted community homes from their neighborhoods.[39] These types of zoning laws frequently operate to deprive people with disabilities, including those with Alzheimer's disease, of housing opportunities available to people without disabilities.[40]

Neighbor fears regarding community houses are normally not based in fact. The evidence is overwhelming that community homes do not generate any adverse impacts on residential neighborhoods.[41] Property values do not decline, and the

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39 *See* 1 Patrick J. Rohan, *Zoning and Land Use Controls* § 3.05[7][a][i] (1994).

40 *See* Cindy Lee Soper, Note, *The Fair Housing Act Amendments of 1988: New Zoning Rules for Community Homes for the Handicapped*, 37 St. Louis L.J. 1033 (1993).

41 *See* Lauber, *A Real Lulu*, 29 J. Marshall L. Rev. at 384. Mr. Lauber examined the more than fifty studies on the impact of community homes on property values and reports that "[a]ll of them, despite differing methodologies, have discovered that community homes . . . have no effect on property values, even for houses adjacent to community residences.

(...continued)

homes do not pose any safety, noise, or traffic problems to residential neighborhoods. That is particularly true for community homes for persons with Alzheimer's, as articulated by one neighbor of a home run by Groome. *See Kind Words for Group Home*, The Times-Picayune, July 23, 1999 ("Parking has actually improved because the residents do not drive. The [Alzheimer group] home is one of the quietest and best maintained on the block.").

Nonetheless, the discriminatory enforcement of zoning ordinances still occurs. Zoning decisions are often based on nothing more than neighbor objections to a proposed home. For instance, the neighbors in Jefferson Parish learned of the proposed home and complained to keep out what they perceived to be the "undesirables." In fact, the appropriate Parish departments were about to approve Groome's application until the neighbors objected and a council member intervened. *See* Dist. Ct. Op. at 6. The community's role in delaying approval of the needed accommodation is well documented by the local press.[42]

Recognizing that these types of scenarios were commonplace in communities across the nation, Congress enacted the FHAA. The continued

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Conversely, studies have shown that community residences are often the best maintained properties on the block."

42 In fact, this case would not even be pending before this Court were it not for the outcry of the neighbors. *See* Martha Carr, *Jeff Group Home to Be Appealed: Parish Decided to Act after Elmwood Residents Lobbied*, The Times-Picayune, July 19, 1999.

vitality of the FHAA is clearly needed to protect against such unfounded fears and the resulting housing discrimination so often encountered by persons with disabilities.

B. Zoning Discrimination Against Alzheimer Homes Impacts the National Care Market.

The continuation of discrimination that prevents homes like those operated by Groome from opening substantially affects the nationwide availability of appropriate housing and care for persons with disabilities, including those with Alzheimer's. Although there is a trend toward small community homes as a preferred long-term care option for persons with Alzheimer's, the option is not available to everyone. The supply has simply not caught up to the rising demand.[43] As illustrated by the example of Tim Ryan and others above, a person with Alzheimer's who cannot find a community home in a local community may be forced to travel to find appropriate care, sometimes to another state. Continued discrimination further exacerbates that problem and impacts interstate commerce in Alzheimer's housing. *See Bird*, 124 F.3d at 681 ("[T]he shift in demand for . . . services from those areas where clinic access is obstructed to those areas where it

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43 *See* Uhlenberg, *Replacing the Nursing Home*.

is not represents the sort of interstate economic effect that is beyond the effective control of any one State and is accordingly a proper subject for congressional regulation under the Commerce Clause.") (internal quotations and citations omitted).

As the above facts and examples demonstrate, a neighborhood that keeps out an Alzheimer community home may think it is affecting only a local situation. Those "local" decisions, however, have grave ramifications for a national problem that is rapidly growing worse. Congress was well within its constitutional power in redressing these situations.

III. GROOME'S REQUEST FOR AN ACCOMMODATION IS A "CONGRUENT AND PROPORTIONAL" RESPONSE TO DISCRIMINATORY ZONING.

Under Supreme Court precedent in *City of Boerne* and *Kimel*, Congress may act under the Fourteenth Amendment to redress constitutional injury, as long as the remedy chosen is "congruent and proportional" to the evil being addressed. *See Boerne v. Flores*, 521 U.S. 507, 520 (1997); *Kimel v. Florida Board of Regents*, 2000 U.S. Lexis 498 at 5 (2000). Groome's situation illustrates how "congruent and proportional" the FHAA's impact is.

The economics of group housing dictate that Groome be allowed to house five rather than four residents. As this Court has recognized, community homes

require a certain number of residents to be economically viable. *See Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 179 (5th Cir. 1996) ("We recognize that the economics of group living arrangements often require a critical mass of residents in order to make feasible the type of alternative living arrangements that the Fair Housing Act was designed to encourage."). Most community homes, particularly those like Groome that rely solely on residents' payments to cover operating costs, typically need more than four residents to operate.[44] The principle of economic viability holds true regardless of whether the home or the organization operating it is a for-profit or non-profit entity because both types of homes are needed in the tight housing market and both must operate economically.

Groome is forced by this economic reality to run its homes with five residents rather than the four persons written into the Parish's residency restrictions. This intrusion on the Parish is extremely minimal: the Parish itself has previously granted variances for community homes housing up to ten persons, and most frequently for six.[45] There is absolutely no evidence that the addition of one resident beyond that currently allowed under the zoning ordinance will

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[44] *See City of Edmonds v. Oxford House*, 514 U.S. 725, 729 (1995); Lauber, *A Real Lulu*, 29 J. Marshall at 387.

[45] *See Group Homes in Jefferson Parish,* The Times-Picayune, July 21, 1999.

fundamentally alter the nature of the residential neighborhood. In fact, Groome's home would pose far less of a problem than other approved uses under the Parish's residential zoning ordinance such as in-home beauty salons or day care centers, and they are a far cry from other prohibited uses such as sorority or fraternity houses.

Considering the distinct harm done to persons with Alzheimer's by excluding them from neighborhood community living, the "reasonable accommodation" required by the FHAA is "proportional" in the extreme. The intentional segregation of people with disabilities is a distasteful and illegal activity, as the Supreme Court held in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 433, 450 (1985). The constitutional evil attending such segregation merits far stronger action than Congress has actually taken in the FHAA, whose "reasonable accommodation" provision requires only that local governments bend their rules as "reasonable and necessary" to provide equal housing opportunities to people with disabilities. Requiring the Parish to allow a five-person home where economics so dictate is well within the bounds of *Boerne* and *Kimel*.

Conclusion

Jefferson Parish's actions, repeated across the nation, would deprive people with Alzheimer's of the right to obtain adequate and properly located community housing. Congress acted appropriately in creating the FHAA to prevent such actions, and the FHAA is well within the bounds of constitutionality. For all of the foregoing reasons, Amicus urges this Court to affirm the district court's opinion and uphold the constitutionality of the FHAA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Alzheimer's Association as *Amicus Curiae* in Support of Appellee and Supporting Affirmance of the Decision Below, has been served upon the following counsel of record, by forwarding same, in both paper and electronic form, by overnight mail, this 22nd day of February, 2000.

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Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains 5206 words.

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Christine R. Ladd

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

"Amicus"

No. 99-30776

GROOME RESOURCES, LTD., L.L.C., Plaintiff-Appellee	)	Appeal from the United States District Court, Eastern District of Louisiana, Civil Action No. 99-CV-1491-J
Versus	)	
PARISH OF JEFFERSON, Defendant-Appellant	)	The Honorable Carl J. Barbier District Judge

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BRIEF FOR BAZELON CENTER FOR MENTAL HEALTH LAW AND OTHER GROUPS LISTED BELOW AS AMICI CURIAE IN SUPPORT OF APPELLEE AND IN SUPPORT OF AFFIRMANCE OF THE RULING BELOW

Amici Curiae:

Bazelon Center for Mental Health Law
AARP
Alliance for Children and Families
American Network of Community Options and Resources
The Arc of the United States
Assisted Living Federation of America
National Association of Protection & Advocacy Systems
National Fair Housing Alliance
United Cerebral Palsy Associations

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INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29, *amici curiae* respectfully submit this brief in support of Appellees, Groome Resources Ltd., L.L.C. Consent to the filing of this brief has been granted by counsel for all parties.[1] The *amici* submitting this brief are organizations who represent, in various capacities, the interests of people with disabilities who rely upon the Fair Housing Amendments Act of 1988.

SUMMARY OF ARGUMENT

For the past twelve years, organizations have used the provisions of the Fair Housing Amendments Act of 1988 (the "FHAA") to obtain suitable housing for people with disabilities. In many instances such housing, and in particular community homes in residential areas, has been foreclosed by local zoning codes enacted or enforced under pressure from residents who desire, irrationally or prejudicially, to keep people with disabilities out of their neighborhoods. The FHAA has proven to be an effective tool not only in the fight to overcome these prejudicial and exclusionary reactions, but also in demonstrating to local citizens

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[1] The interest of each amicus is set forth in Appendix A. Non-legal sources cited herein are available from the Bazelon Center, 1101 15th Street, N.W. Washington, D.C. 20005, (202) 223-0409.

the viability and safety of residential community homes and the value of their residents to the community.

Appellant Parish's facial attack on the FHAA threatens to undermine the primary legal basis for preventing housing discrimination against people with disabilities. A reversal of the district court's ruling would affect not just people with Alzheimer's disease, but also senior citizens with other physical or mental disabilities, as well as people of any age who have vision impairments, are in wheelchairs, or have mental disabilities. All of these groups have fought for many years for the right to live a normal life in housing available to people without disabilities.

Amici file this brief to provide the Court with information on the role of the FHAA and to demonstrate, on the facts and the law, that the FHAA is eminently constitutional. Congress acted appropriately under the Commerce Clause to address discrimination in a *commercial* activity – the buying, selling, and renting of housing – that affects the national housing market and in particular the market for people with disabilities. Congress also acted appropriately under the Fourteenth Amendment to address zoning discrimination against people with disabilities with a remedy that has an exceedingly light touch on local governments – mere "reasonable accommodation" in zoning decisions. The legislative history

of the disability amendment to the Fair Housing Act is replete with facts that support Congress's conclusion that it had Constitutional authority under both the Commerce Clause and the Fourteenth Amendment to deal with the nation's problem of discriminatory and exclusionary housing practices. *Amici* request that the Court uphold the FHAA and in doing so confirm that the nation's laws redressing discrimination will not lightly be overturned.

ARGUMENT

I. The FHAA Addresses the Goal of Eliminating Segregation and Nationwide Discriminatory Housing Practices.

Succumbing to neighborhood pressure, the Parish refuses to make an extremely modest accommodation – five unrelated residents instead of the four permitted as of right – for Groome's community home. This direct and irrational discrimination is precisely the kind of response that for many years has kept people with disabilities locked up in institutions and excluded from "normal" society. The FHAA was designed to address the national housing problem caused by such discrimination.

A. Community Living Programs for People with Disabilities Is a National Policy Designed to Redress Decades of Segregation.

The treatment of people with disabilities, both mental and physical, has had a particularly sordid history in this country. Well into the middle of the 20th Century, the stated goal and official policy of many states was to segregate people with disabilities from "normal" society.[2] Those with severe disabilities were

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[2] *See* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 399 (1991); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 U.C.L.A. L. REV. 1341, 1342 (June 1993); Stanley S. Herr, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 18-29 (1983); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 460-63 (1985) (Marshall, J., concurring in part and dissenting in part).

considered "defective," "abnormal," "dangerous," a "blight" on society, and generally to be excluded and hidden.[3] The segregation of people with disabilities from society primarily took the form of isolation in institutionalized wards and similar facilities. *See Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 2181 (1999).

To society's credit, we have moved well beyond the early 20th Century approach and now generally recognize, at least in terms of health care and social policy, that people with disabilities have a right to a normal life and to contribute their gifts and energy to our society.[4] Institutionalization and segregation have largely given way to efforts to integrate people with disabilities into local communities, schools and universities, recreational facilities, political functions, sporting events, and every facet of normal community life.

For many persons with disabilities, eliminating segregation depends on the availability of community home living in residential neighborhoods. In the recent *Olmstead* case, the Supreme Court held that segregation of persons with disabilities into institutions may constitute discrimination and acknowledged the

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3 *See* Cook, *supra n.* 2, at 400-03; *City of Cleburne*, 473 U.S. at 461-62.

4 Integration of people with disabilities found its way into national policy discussions in the 1960s. *See, e.g.*, Bengt Nirje, *The Normalization Principle and its Human Management Implications, in* PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 179, 186-87 (R. Kugel & W. Wolfensberger eds. 1969).

importance of the community living alternative. 119 S. Ct. at 2187. Where community living is appropriate, it contributes to the independence of the residents, while providing a support group for dealing with the still-numerous barriers faced by people with disabilities. The federal government has repeatedly recognized the benefits of community living and has passed several laws designed to foster such arrangements on a national scale.[5]

Community homes should be placed across residential neighborhoods rather than clustered in poor neighborhoods or in commercial or industrial districts.[6] If properly located, community living arrangements are an effective and critical alternative to hospitalization or nursing homes for many people with disabilities. The interaction in neighborhoods also increases acceptance of people with disabilities and tolerance for diversity.[7]

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[5] *See, e.g.*, Children and Community Mental Health Assistance Act of 1994, 42 U.S.C. § 290 *et. seq.*; Letter from Donna E. Shalala, Secretary, Department of Health and Human Services, to Governors, Jan. 14, 2000, available at http:\www.hcfa.gov/medicaid/smd1140b.htm (visited Feb. 16, 2000). Omnibus Budget Reconciliation Act of 1981, Publ. L. No. 97-35, § 902(e)(2)(B), 95 Stat. 357, 360 (repealing 1963 act and offering state Medicaid waivers for home and community-based services); Social Services Amendments of 1974, Pub. L. No. 93-647, § 2001, 88 Stat. 2337 (codified at 42 U.S.C. § 1397), (1988) (favoring community-based care over institutional care); Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 210(b), 88 Stat. 633 (codified at 12 U.S.C. § 1701q(d)(4)) (1988) (subsidies for developmentally disabled residential facilities).

[6] Martin Jaffe & Thomas P. Smith, American Planning Ass'n, *Siting Group Homes for Developmentally Disabled Persons* at 8 (Oct. 1986) (citing Sylvia Bercovici, American Ass'n on Mental Deficiency, *Qualitative Methods and Cultural Perspectives in the Study of Deinstitutionalization*, Monograph 4 (R. Bruininks ed. 1981).

[7] *See* 134 Cong. Rec. S10,552 (daily ed. Aug. 2, 1988) (statement of Sen. Weicker, sponsor

B. Discriminatory Zoning Is Widely Directed at Community Homes and People with Disabilities.

Despite the progress of integration, a mere decade ago it was not only commonplace for landlords to refuse to rent to people with disabilities, but they could do so without legal restriction in many states. As community living arrangements gained momentum, the irrational and prejudicial practices used by landlords were adopted by fearful neighborhoods and found their way into local zoning decisions.[8] The familiar "NIMBY" syndrome – not in my backyard – created pressure on local governments to ban community homes outright or limit residence in "family" neighborhoods to groups of relatives only.[9] When these approaches failed, localities resorted to more discreet but equally effective bans by, for instance, limiting the number of unrelated persons who could live in homes in neighborhoods, or by requiring special permits and variances that allowed local prejudice full voice.[10] As reflected by the facts in *Groome*, the practice continues

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of FHAA) ("The attitudes, stereotypes, and misconceptions of the rest of society about people with disabilities are not going to change until those of us without disabilities have the opportunity to be around people with them – as classmates, as colleagues, and as neighbors.").

[8] *See* G. Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions*, 66 MASS. L. REV. 125 (1981); P. Rohan, 1 *Zoning and Land Use Controls* at § 3.05[7][A][i] (1994).

[9] *See* American Psychiatric Association, *A Task Force Report of the American Psychiatric Ass'n Homeless Mentally Ill* (1984); Carol K. Sigelman et al., *Community Reactions to Deinstitutionalization*, 45 J. REHABILITATION 52, 52 (Jan./Feb./Mar. 1979); Alan I. Leshner, *Outcasts on Main Street* at 24-26 (1992).

[10] *See generally Oxford House v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993); *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *Stewart B.*

today.

When Congress held hearings on adding people with disabilities to the Fair Housing Act in 1979 and 1986-1988,[11] the testimony described the impact of discriminatory zoning on housing and particularly on community homes. One state official testified that efforts in his state to locate community housing

> are 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 same witness noted the national scope of the problem, reporting that only 28 states and fewer than 50 local governments offered any legal protection against this discrimination.[13] Another witness representing 40 national disability organizations testified that community homes in particular had been the focus of "segregation" by state and local governments and their zoning practices.[14] Senator Mathias commented on the widespread unavailability of "small-scale residential facilities" for persons with mental disabilities due to the irrational fear of people with

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McKinney Found. v. Town Plan & Zoning Comm'n, 790 F. Supp. 1197 (D. Conn. 1992).

11 The original FHA was passed in 1968 to deal with racial discrimination. Gender discrimination was added in 1974, and protection for people with disabilities and families with children was added in 1988.

12 *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 100th Cong. 95-97 (1987) at 239 (statement of Homer C. Floyd, Executive Director, Pennsylvania Human Relations Commission).

13 *Id.* at 241.

14 *Id.* at 97 (statement of Ms. Bristo).

disabilities that blocks the acceptance of such community homes.[15] Other testimony emphasized the importance of ensuring access to community home living arrangements.[16] A Congressional Research Service report identified "restrictive zoning ordinances" as the "main difficulty" in siting alternative living arrangements for persons needing specialized assistance.[17]

The Congressional hearings solidified consensus on the national scope and impact of the practices of local communities who were not open to the integration of people with disabilities into their communities. They also set the stage for the legislation at issue in this case, the FHAA. The wide, bipartisan support for adding people with disabilities to housing discrimination laws reflects the widespread recognition that the federal government needed to act to redress a national problem caused by repeated localized discriminatory actions. Congress' authority to do so was never challenged.[18]

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15 *Fair Housing Amendments Act of 1986: Hearing on H.R. 4119 before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 99th Cong. 50 (1986).

16 *Id.* at 102-03 (statement of Bonnie M. Milstein, Civil Rights Task Force, Consortium of Citizens with Developmental Disabilities).

17 *See Fair Housing Act Amendments of 1979: Hearings on H.R. 2540 before the Subcommittee on Civil and Constitutional Rights of the Committee of the Judiciary,* 96th Cong. 682 (1979).

18 The Parish's reference to the statement in H.R. Rep. No. 100-711 (1988) (Parish's brief at p. 43) that the FHAA would be deemed unconstitutional is inaccurately characterized. The constitutional debate surrounding the FHAA regarded the use of ALJs in the enforcement scheme, not Congress' authority to regulate housing for people with disabilities. *See, e.g.*, House Report No. 100-711 at 70-75 (additional views of same representatives quoted by the Parish).

II. The Commerce Clause Authorized Congress to Enact Legislation Preventing Housing Discrimination Against People with Disabilities.

Unlike the law struck down in *United States v. Lopez,* 514 U.S. 549 (1995), the FHAA is well within Congress' Commerce Clause power because it addresses a quintessentially commercial activity in the national housing market for people with disabilities.

A. *Lopez* Recognizes Congress' Authority to Address Economic Matters that Affect Interstate Commerce.

Under *Lopez* and its progeny, Congress remains free to regulate commercial activity that it rationally believes affects interstate commerce, as it has done in the FHAA. *See United States v. Kirk*, 105 F.3d 997 at 999 (5th Cir. 1997); *United States v. Robinson*, 119 F.3d 1205, 1211 (5th Cir. 1997).

The Supreme Court has long recognized that Congressional authority under the Commerce Clause is extensive and necessary to ensure the viability of commerce among the fifty states. *Lopez* is not to the contrary but reflects a situation in which Congress attempted to regulate activity that (1) had no apparent relationship to commerce (gun possession near a school); (2) lacked any connection to interstate commerce (e.g., no requirement of interstate gun transport or purchase), and (3) was not supported by any Congressional findings or legislative history linking the regulated activity with commerce. *Lopez*, 514 U.S.

at 561, 562, 567; *see also id.* at 580 (Kennedy, J. concurring) ("[U]nlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus."). Under those facts, the five-Justice majority in *Lopez* agreed the school zone gun law reached too far.

Where the activity being regulated is commercial – as in the housing market and national health care markets at issue here – the constitutional authority is more apparent. The *Lopez* majority was careful to reiterate and emphasize that Congress' Commerce Clause authority continues to have a long reach regarding commercial activities:

> We do not doubt that Congress has authority under the Commerce Clause to regulate numerous *commercial activities* that substantially affect interstate commerce . . . .

Id. at 565-66 (emphasis added). The concurring justices likewise warned of the "immense stake in the stability of our Commerce Clause jurisprudence," and as to purely commercial activities they declared that "[s]tare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions *of a commercial nature*." *Id.* at 574 (emphasis added). They further cautioned "great restraint before the Court determines that the Clause is insufficient to support an exercise of

the national power." *Id.* at 568 (Kennedy, J., concurring).

The Fifth Circuit also recognized that *Lopez*'s facts were particularly deficient under the Commerce Clause, *see United States v. Lopez*, 2 F.3d 1342, 1359, 1362-63 (5th Cir. 1993). Since *Lopez* this Court has upheld a number of federal statutes under Commerce Clause challenges, including the Freedom of Access to Clinic Entrances Act (*United States v. Bird*, 124 F.3d 667 (5th Cir. 1997)); the Hobbs Act (*United States v. Hickman*, 179 F.2d 230 (5th Cir. 1999); *United States v. Miles*, 122 F.3d 235 (5th Cir. 1997); *United States v. Robinson*, 119 F.3d 1205 (5th Cir. 1997)); the Child Support Recovery Act (*United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997)); the Anti-Car Theft Act (*United States v. Coleman*, 78 F.3d 154 (5th Cir. 1996)); the Armed Career Criminal Statute (*United States v. Harkrider*, 88 F.3d 1408 (5th Cir. 1996)); and numerous federal gun control laws (*see, e.g., United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995); *United States v. Knutson*, 113 F.3d 27 (5th Cir. 1997)).

Some of these laws were upheld in part because they directly involved commercial activity (*e.g.*, the Child Support Recovery Act in *Bailey*). Others were upheld even though they acted upon noncommercial activity because the aggregate effect of those activities impacted a national commercial market. In *Bird*, for instance, the activity involved was essentially noncommercial (interference with

persons seeking services at clinics; *Bird,* at 675). The Court nevertheless found that the facts documented in the legislative history and elsewhere identified a "nationwide problem" of interference with abortion rights under which Congress could have reached a "fair inference, supported by Congressional testimony," that localized interference with abortion rights would affect the national market. *Id.* at 678. The Court specifically recognized, in contrast to the lack of legislation facts in *Lopez*, that the facts developed after "months of legislative hearings, research, and debate" on the law at issue were "entitled to deference and should be interpreted . . . to support a constitutional reading of the Act." *Id.*

Lopez has constructed a part of the outer wall around the Commerce Clause power (*see Kirk*, 105 F.3d 997), but it is not applicable in a case involving intrastate commercial activity that impacts a broad, nationwide commercial market. This is all the more the case when Congress has taken the trouble to develop legislative facts supporting the commercial and interstate nature of the regulated activities.

B. Congress Had Authority to Enact the FHAA to Address Intrastate Commercial Activities that Substantially Affect Interstate Commerce.

Under the third *Lopez* category,[19] as applied by this Court in *Bird*, the

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[19] The *Lopez* court identified three categories of activities that are properly subject to the

FHAA's proscription on housing discrimination against people with disabilities is constitutional because Congress could have rationally concluded that housing discrimination is intrastate commercial activity that substantially affects interstate commerce.

1. The FHAA Addresses Commercial Activity in the Sale and Rental of Housing.

In contrast to *Lopez*, the FHAA regulates *commercial* activity. Direct regulation of commercial activity does not invoke the same level of concern as legislation that affects intrastate, noncommercial activity. *See Bird*, 124 F.3d at 675-78 (emphasizing the "intrastate, *noncommercial* conduct" in that case) (emphasis in original). It is easier to divine Congress' rationale in regulating intrastate activity if that activity is in fact commercial in nature. Any rational link with an interstate market should suffice because the "substantiality" of interstate impacts then arises from the aggregate impact of many small, intrastate

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Commerce Clause power. The first (instruments of commerce) is not at issue here. Under the second, persons and things moving in interstate commerce, the facts supporting the FHAA and Groome's lawsuit are sufficient to support the act because of the documented interstate movement of people with disabilities (as reflected in the Congressional hearings described *infra* Section II.B.2.b) and also because of the specific *Groome* facts regarding the movement of staff and money in interstate markets. It is the movement of staff and money that distinguishes this case from *Bird*, in which the lack of any interstate facts specific to that case required a finding that the law as applied to those facts was not authorized under the second *Lopez* prong. *Amici* believe the FHAA is fully supportable under either the second or third *Lopez* prong (substantial effect on interstate commerce), but we focus on the third prong herein as more relevant to the *Groome* situation.

commercial transactions. *See Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Robinson*, 119 F.3d 1205, 1209, 1214-15 (5th Cir. 1997) (effect of single intrastate activity can be slight as long as cumulative effect is substantial); *United States v. Miles*, 122 F.3d 235, 241 (5th Cir. 1997); *Lopez*, 514 U.S. at 559-560 and cases cited therein (the Court has upheld "wide variety of congressional Acts regulating intrastate economic activity. . .").

It is hard to imagine any activity more transparently commercial than the buying, selling, and rental of housing. Zoning decisions that affect the right to buy or use living facilities thus affect a commercial transaction. Appellant's attempt to demonize Groome as a for-profit institution merely illustrates the commercial nature of the transaction the Parish is prohibiting.[20] If child support debt and payments are a commercial transaction, as this Court recently held in *Bailey* (115 F.3d at 1228), then surely the contracts and payments associated with the purchase and use of real estate are more so. Because Congress has focused on commercial activity, the Court need only examine whether local discriminatory practices in the aggregate have any significant effect on interstate commerce. This question can only be answered in the affirmative.

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[20] Appellants' attempt to set for-profit institutions aside for lesser protection is meaningless, because both for-profit and non-profit homes have to operate without deficits to stay in business. Furthermore, because some areas of the country do not have the non-profit infrastructure to provide such housing, it would be inappropriate to draw such an artificial distinction.

2. The FHAA Regulates a National Problem in an Interstate Housing Market that Affects the Availability of Housing Nationwide for People with Disabilities.

In addition to its commercial character, the activity addressed by Congress in the FHAA – the availability of housing for people with disabilities – affects a national market, both in individual instances and in the aggregate.

a. Housing Discrimination Against People With Disabilities Is an Interstate and National Problem.

Congress has addressed housing-related subjects under the Commerce Clause repeatedly, and courts have upheld those acts by recognizing that the housing rental market is an interstate one. *See, e.g., Russell v. United States*, 471 U.S. 858, 862 (1985); *McLain v. Real Estate Board of New Orleans,* 444 U.S. 232 (1980); *United States v. Patterson*, 792 F.2d 531, 533 (5th Cir.), *cert. denied*, 479 U.S. 865 (1986).[21] Even post-*Lopez*, the courts have upheld federal laws regulating the housing rental market. *See, e.g., United States v. McMasters*, 90 F.3d 1394, 1398-99 (8th Cir. 1996) ("rental real estate represents an ongoing commercial enterprise, which frequently has interstate connections. There is little question that Congress may regulate other aspects of residential rental real estate . . . .") (citing

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[21] In *United States v. Corona*, 108 F.3d 565 (5th Cir. 1997), a panel of this Court acknowledged *Russell* but questioned whether under *Lopez* mere rental alone would suffice without a showing of "substantial" impact of a particular rental activity on an interstate market. The Court need not address here the unanswered question in *Corona* because widespread zoning discrimination against people with disabilities, as documented in the legislative history, has a

to the Fair Housing Act); *United States v. Martin*, 63 F.3d 1422, 1426-28 (7th Cir. 1995); *United States v. Jones*, 178 F.3d 479, 480 (7th Cir. 1999).

The impact of the FHAA goes beyond mere rental, moreover, to address the lack of suitable housing for people with disabilities nationwide. As reflected in Section I.A above and in the amicus brief filed by the Alzheimer's Association, the need for community homes in residential areas is critical, and the shortage is in part due to local zoning discrimination. Victims of such discrimination are forced to search for acceptable housing in areas not closed to them, and it is entirely rational to assume that many of them must do so across state borders. Community homes in particular are affected in an interstate manner by zoning exclusion because it forces residents and staff to search for alternatives, frequently in other states. *See infra* pp. 16-17 (testimony and examples in legislative history). Groome's situation – where the seller of the house does not live in Louisiana; the money would have to travel by means of interstate commerce (*e.g.*, bank wire) to complete the transaction; [22] and staff and potentially residents will come from out of state – is merely one example of the interstate impacts from discriminatory zoning.

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substantial interstate impact on its face.

[22] In *Bailey*, this Court held that child support payments that must travel interstate are by themselves a sufficient basis for Commerce Clause jurisdiction. 115 F.3d at 1226. The interstate payment required of Groome is equally sufficient.

b. The Legislative History Documents the Interstate Impact of Zoning and Housing Discrimination.

The Court should have little difficulty recognizing the interstate ramifications of housing discrimination, because that impact is documented in the legislative history of the FHAA. Testimony before Congress during the 1979 and 1986-1988 hearings[23] repeatedly emphasized both the scope of the problem and its interstate impacts. Such a legislative history is not an absolute requirement for constitutionality, nor is this Court limited to the facts presented to Congress. *See U.S. v. Kirk*, 105 F.3d 997 (5th Cir. 1997) (recognizing that *Lopez* rejected a requirement of formalized Congressional findings); *Scott v. University of Mississippi*, 148 F.3d 493, 501 (5th Cir. 1998). Nevertheless, the legislative history of the FHAA is entitled to substantial weight and deference. *See Kirk,* 1997 U.S. App. LEXIS at *5; *Bird*, 124 F.3d at 678; *Robinson*, 119 F.3d at 1212.

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[23] In 1979 Congress first debated adding people with disabilities to the FHA. The House passed such a bill but the Senate fell three votes short of breaking a filibuster. Hearings on the same matter resumed in 1986, and the law was finally passed in 1988. *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 100th Cong. 151 (1987). During the 1988 hearings, there is repeated reference by the bill's sponsors and leaders of their awareness of and reliance on the 1979 hearings and fact-finding to support the 1988 version of the bill. *See, e.g., id.* at 1 (Sen. Simon), 151 (Sen. Kennedy); *Fair Housing Amendments Act of 1987, Hearings on H.R. 1158* Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 100th Cong. (1987); *Hearings on H.R. 4119* at 86 (HUD General Counsel responding to question by Rep. Slobodin).

The Congressional proceedings and hearings on inclusion of people with disabilities in the FHA spanned ten years and encompassed almost twenty pieces of related legislation, four House and Senate reports, thirty-one days of testimony, the appearance of over 150 witnesses, and thirty-seven statements in the Congressional record.[24] In hearings in 1987, the Senate Judiciary Committee learned that 20 million Americans with physical disabilities were routinely excluded from most private housing; that hundreds of thousands of persons with mental impairments were similarly forced to live in institutions and nursing homes because of the lack of residential housing; and that society's misconceptions, ignorance, and prejudice were the cause of this exclusion.[25] Testimony revealed the extent to which discriminatory housing arrangements affected persons in the military married to spouses with disabilities, including those who moved across state boundaries for military reasons but encountered discrimination in their new state.[26] Similarly, a representative of the Paralyzed Veterans of America recounted

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[24] These figures are based on a compilation of the proceedings involving H.R. 1158 (as passed into law), S. 558, S. 876, and H.R. 4425 from the 100th Congress; H.R. 4119, S. 139, S. 2040, S. 2146, and H.R. 5143 from the 99th Congress; S. 1220 and S. 1612 from the 98th Congress; S. 506, H.R. 2540 and H.R. 5200 from the 96th Congress; and H.R. 3504 and S. 571 and H.R. 7787 from the 95th Congress, all of which related to the inclusion of people with disabilities in the FHA.

[25] *Hearings on S. 558*, at 95-97 (statement of Marca Bristo representing 40 national disability organizations).

[26] *Fair Housing Amendments Act of 1986: Hearing on H.R. 4119 before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 99th Cong. 244 (1986)

numerous incidents of discrimination against former military personnel returning to their home states (thus moving in interstate markets), reported by chapters throughout the United States and Puerto Rico.[27] Another witness recounted the number of states that failed to protect veterans with disabilities against discrimination, concluding "these are problems that go across the country, in all areas of the country."[28] Some of the testimony involved students at colleges and universities, who are among the most mobile and interstate of persons seeking residence.[29]

Committee leaders expressed their own concern that the repeated zoning exclusion of viable community homes and other housing for people with disabilities is an unacceptable national problem as deserving of federal action as similar discrimination against minorities. *See, e.g.*, H.R. No. 100-711, at 13 (1988); *Hearings on S. 558* at 4 (statement of Sen. Kennedy). Likewise, on the floor of the Senate and House, other statements were directed at the extent of the problem and the need for national action.[30] The bill's provisions directly target discriminatory zoning practices across the nation:

(statement of Sharon Mistler, spouse of military husband).

27 *Id.* at 252-53, 258-62 (statement of David M. Capozzi, Associate Advocacy Director, Paralyzed Veterans of America).

28 *Id.* at 277 (statement of Ruth Hall-Phillips, Paralyzed Veterans of America).

29 *Id.* at 262 (statement of Mr. Capozzi).

30 *See, e.g.*, 134 Cong. Rec. H4604 (daily ed. June 22, 1988) (statement of Rep. Rodino); *id.*

> These new subsections would also apply to state or local land use . . . laws, regulations, practices or decisions which discriminate against individuals with handicaps. . . . [T]hat authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or *land-use requirements on congregate living arrangements among non-related persons with disabilities*. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities. *The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices."*

H.R. Rep. No. 100-711, at 24 (1988) (emphasis added).

Perhaps most telling, during the 1979 hearings that led to the 1988 amendments, the Library of Congress's Congressional Research Service prepared an extensive legal memorandum analyzing the constitutionality of the inclusion of people with disabilities in the FHA under both the Commerce Clause and the Fourteenth Amendment. *See Fair Housing Act Amendments of 1979: Hearings on H.R. 2540 before the Subcommittee on Civil and Constitutional Rights of the Committee of the Judiciary,* 96th Cong. 662-697 (1979) ("Legal Analysis of Issues Relating to Draft Legislation Amending the Fair Housing Act to Prohibit Discrimination Against Handicapped Persons"). In nine pages of analysis, the Research Service reviewed existing Supreme Court and federal circuit precedent on the Commerce Clause power, applied it to discrimination against people with

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at H4611 (statement of Rep. Miller); *id.* at H.4613 (statement of Rep. Coehlo).

disabilities, and ultimately concluded:

> Discrimination against the handicapped as prohibited by the proposed Fair Housing Amendments of 1979 (draft legislation) would in all probability *have some effect upon interstate commerce*, especially in view of the mobility of persons in this country. Persons are constantly moving to and from States and most families live in several different localities during their lifetimes. *State and local land use and housing controls which discriminate against handicapped persons keep such persons from living in particular areas or cause them to reside in discrete, undesirable areas thus obstructing the flow of housing materials as well as persons across state lines*. Specific acts of such discrimination, when magnified to a general trend, *affect commercial dealings, practices and opportunities in interstate commerce*.

Id. at 676 (emphasis added). The report added that "legislation on a national scale would be a reasonable means for combatting such a problem [i.e., local housing discrimination against people with disabilities], one not being effectively dealt with on the state, local or judicial levels." *Id.* at 677-78. The same report specifically singled out local government discriminatory zoning rules as a particularly important federal target:

> Community or group homes have been seen by many people as the most beneficial method for caring for handicapped persons who need certain specialized assistance. Difficulties are also presented by this approach – the main difficulty being that *many of these alternative living arrangements are often simply not available due to various problems such as restrictive zoning ordinances*.

Id. at 682. This report conclusively establishes that Congress not only investigated the facts supporting an interstate commerce connection, it even had the facts supporting Commerce Clause authority legally analyzed before passing the

amendments. As this Court stated in *Bird*, such Congressional effort is entitled to considerable deference. *Bird*, 124 F.3d at 678.

The FHAA readily passes scrutiny under *Lopez* and this Court's precedent. The FHAA suffers neither of the constitutional infirmities – the lack of any commercial nexus and the total absence of legislative facts – found in *Lopez*. Instead, it is in line with, and even surpasses, the facts in cases like *Bird* and *Kirk* where this Court has upheld the Commerce Clause power *even without* the presence of a regulated commercial activity, legislative facts, or specific facts tying the matter at issue to interstate commerce. The FHAA as applied to Groome's situation has all three. These elements take the constitutionality of the FHAA beyond serious challenge under the plenary Commerce Clause power.

III. The Fourteenth Amendment Gives Congress the Power to Prevent Housing Discrimination Against People with Disabilities.

Under the Supreme Court's recent decisions in *City of Boerne* and *Kimel*, and under this Court's decision in *Coolbaugh*, the FHAA is a legitimate and proportional response to a well-documented discriminatory practice that is well within Congress' authority under Section 5 of the Fourteenth Amendment.

A. Congress Has Wide Latitude to Address Fourteenth Amendment Violations as Long as Its Remedy is "Congruent and Proportional" to the Identified Violation.

The Supreme Court has relied upon a balancing test to determine the validity of legislation enacted under Congress' Section 5 power. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court described this test, stating that the role of the judicial branch is to ensure "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. 507, 520 (1997). The Court recently re-affirmed this approach in *Kimel v. Florida Board of Regents*, 2000 U.S. Lexis 498 at *4-*5 (2000); *see also Coolbaugh v. Lousiana*, 136 F.3d 430, 434 (5th Cir. 1998) (upholding the constitutionality of the Americans with Disabilities Act under the *Boerne* approach).

As this Court has stated, "This proportionality inquiry has two primary facets: the extent of the threatened constitutional violations, and the scope of the steps provided in the legislation to remedy or prevent such violations." *Coolbaugh*, 136 F.3d at 435. Thus, the harms prevented are to be weighed against the burden of the means of enforcement that Congress has chosen.

In permitting Congress to remediate potential Fourteenth Amendment violations, the Supreme Court has recognized the reality that Congress must be

given latitude. In particular, Congressional action under Section 5 may not only address direct constitutional violations, but may also sweep within its prohibitions other activity which may in and of itself not be an outright violation of that amendment:

> 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 518 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)); *see also Coolbaugh*, 136 F.3d at 434. Because of the breadth of Congress' Section 5 power, "Congress must have wide latitude" in determining appropriate legislation to enforce the equal protection clause. *City of Boerne*, 521 U.S. at 520. Courts must, therefore, give deference to Congress' identification of Fourteenth Amendment violations and its selection of means to combat them. "[t]he judiciary's 'sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Coolbaugh*, 136 F.3d at 436 (citing *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180 (1997)); *see also Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (stating that it is "for Congress . . . to assess and weigh the various . . . considerations . . . . It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.").

B. The Extensive and Irrational Discrimination Against People with Disabilities Identified by Congress Constitutes a Serious Constitutional Injury.

Through the FHAA, Congress has readily identified and quantified the extent of the Fourteenth Amendment "injury" to be remediated – discrimination in housing and zoning practices against people with disabilities. The Supreme Court has already recognized this type of discrimination as a constitutional injury in *City of Cleburne v. Cleburne Living Center* (473 U.S. 432, 448 (1985)) in striking down a local zoning ordinance requiring a special use permit for community homes for people with mental disabilities. The Court held that such an ordinance could only "rest on an irrational prejudice against the mentally retarded." 473 U.S. 432, 450 (1985).

As discussed above, the legislative history of the FHAA is replete with congressional testimony and findings describing the widespread discrimination that people with disabilities face in securing adequate housing. This extensive testimony indicated that discrimination is frequent and that the victims of such discrimination are severely harmed. *See supra* pp 18-20. Congress also heard testimony describing local ordinances that, through ignorance or prejudice, segregate people with disabilities from the rest of their community. *See, e.g., Fair Housing Amendments Act of 1987: Hearings on S. 558* at 239.

Congress included findings that "[w]hile state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities" H.R. REP. NO. 100-711, at 24 (1988); and found that people with disabilities "have been denied housing because of misperceptions, ignorance, and outright prejudice." *Id.* at 18.

C. Congress Has the Power to Prevent Housing Discrimination Under Section 5 of the Fourteenth Amendment.

Under the tests in *Boerne* and *Kimel*, Congress has considerable room to legislate when the injury addressed is as serious as the discrimination graphically described in the legislative history. The approach taken by Congress is easily "congruent and proportional" because the minimal burden imposed by the FHAA on local governments far outweighs the unconstitutional discrimination at issue.

In the context of zoning and land use matters, the only provision of the Fair Housing Amendments Act that appellants challenge simply requires communities to make "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [people with disabilities] equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). The vast majority of local zoning activity remains untouched. Unreasonable and burdensome accommodations will, by the very terms of this law, not be required.

In *Coolbaugh v. Louisiana*, this Court has already upheld the Americans with Disabilities Act ("ADA") as a valid exercise of Congress' Section 5 power to enforce the Fourteenth Amendment. 136 F.3d at 437. The ADA, much like the FHAA, includes provisions requiring "reasonable accommodation" of people with disabilities. This court wrote that "Congress' scheme in the ADA to provide a remedy to people with disabilities who suffer discrimination and to prevent such discrimination is not so draconian or overly sweeping to be considered disproportionate to the serious threat of discrimination Congress perceived." *Id.* at 437. Because the harms identified in the ADA are substantially similar to those identified in the FHAA, the court's balancing in *Coolbaugh* is instructive, showing that a reasonable accommodation standard is an appropriate means to combat such destructive discrimination.[31]

Thus, the FHAA remedies harmful and substantial discrimination, without creating a significant new burden on local governments. Such legislation is well within Congress' broad power to enforce the Equal Protection Clause of the Fourteenth Amendment.

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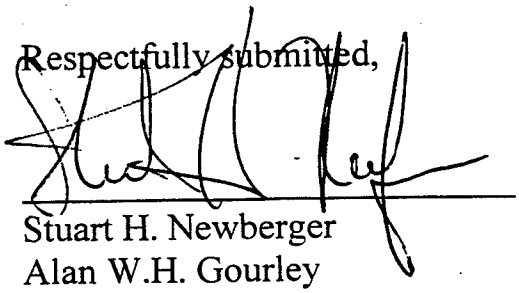
31 The United States Supreme Court has recently granted certiorari in *Alsbrook v. Maumelle*, 184 F.3d 999 (8th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3164 (U.S. Jan. 25, 2000) (No. 92-212) to hear a constitutional challenge to the ADA. At the time of this brief, this case had not been heard.

CONCLUSION

The attack on the FHAA by Appellants threatens to undermine twelve years of progress in ending segregation against all people with disabilities, not just for people with Alzheimer's disease. The FHAA is well within the limits on Congress's authority to prevent such discrimination. *Amici* respectfully request that the judgment of the district court be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Bazelon Center For Mental Health Law And Other Groups Listed Below As Amici Curiae In Support Of Appellee And In Support Of Affirmance Of The Ruling Below, has been served upon the following counsel of record, by forwarding same, via Federal Express, this 22nd day of February, 2000.

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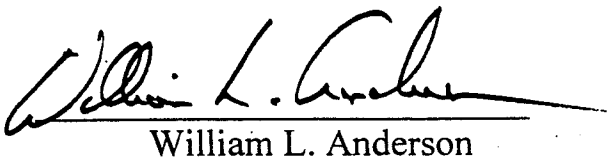

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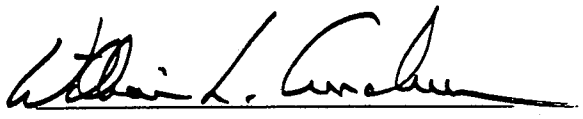
CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains 6,697 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 97 in Typeface *Times New Roman* and in Font Size *14*.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R.32.2.7, may result in the court's striking the brief and imposing sanctions against the person signing the brief.



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APPENDIX A

INTEREST OF *AMICI CURIAE*

Judge David L. Bazelon Center for Mental Health Law

The Bazelon Center for Mental Health Law is a national legal advocacy organization representing low-income adults and children with mental disabilities. The Center seeks their full integration into the community by protecting their rights to choice and dignity and expanding their access to housing and other support. Among others, the Center has been counsel of record or counsel for amici in a number of significant fair housing cases involving zoning and land use issues, including City of Edmonds v. Oxford House, Inc., 115 S.Ct. 1776 (1995); Marbrunak, Inc. v. City of Stow, 974 F.2d 43 (6th Cir. 1992); and Potomac Group Home Corp. v. Montgomery County, 823 F.Supp. 1285 (D.Md. 1993). Because of their disability and poverty, many clients and constituents of the Bazelon Center rely on community and group homes to provide more humane and integrated settings than are available in state hospitals and nursing homes. The Center advocates broad enforcement of the Fair Housing Act so that people with disabilities may have an equal opportunity to use and enjoy the broadest possible range of dwellings.

AARP

AARP is a nonprofit membership organization of more than 33 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. AARP's membership includes many older persons with disabilities, and the Association supports their rights to equal choice in housing. Accordingly, the Association advocated for passage of the Fair Housing Amendments Act of 1988, with its prohibition on exclusionary local zoning laws and regulations. AARP continues to advocate in state and federal courts for proper implementation of the Act, having filed amicus curiae briefs in a number of cases, including City of Edmonds v. Oxford House, Inc., 115 S.Ct. 1776 (1995) and United States v. City of Taylor, 872 F.Supp. 423 (E.D. Mich. 1995).

Alliance for Children and Families

The Alliance for Children and Families is an international nonprofit association that represents more than 350 child and family serving agencies operating in all fifty states, the District of Columbia and Canada. Alliance members serve more than five million families annually in more than 2000 communities across North America, providing a broad range of services,

including residential foster care group homes for children who have been neglected or abused, who are unable to live with their families. Like people with disabilities, these children have often been excluded from neighborhoods by restrictive zoning and land use provisions. *See, e.g., Children's Alliance v. City of Bellevue*, 950 F.Supp. 1491 (W.D.Wash. 1997). The Fair Housing Act protects the housing choice of these children and allows them to be reintegrated into the community.

American Network of Community Options and Resources

The American Network of Community Options and Resources ("ANCOR") (formerly the National Association of Private Residential Resources) is a nationwide association of over 550 private, non-profit, for-profit and family care agencies that together provide support and services to more than 50,000 people with disabilities. ANCOR has over twenty-five years of proven leadership representing private providers at the federal level. The membership serves persons of all ages, income levels, sexes and races in urban rural and suburban areas – supporting people wherever they live and work. Most member agencies support group homes, apartments and other supported living arrangements. They prefer to establish homes in stable residential communities in order to best meet the needs of the people

they support. The number of persons living in the homes varies depending upon their particular needs and preferences. Consequently, the case before the Court will have substantial impact on ANCOR's members.

The Arc of the United States

The Arc of the United States ("The Arc"), through its more than 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its founding in 1950, The Arc has participated actively in the formulation of public policy with respect to the rights of, and services and supports for, citizens with mental retardation. A top priority of The Arc is to make community-based supports and services, including an appropriate variety of housing options, available to people with mental retardation. The issue before this Court relates directly to the rights of individuals with mental retardation seeking to live in the community and is one of great interest to The Arc and its members.

Assisted Living Federation of America

The Assisted Living Federation of America ("ALFA") represents

7,000 for-profit and not-for-profit assisted living providers, continuing care retirement communities, independent living operators and related senior care businesses. As the leading association representing the assisted living industry, ALFA's primary mission is to foster excellence in assisted living residences and related care settings, preserve consumer choice and enhance the quality of life for residents and their families.

Founded in 1990 to advance the assisted living industry and the quality of life for the approximately one million consumers it serves, ALFA broadened its mission in 1999 to encompass all of long-term care, in recognition of the evolving interconnection between assisted living and all seniors housing and care models.

ALFA advocates for both providers of assisted living and for the residents and families who call ALFA's member facilities their home. In the vast majority of cases, residents want to live in an assisted living community near their prior homes, family and friends. Historically, some of ALFA's members, and thus the residents they serve, have faced opposition from neighborhood activists seeking to preclude development of an assisted living or similar facility in a given geographic areas, and thereby limiting or precluding the ability of residents to select supportive community-based care and assistance near their family and friends.

The Fair Housing Amendments Act ("FHAA") has been a strong weapon against discriminatory housing and zoning policies enacted or applied by state or local governments that tend to discriminate against the elderly and others who are physically disabled or mentally compromised. Many of ALFA's members serve residents who are aged and have certain physical or mental ailments which quality them for protection under the Americans With Disabilities Act, the Rehabilitation Act, and the FHAA. Many of ALFA's members serve residents with Alzheimer's Disease or other forms of dementia who could live happier, more productive lives in community-based settings such as assisted living residences.

Thus, ALFA has a strong interest in the outcome of this case. ALFA and its members have a direct interest in the ongoing viability of the FHAA and the restatement of national policy precluding discrimination in housing and zoning matters against individuals because of their age and physical or mental infirmity or condition.

National Association of Protection & Advocacy Systems

The National Association of Protection and Advocacy Systems ("NAPAS") is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network. NAPAS is deeply concerned that appropriate housing in the community be made available for persons with disabilities because its members have a statutory mandate to advocate for the full inclusion of persons with disabilities in all areas of life.

National Fair Housing Alliance

The National Fair Housing Alliance ("NFHA") is a non-profit corporation organized under the laws of Virginia with its principal place of business in Washington, D.C. NFHA is comprised of more than eighty-five private, non-profit fair housing councils or centers located throughout the United States. NFHA strives to identify and eliminate practices that constitute barriers to equal access to housing for persons protected under the

Fair Housing Act, 42 U.S.C. §§ 3601 et seq. ("Fair Housing Act"), by researching the nature and effects of housing discrimination and advocating for effective programs of fair housing enforcement and compliance. NFHA also provides technical assistance to private fair housing and community groups and conducts fair housing training for the real estate, lending, and insurance industries. Through their involvement in the filing of thousands of administrative and civil complaints in state and federal courts across the country, NFHA's members have played a vital role in the enforcement of both the Fair Housing Act and state and local fair housing laws.

In particular, NFHA's members provide assistance and counseling to persons with disabilities who seek housing in group homes, to residents of such housing and to operators of such housing. NFHA's members assist city, county and other officials in considering fair housing issues relating to group homes and provide training and technical assistance to their communities about the scope and nature of discrimination against group homes and their residents. NFHA and its members devote time, energy and resources to identification of the housing needs of people with disabilities and making housing available to such persons without unlawful discrimination.

United Cerebral Palsy Associations

United Cerebral Palsy Associations ("UCP") is a non-profit, human service organization, founded in 1948 and comprised of approximately 140 local affiliates in 48 states that provide direct services to over 30,000 adults and children with disabilities per day. Those services include, among others, employment training, independent living, assistive technology, and community outreach. UCP's mission is to affect positively the quality of life for individuals with cerebral palsy and other disabilities, along with their families, and to advance the independence, productivity, inclusion and full participation of adults and children with disabilities across the full spectrum of life activities. Many individuals with disabilities have been denied their rights and excluded from opportunities, including access to housing options because of false and demeaning stereotypes. UCP has utilized the Fair Housing Act Amendments of 1988 to make available a variety of housing options for individuals with disabilities.

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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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS INTERVENOR

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

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[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-

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."

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.

Respectfully submitted,

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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).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the brief contains 1194 lines of text in monospaced typeface.

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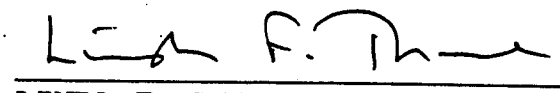
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the court's striking the brief and imposing sanctions against the person signing the brief.



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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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March 13, 2000

Eldon H. Crowell, Esquire
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1001 Pennsylvania Avenue, N.W.
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RE: Crowell & Moring Amicus Briefs in
Groome Resources v. Parish of Jefferson

Dear Mr. Crowell:

It was a pleasure to meet you last weekend at the Conference on Public Service and the Law at the University of Virginia. As a 1985 graduate of the Law School and a public interest lawyer these past 15 years, I found the Conference to be a terrific morale booster. Thank you for your support of the Public Service Center and of the Conference, which I hope will become an annual tradition.

In our short conversation, I also thanked you for your firm's help in an important case pending in the Fifth Circuit, **Groome Resources v. Parish of Jefferson**. In that case, the parish (county) challenges the constitutionality of the Fair Housing Act as applied to zoning and land use matters affecting group homes for people with disabilities. While we have seen similar challenges in a handful of Circuit Courts, this has been the most serious, and comes on the heels of a number of Supreme Court cases which have weakened federal civil rights laws.

When the parish filed its notice of appeal, we began to look for a firm to assist us in writing an *amicus* brief defending the constitutionality of the Act. With the help of the Washington Lawyers Committee, we quickly identified Crowell & Moring as the most capable (and most willing to jump right in).

In the end, the firm actually produced two *amicus* briefs. The first, on behalf of the Bazelon Center and eight other national organizations lays out a succinct and powerful argument supporting the constitutionality of the Fair Housing Act, and provides the Fifth Circuit a road map for affirming the decision below. I have every reason to believe that the brief will also be very valuable to the civil rights and disability communities should we face future such challenges around the country. The second, written for the Alzheimer's Association represents a marvelous synthesis of Congressional testimony, legal argument and evidence about the real world effect of well-run group homes for people with Alzheimer's disease. It pulled heartstrings where it needed to, and made hard-headed legal arguments of the highest caliber as well.

Bill Anderson was the firm's head honcho on the briefs, and he was ably assisted by Alan Gourley, Chris Haile, Shari Lahlou and Stuart Newberger. Each went out of his or her way, but special thanks goes to Bill, whose concentration on and commitment to the briefs never flagged, even on a European trip just prior to the filing deadline.

While inadequate, this letter is meant to express my deepest gratitude for your firm's work, and our sincere hope that we may have the opportunity to work with the firm's wonderful lawyers again in the future.

Sincerely,

Michael Allen

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March 13, 2000

William L. Anderson, Esquire
CROWELL & MORING
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Washington, D.C. 20004-2595

RE: **Groome Resources v. Parish of Jefferson**

Dear Bill:

Somewhat belatedly, let me express my deepest gratitude for the work you, Alan Gourley, Chris Haile, Shari Lahlou and Stuart Newberger did on the two *amicus* briefs in *Groome Resources*. The "Bazelon brief" lays out a succinct and powerful argument supporting the constitutionality of the Fair Housing Act, and provides the Fifth Circuit a road map for affirming the decision below. I have every reason to believe that the brief will also be very valuable to the civil rights and disability communities should we face future such challenges around the country.

As I have already said by e-mail to Shari, the "Alzheimer's Association brief" is a marvelous synthesis of Congressional testimony, legal argument and evidence about the real world effect of well-run group homes for people with Alzheimer's disease. It pulled heartstrings where it needed to, and made hard-headed legal arguments of the highest caliber as well.

Without your firm's assistance, it would have been very difficult to produce one brief of such extraordinary depth and effectiveness, let alone two.

I hope the Bazelon Center (and other *amici*) have an opportunity to work with you again.

Sincerely,

Michael Allen

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March 13, 2000

John P. Relman, Esquire
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Dear John:

Belatedly, please accept my sincere thanks for trekking down to Charlottesville the week before last to teach my Housing Law Clinic class and to give your powerful presentation on integration and non-discrimination. For the rest of the weekend, people came up to me to say how moved they were by your remarks, and how you forced them to look at their own actions in a new light. In particular, Kim Emery, the assistant dean for public service, expressed a desire to have you return to speak to a much bigger group.

I mentioned to you that I've been involved in a new project called the Building Better Communities Network, which will be holding a lunch forum on the topic of integration and community next month (tentatively scheduled for April 26). We have invited Roger Wilkins and John Calmore to speak, and would hope that you might join us as a thoughtful respondent. As our plans get firmed up, I will be in touch with you.

In the meantime, I hope all is well with you.

Sincerely,

Michael Allen

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Washington, D.C. 20036

RE: Amicus Briefs in **Groome Resources v. Parish of Jefferson**

Dear Lars:

What a treat it was to work with you on the *Groome Resources* case! From our initial conversations about the importance of the case, through your insightful recruiting of Crowell & Moring, to the filing of two high caliber briefs, your presence in the case was instrumental. Because of your work, we can await the Fifth Circuit's decision with a large measure of hope, and we can think of this case as the place where we turned back the tide on arguments that the Fair Housing Act is unconstitutional as applied to local zoning and land use issues.

I have thanked Bill Anderson and his colleagues separately and effusively.

I look forward to the next time you and I can work together.

Sincerely,

Michael Allen

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