

A04-435

STATE OF MINNESOTA
IN SUPREME COURT

BETH ANN HINNEBERG,

Relator,

v.

BIG STONE COUNTY HOUSING AND
REDEVELOPMENT AUTHORITY,

Respondent.

BRIEF OF *AMICUS CURIAE*
**THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS,
INC. AND HOME Line**

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THE *AMICI*

The National Association of Protection and Advocacy Systems (NAPAS) is the voluntary national membership association of protection and advocacy agencies (P&As) and client assistance programs (CAPs), which are federally mandated and located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories¹. The P&A/CAP system comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. This case is of particular interest to NAPAS because the lower court's erroneous interpretation of two important civil rights statutes meant to protect the rights of people with disabilities -- Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (2000), and the Fair Housing Act (FHA), 42 U.S.C. § 3604 (2000)² -- raises issues of national significance. If not corrected, the interpretation of these statutes reflected in the decision below could lead to continued misapplication of the law that will in turn result in serious limitations on the rights of people with disabilities.

HOME Line is a non-profit, Minnesota statewide tenant advocacy organization that began operating in 1992. HOME Line has three attorneys on staff and numerous law student volunteers who provide legal, education and advocacy services so that tenants

¹ Pursuant to Minn. R. Civ. App. P. 129.03, the *amici* certify that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel has made a monetary contribution to this brief's preparation or submission.

² The Federal Housing Act was amended by the Federal Housing Amendment Act of 1988 to protect persons with disabilities. This brief refers to the FHA to include both the original act and the 1988 amendment.

throughout Minnesota can solve their own rental housing problems. HOME Line operates a free hotline available to all tenants, regardless of income. HOME Line works to improve public and private policies relating to rental housing by involving affected tenants in the process. Annually, HOME Line receives approximately 8,000-9,000 calls from people in need of housing assistance; 3-4% of those calls relate to reasonable accommodation requirements of the ADA.

These *amici* represent a constituency that includes persons with disabilities who have a need for Section 8 housing assistance. The constituency lacks financial means for affordable housing, and often requires reasonable accommodations from entities like Respondent to meet their basic needs in housing. The lower court's restrictive reading of the federal laws intended to protect this constituency will have a serious adverse affect on their daily lives. This is a public interest that transcends the specific interests of the parties in this case.

STATEMENT OF FACTS

A. The Extent Of The Problem: Disability And Housing Issues In Minnesota.

According to the 2000 census, 15% of Minnesotans aged five and older have some form of disability. See Minnesota State Council on Disability, Legislative Report (2003).³ This amounts to a total of 392,313 Minnesotans (not including those persons in

³ Excerpted copies of these publicly available government reports are attached to this brief for the Court's convenience. The Court may consider this material because "appellate courts may . . . consider cases, statutes, and other publicly available legal resources that were not presented to the district court." *Podvin v. The Jamar Co.*, 655 N.W.2d 645, 648

an institutional setting). *Id.* Statistics show that the existence of a disability can have a significant negative impact on the ability of a person to gain employment. Although 84.3% of Minnesotans without a disability are employed, only 56.6% of Minnesotans with a disability are employed. Thus, a very large number of Minnesotans with disabilities are likely to have financial need, due to lack of employment, resulting in a particularized need for access to affordable housing.

Indeed, the Minnesota State Council on Disability finds that people with disabilities have a much higher rate of poverty than other Minnesotans. For working-age adults (age 21-64), the incidence of poverty for persons with disabilities is about two and one-half times greater than for persons without disabilities. Accordingly, while 5% of males without disabilities aged 21-64 are in poverty, this percentage increases to 13% with respect to similarly-aged males with disabilities. The gap is even greater for women. Six percent of women without disabilities aged 21-64 are in poverty, while 16.5% of women with disabilities are in poverty.⁴

(Minn. Ct. App. 2003) (citing *Fairview Hosp. v. St. Paul Fire & Marine Insurance Company*, 535 N.W.2d 337, 340 n. 3 (Minn. 1995)).

⁴ In generating these statistics, the census defines disability as: People five years old and over are considered to have a disability if they have one or more of the following: (a) blindness, deafness or a severe vision or hearing impairment; (b) a substantial limitation in the ability to perform basic physical activities, such as walking, climbing stairs, reaching, lifting or carrying; (c) difficulty learning, remembering or concentrating; or (d) difficulty dressing, bathing or getting around inside the home. In addition to the above criteria, people 16 years old and over are considered to have a disability if they have difficulty going outside the home alone to shop or visit a doctor's office, and people 16-64 years old are considered to have a disability if they have difficulty working at a job or business.

Big Stone County has more than one thousand persons aged five or older with at least one disability, representing more than 17% of the county's population. Hennepin County has nearly 150,000 persons aged five or older with at least one disability, representing more than 13% of the county's population.

According to the Minnesota Department of Human Services, mental illness, which can be disabling, is more common than many people realize. "Research shows in any given year approximately one in five adults are affected by a mental health disorder." Minnesota Department of Human Services webpage.⁵ "Housing ranks as a priority concern of individuals with serious and persistent mental illness in Minnesota. . . . Greater emphasis has been placed on conventional housing supplemented by appropriate assistance tailored to individual need." "Housing for Persons With a Serious and Persistent Mental Illness," DHS publication (January, 2001) (attached). "Locating decent, affordable, safe housing in Minnesota is often difficult and out of the financial reach of most persons with a serious and persistent mental illness." *Id.*

It is the policy of the state of Minnesota, under the Comprehensive Mental Health Act, to ensure that:

Housing services provided as part of a comprehensive mental health service system: (1) allow all persons with mental illness to live in stable, affordable housing, in settings that maximize community integration and opportunities for acceptance; (2) allow persons with mental illness to actively participate in the selection of their housing from those living environments available to the general public; and (3) provide necessary support regardless of where persons with mental illness choose to live.

⁵ (www.dhs.state.mn.us/main/groups/disabilities/documents/pub).

Minn. Stat. § 245.461, subd. 4. According to the Minnesota Housing Finance Agency (MHFA), there is a shortage of 11,500 units of affordable housing in the Twin Cities metropolitan area. DHS Publication, *supra*. The MHFA finds there is an equivalent shortage in Greater Minnesota. Although the State needs 7,500-8,500 new units of affordable housing each year, only about half that is being provided. *Id.* The State thus recognizes a severe shortage of affordable housing, particularly for persons with mental health disabilities.

In sum, a substantial proportion of Minnesota's population have one or more disabilities. These persons are less likely to be employed and more likely to be in poverty. The State, as well as the federal government (through passage of the ADA and FHA), recognizes the public policy goal of providing affordable housing for persons with disabilities – which is a critical need. In light of the foregoing, it is imperative that the courts enforce the “reasonable accommodation” requirements of federal and state laws, to ensure protection of persons with disabilities. Contrary to the holding of the Court of Appeals, it is not sufficient to prevent overt discrimination. As reflected in the text of the ADA and the FHA, public entities like Respondent must also make reasonable accommodation for individual persons with disabilities to prevent discrimination and afford meaningful access to the public benefits they provide.

B. Respondent Did Not Consider Appellant's Specific Needs For Reasonable Accommodation.

The record before the Big Stone County Housing and Redevelopment Authority (“HRA”) and the Court of Appeals demonstrates that Appellant Beth Ann Hinneberg had a range of disabilities that made it necessary for the HRA to provide a reasonable accommodation. The record also establishes that the HRA did not even consider whether to provide a reasonable accommodation. Instead, the HRA simply referred to its policy limiting portability of vouchers. Indeed, the HRA expressly stated it would not even consider a reasonable accommodation to the policy. In the face of undisputed evidence of disability, it was unlawful for the HRA to refuse to consider a reasonable accommodation.

The records provided to the HRA, apparently undisputed, established that Ms. Hinneberg had a team of doctors and therapists in the Twin Cities that specialized in treating her multiple disorders. ASR at 19.⁶ According to Dr. Douglas Hedlund, a Board certified psychiatrist, in a letter to the HRA dated December 4, 2003, Appellant had a therapist and psychiatrist she had worked with for several years in the metro area and also attended Vail Place, a “unique community support program providing rehabilitative mental health services.” *Id.* It was Dr. Hedlund’s considered opinion that “[c]ontinuity of care is extremely important at this phase in her long-term treatment plan. *Id.*

⁶ Cites to “ASR” reference the Appellant’s Supplemental Record.

This opinion was reinforced by a letter from psychologist Jean Koski, confirming that Ms. Hinneberg was receiving social security benefits relating to her physical and mental disabilities, and identifying her mental health diagnosis as including generalized anxiety, major depression, dysthymia and schizotypal personality disorder. The letter noted that Ms. Hinneberg had “very, very limited family support” and that over the years “she has built a strong trusting relationship with her psychiatrist, Dr. Hedlund, and with me, her psychologist.” *Id.* at 20. Ms. Koski noted that “she does not do well with change.” *Id.*

A third doctor, Dr. Carolyn Bowles, submitted a letter to HRA stating that she had been treating Appellant for fibromyalgia and that Ms. Hinneberg:

has finally come up with a group of physicians and providers that seem to understand her and are able to help her. She has a complicated range of mental health issues and medical problems. She needs specialists to provide her care. I think it would be best for her to keep her in the Twin Cities where she is established. If she were to have to live in a more rural setting, she will not have access to the types of providers that she needs to see on a regular basis to keep her health stable. I am a rheumatologist and take care of her fibromyalgia. She will not have access to a rheumatologist unless she stays close to the Twin Cities.

Id. at 21. There was no contrary evidence submitted.

Respondent’s position in response to the undisputed medical evidence of disability was simply to refuse to consider a reasonable accommodation. As Respondent stated at the hearing:

[I]n closing, I would just like to reiterate that the reason for denial of the voucher was due to our policy on living in our county for twelve months before your being able to port. **Our policy does not state that we will do anything with a reasonable accommodation in that initial reset period,**

but they will be looked at once you step in our county . . . My main reason for denying the porting of the voucher is our policy states that you must live in our county for twelve months before being able to port it.

Id. at 5-6 (emphasis supplied).

DISCUSSION

The Court of Appeals' unduly restrictive reading of the applicability of the FHA and ADA is contrary to the vast weight of decisions broadly enforcing the reasonable accommodation requirements of these laws. Indeed, the Court of Appeals cited in its decision significant authority adverse to its narrow reading of the statutes, but the Court failed to distinguish or otherwise account for these cases. The Court of Appeals erred in part (it appears), by deciding the appeal on a legal basis that was not advanced or briefed by the parties before it. The Court thus did not have the benefit of briefing or argument on the issue that ultimately was the basis of its holding – the threshold applicability of the FHA and ADA to a county HRA voucher program and its portability policy.

The *amici* respectfully submit that, upon consideration of the argument below, the FHA and ADA unquestionably do apply to Respondent's voucher program, and that Respondent was obligated under these statutes to provide a reasonable accommodation to Appellant in light of her undisputed disabilities.

I. THE FEDERAL HOUSING ACT'S BROAD REACH APPLIES TO RESPONDENT'S VOUCHER PROGRAM AND PORTABILITY POLICY.

Congress has declared the purpose of the FHA to provide for fair housing throughout the United States. *U.S. v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir.

1975). The FHA's expansive reach provides protections that extend beyond the sellers and lessors directly selling or renting housing. Under the FHA, it is illegal "[t]o discriminate in the sale or rental, **or otherwise make unavailable or deny**, a dwelling to any buyer or renter because of [that buyer or renter's] handicap."⁷ 42 U.S.C. § 3604(f)(1) (2003) (emphasis supplied). The FHA specifically defines discrimination to include "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.* at § 3604(f)(3)(B). Courts consistently apply the FHA beyond simply selling or renting housing.

In holding that the FHA did not even apply to Respondent's program, the Court of Appeals reasoned that Respondent does not engage in the direct sale or rental of housing, because "it only provides rental vouchers to landlords." In its narrow interpretation of the FHA, limiting application to solely the sale or rental of a dwelling, the lower court ignored the language of the FHA that makes it illegal to discriminate not only in the sale or rental of a dwelling but also to "otherwise make unavailable or deny, a dwelling to a buyer or renter because of [that buyer or renter's] handicap." *Id.* at § 3604(f)(1).

The Court of Appeals acknowledged, but failed to address or distinguish, extensive case law that broadly construes the weight and breadth of the FHA, and applies the FHA to cover activities as diverse as mortgage and insurance "redlining," steering and exclusionary zoning actions. See, e.g. *McGary v. City of Portland*, 386 F.3d 1259 (9th

⁷ The term "handicap" subsequently has been replaced by the term "disability."

Cir. 2004) (plaintiff stated a Fair Housing Act claim by alleging that city denied his request for additional time to clean his yard); *U.S. v. City of Jackson, Miss.*, 359 F.3d 727 (5th Cir. 2004) (zoning ordinances and policies violated the FHA by failing to make the reasonable accommodations); *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565 (2d Cir. 2003) (city's failure to grant reasonable accommodation to group home for recovering alcoholics and drug addicts, by excepting home from certain zoning regulations, violated FHA and ADA; *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1209–10 (7th Cir. 1984); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (village's refusal to rezone property to permit construction of federally financed low-cost housing was discriminatory). Respondent's voucher program and portability policy are analogous to these other ancillary, yet vital, activities that affect the availability of housing and over which courts have applied the FHA.

The specific issue of whether the FHA applies to Section 8 housing vouchers was addressed in an unpublished decision, *Andrews v. Springfield Housing Authority*, No. 91-CV-0106 (Mass. Trial Ct., Housing Ct., Hampden Div. 1991) (copy attached). In *Andrews*, the court found the defendant violated the FHA when it refused the plaintiff's request to port her housing subsidy to a neighboring town. The court held that the plaintiff, a recovering drug addict, had a disability within the meaning of the FHA and that the request that she be permitted to use her housing subsidy in the neighboring town

to help her remain drug free was a request for a reasonable accommodation that the statute required that housing authority to make.

Courts have consistently applied the FHA to a multitude of other situations where a party “otherwise made unavailable or denied” housing, and where defendant’s activity was not directly involved in the sale or rental of a dwelling. Courts have held that Section 3604(a) not only prohibits conduct constituting a refusal to sell or rent but also conduct that otherwise makes dwellings unavailable. *Laufman v. Oakley Building and Loan Co.*, 408 F. Supp. 489, 492 (S.D. Ohio 1976). Courts have given broad reading to Section 3604 and have applied it specifically to a variety of discriminatory conduct having nothing to do with refusals to sell or rent, including rejection by an orphanage of minority orphans, adoption by municipalities of exclusionary ordinances and racial steering by real estate brokers. *Id.* (internal citations omitted). The court in *Laufman* held that “a denial of financial assistance in connection with the sale of a home would effectively ‘make unavailable or deny’ a ‘dwelling.’ When such denial occurs as a result of racial consideration § 3604(a) is transgressed.” *Id.* at 493.

The plaintiffs in *Laufman* were denied a loan because of the racial composition of the neighborhood in which the home was located. *Id.* at 498. The court agreed that such clearly discriminatory conduct interfered with the plaintiffs in their right to equal housing opportunities protected by the FHA, causing the plaintiffs the loss of important benefits from interracial association. *Id.* (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1982)).

Courts also consistently apply the FHA in cases that involve mortgage or insurance “redlining.” In *NAACP v. American Family Mut. Ins. Co.*, the court considered whether redlining in the insurance business is a form of racial discrimination violating the FHA. 978 F.2d 287, 290 (7th Cir. 1992). Redlining is defined as charging higher rates or declining to write insurance for people who live in a particular area. *Id.* The plaintiffs in *American Family* observed that a mortgage loan is typically essential to home ownership, and that lenders do not provide credit unless borrowers obtain insurance on the house that in turn serves as security for the loan; without insurance, there is no mortgage and therefore no house. *Id.* Thus, by charging higher premiums in certain areas, some would-be buyers are unable to purchase the insurance, which results in an inability to secure a mortgage and a home. If the pricing mechanism is based on racial discrimination, there is a violation of the FHA. The court held “[s]ection 3604 applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant.” *Id.* at 301.

Racial steering is yet another example of discriminatory conduct to which courts time and time again apply the FHA. For example, the court in *Heights Community Congress v. Hilltop Realty Inc.* found that five Hilltop agents violated Section 3604(a) on eight occasions by engaging in “racial steering,” which the court determined “otherwise made unavailable” housing on account of race. 774 F.2d 135, 141 (6th Cir. 1985). Although racial steering is not a direct refusal to sell or rent housing, it is sufficiently

intertwined in an individual's ability to find housing to bring it under the broad umbrella of the FHA.

Courts also have extended the reach of the FHA to include actions that affect a service or facility in connection with the property that in turn affects the plaintiff's use and enjoyment thereof. *Trovato v. City of Manchester*, 992 F. Supp. 493, 497 (D.N.H. 1997). In particular, the Second Circuit recognized that the availability of convenient parking affected a woman with disabilities ability to use and enjoy her dwelling fell within the meaning of the FHA. *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 335 (2nd Cir. 1995). In *United States v. City of Black Jack*, the plaintiff alleged that the City had denied persons housing based on their race in violation of Section 3604(a), and had interfered with the exercise of the right to equal housing opportunity, by adopting a zoning ordinance that prohibited the construction of any new multi-family dwellings. 508 F.2d at 1181. Particularly, the plaintiffs alleged that the City's ordinance essentially acted to preclude construction of low to moderate income housing. *Id.* at 1181-82. While recognizing

where a municipality exercises its zoning powers in a racially discriminatory manner and thereby excludes housing which provides rental opportunities for significant numbers of non-white persons, such conduct constitutes a violation of 42 U.S.C. 3604 (a),

the court declined to hold that the ordinance had a racially discriminatory effect. *Id.* at 1182. In reversing the lower court, the Eighth Circuit reasoned

Title VIII is designed to prohibit 'all forms of discrimination, sophisticated as well as simpleminded.' Just as Congress requires *** the removal of artificial, arbitrary, and unnecessary barriers to employment when the

barriers operate invidiously to discriminate on the basis of racial or other impermissible classification, such barriers must also give way in the field of housing.

Id. at 1184 (internal citations omitted).

The FHA is applicable to a multitude of activities, such as zoning, that “otherwise make unavailable or deny” housing based on race, color, religion, sex or disability. The Third Circuit Court of Appeals applied the FHA to another zoning situation in which the lower court had rejected the contractor’s request for a variance in order to build a nursing home for persons with disabilities in a non-hospital support zone. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1098 (3rd Cir. 1996). The court enjoined the Township from interfering with the construction of the nursing home, as the zoning variance allowing construction was a reasonable accommodation under the FHA. *Id.* at 1106. Applying the FHA to zoning is analogous to applying it to Respondent’s voucher portability policy – it affects housing availability.

The Court of Appeals erred in relying on *Michigan Prot. and Advocacy Serv., Inc. v. Babin*, 18 F.3d 337 (6th Cir. 1994). The plaintiffs in *Babin* claimed that their right to housing was violated when a homeowner, who was negotiating the sale of a home with a state agency, sold the property instead to a group of neighbors. *Id.* at 340. The state agency intended to utilize the home as a group home for adults with mental disabilities, and there was evidence the neighbors bought the house to prevent that from happening. *Id.*

The court held that the defendants participated in normal economic competition, which falls outside the scope of the FHA. *Id.* at 347. In its analysis, the court noted the very broad reach of the FHA, stating “Congress intended § 3604 to reach a broad range of activities that have the effect of denying housing opportunities to a member of a protected class.” *Id.* at 344. In fact, in 1998 when Congress amended § 3604(f), it intended that the section reach actors who were directly involved in real estate business as well as actors who would directly affect the availability of housing such as state and local governments. *Id.* (citing H.R. Rep. No. 711 11th Cong., 2d. Sess. 22 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2183). The court also agreed with the Third Circuit that Congress’s intent in enacting § 3604(f)(1) was to reach property owners and their agents who directly affect the availability of housing for a person with a disability. *Id.* at 344. The court even went further and stated that the scope of § 3604(f)(1) may extend to other actors who though not owners or agents are in the position directly to deny a member of a protected group’s housing rights. *Id.*

In the case before it, however, the court held that the neighbors’ participation in bidding for the house constituted normal economic competition, which did not fall within the ambit of the broad range of activities covered by the FHA. *Id.* at 344. The *Babin* case is limited to its facts, and constitutes a unique situation unlike the present case. Appellant and Respondent are not participating in a market, bidding against each other. Respondent is not a private party, but is a government entity vested with the exclusive ability to set policies and issue housing vouchers. Indeed, Respondent has not even contended that its

decision to deny Respondent's application to port her voucher was affected in any fashion on issues of "normal economic competition." To the contrary, under the broad weight of authority set forth above, Respondent was legally obligated to consider Appellant's request for a reasonable accommodation in light of her disability.

II. THE COURT OF APPEALS MISAPPLIED THE ADA "REASONABLE ACCOMMODATION" REQUIREMENT, CONTRARY TO THE PLAIN LANGUAGE OF THE ACT.

The Court of Appeals properly found that Title II of the ADA applied to Respondent as a "public entity." The Court further cited the applicable provision of the Title II, which states that:

. . . [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (2000). The Court thus properly concluded that Respondent "**shall make reasonable modifications** in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability,' **unless** respondent demonstrates that such modifications would fundamentally alter the nature of its programs." 28 C.F.R. § 35.130(b)(7) (2004) (emphasis supplied).

At this point, however, the Court of Appeals took a wrong turn. Rather than continue an analysis of whether a reasonable accommodation was necessary to avoid discrimination under Respondent's voucher portability policy, the Court instead switched to an evaluation of whether Respondent's policy was discriminatory in intent or impact. The Court considered the test for whether a policy resulted from a discriminatory intent,

or had a discriminatory impact, as set forth in *Alexander v. Choate*, 469 U.S. 287, 301, 105 S. Ct. 712, 720 (1985). Finding that “Respondent subjects every individual to the same restriction on portability,” the Court concluded there was no discriminatory intent or impact. The Court failed entirely to consider, however, whether reasonable accommodation was necessary *in the instant case* to avoid discrimination.

Treating persons with disabilities the same way as all other persons is antithetical to the premise of reasonable accommodation. *Marcano-Rivera v. Pueblo Intern., Inc.*, 232 F.3d 245, 257 (1st Cir. 2000); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1236 (9th Cir. 1999).⁸ The premise of reasonable accommodation is to consider a person’s disabilities in determining whether a policy requires modification to “avoid discrimination.” 28 C.F.R. § 35.130(b)(7) (2004). Section 35.130(b)(7), requiring “reasonable accommodation” is a distinct legal requirement from the prohibition on discrimination found in Section 35.130(b)(3) (stating that “[a] public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration . . . that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability”).

⁸ Although these cases were decided under the employment provisions of Title I of the ADA, in assessing Title II’s reasonable modification requirement, courts often track the reasonable accommodation requirements in Title I of the ADA. *See, e.g., Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003); *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (adopting the case-by-case nature of the accommodation analysis, as well as the duty to engage in an interactive process).

Indeed, a refusal to make reasonable accommodation itself can constitute prohibited discrimination. 42 U.S.C. § 3604(f)(3)(B) (2003); *see also* Minn. Stat. § 363A.10, subd. 1 (2003) (Minnesota Human Rights Act). The Court of Appeals entirely missed this point, in holding that Appellant must “make an initial showing of discrimination” to even trigger the need for Respondent to consider a reasonable accommodation.

The distinction between discriminatory intent or impact, on the one hand, and the need for “reasonable accommodation,” on the other hand, is reflected in other legislation protecting persons with disabilities. For example, the Minnesota Human Rights Act, Minn. Stat. §§ 363A.01, *et seq.* (2003), declares that an “unfair discriminatory practice” includes:

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

Minn. Stat. § 363A.10, subd. 1(2) (2003).

Minnesota courts have recognized the concept of “reasonable accommodation” as being distinct from discriminatory intent or impact. In *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13 (Minn. App. 2003), the Court held that reasonable accommodation required modification of a Minneapolis City Code provision establishing spacing requirements for housing facilities for persons with disabilities. In that case, a group sought to build housing for persons with disabilities, and a city ordinance required certain siting requirements that would not normally allow the

development as planned. *Id.* at 17. The City granted a waiver of the ordinance to allow the project. *Id.* The Court affirmed issuance of the waiver, finding that it might be required as a “reasonable accommodation” for the persons the facility would serve. *Id.* at 20-21.

Federal decisions applying the ADA similarly interpret the “reasonable accommodation” requirement as a distinct issue from assessment of the “discriminatory intent” and “disparate impact” prohibitions of the statute. “Congress understood . . . [the ADA] would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.” *Tennessee v. Lane*, 541 U.S. 509, slip op. at 1-2 (2004) (Ginsburg, J., *concurring*); see also *Frederick L. v. Dep’t Public Welfare, Pennsylvania*, 364 F.3d 487 (3d Cir. 2004) (applying “reasonable accommodation analysis”); *Wisconsin Community Service v. City of Milwaukee*, 309 F. Supp. 2d 1096, 1102 (E.D. Wis. 2004) (requiring modification of zoning ordinance and rejecting argument that accommodation would cause a fundamental alteration of the zoning program); *Makin v. Hawaii*, 114 F. Supp.2d 1017 (D. Haw. 1999).

In the above-cited federal cases and the *Plymouth Church* case, as in the present case, the courts assessed not discriminatory intent or impact, but instead addressed whether a reasonable accommodation was necessary given the specific facts of the case to avoid discrimination. These courts properly recognized the failure to provide a reasonable accommodation as *one form* of discrimination. That is the type of “reasonable

accommodation” analysis the Court of Appeals did not undertake, but which the Supreme Court should require.

CONCLUSION

Because the lower court found that neither the ADA nor the FHA applied to Respondent’s voucher program, the court never reached the critical issue of whether these laws required Respondent to modify its voucher portability policy to accommodate Appellant’s disability. In its decision, the Court of Appeals is inconsistent with cases brought under the ADA and the FHA throughout the country. The result is not simply the denial of Appellant’s rights, but also the prevention of other similarly situated Minnesota citizens that Home Line and the P&As regularly try to assist from getting adequate housing and care.

NAPAS and HOME Line respectfully request that the Court reverse the Court of Appeals, find that the ADA and FHA apply to Respondent’s voucher portability policy, and enforce the statutory requirements that Respondent must consider whether it should provide a reasonable accommodation to Appellant in light of her disabilities.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).