

NO. A04-0435

State of Minnesota
In Supreme Court

Beth Ann Hinneberg;

Appellant,

vs.

Big Stone County Housing and
Redevelopment Authority,*Respondent.*

APPELLANT'S REPLY BRIEF

James A. Lee, Jr. (#0129276)
LEGAL AID SOCIETY OF MINNEAPOLIS
2100 Plymouth Avenue North, Room 132
Minneapolis, MN 55411
(612) 436-5414

Attorneys for Appellant

Keith S. Moheban (#218360)
Allison C. Archer (#31934X)
LEONARD, STREET AND DEINARD
PROFESSIONAL ASSOCIATION
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
(612) 225-1500

*Attorneys for Amici Curiae Nat'l Association of Pro-
tection and Advocacy Systems, Inc., and HOME Line*

Lisa Walker Scott, *pro hac vice*
Member, District of Columbia Bar (#435547)
HOUSING AND DEVELOPMENT LAW
INSTITUTE
630 Eye Street, N.W.
Washington, DC 20001
(202) 289-3400

*Attorney for Amicus Curiae, Housing and
Development Law Institute*

William J. Watson (#114911)
BIG STONE COUNTY ATTORNEY
37 N.W. Second Street
Ortonville, MN 56278
(320) 839-6197

Attorney for Respondent

William F. Maher, *pro hac vice*
Member, Florida Bar (#140175)
NATIONAL ASSOCIATION OF
HOUSING AND REDEVELOPMENT
OFFICIALS
630 Eye Street, N.W.
Washington, DC 20001
(202) 289-3500

*Attorney for Amici Curiae National
Association of Housing and Redevelopment
Officials; Minnesota Chapter, National
Association of Housing and Redevelopment
Officials; and North Central Regional Council,
Association of Housing and Redevelopment
Officials*

TABLE OF CONTENTS

	Page
I. PERMITTING PORTABILITY CANNOT BE CONSIDERED A FUNDAMENTAL ALTERATION OF RESPONDENT’S PROGRAM WHEN PORTABILITY IS THE RULE, NOT THE EXCEPTION, IN THE SECTION 8 PROGRAM.....	1
II. FAIR HOUSING CONCERNS FREQUENTLY OVERRIDE PROGRAM GOALS SUCH AS THOSE RAISED BY RESPONDENT	3
A. Imperatives for Insuring Fair Housing and Anti-Discrimination Are Incorporated Broadly in Every Area of Housing Enterprises, Particularly Areas Affected By the Activities of Public Agencies.....	3
B. Reasonable Modification of Policies Does Not Result in Fundamental Alteration of Programs. Consideration of a Reasonable Accommodation Request is an Individualized Inquiry That Respondent Failed to Make in This Case.....	7
III. RESPONDENT AND <i>AMICI CURIAE</i>’S ARGUMENT THAT RESPONDENT TREATS DISABLED AND NON-DISABLED PERSONS ALIKE FAILS TO PROPERLY CONSIDER INDIVIDUAL ACCOMMODATION REQUESTS FOR DISABLED PERSONS.....	13

TABLE OF AUTHORITIES

	Page
Federal Cases	
<i>Bentley v. Peace and Quiet Realty</i> , --- F. Supp. 2d ---, 2005 WL 1023279 (May 3, 2005).....	9
<i>DeBord v. Board of Education</i> , 126 F.3d 1102 (8th Cir. 1997)	15
<i>Essling's Homes Plus Inc. v. City of St. Paul</i> , 356 F. Supp. 2d 971 (D. Minn. 2004)	14
<i>Forest City Daly Housing Inc. v. Town of North Hempstead</i> , 175 F.3d 144 (2d Cir. 1999).....	15
<i>Giebeler v. M&B Associates</i> , 343 F.3d 1143 (9th Cir. 2003)	9
<i>Hemisphere Building Co. v. Village of Richton Park</i> , 171 F.3d 437 (7th Cir. 1999).....	15
<i>Langlois v. Abington Housing Authority</i> , 234 F. Supp. 2d 33 (D. Mass. 2002)	4, 5
<i>PGA Tour Inc. v. Martin</i> , 532 U.S. 661, 121 S. Ct. 1879, 149 L. Ed.2d 904 (2001)	7, 10
<i>Pottgen v. Missouri State High School Activities Assoc.</i> , 40 F.3d 926 (8th Cir. 1994).....	9
<i>Salute v. Stratford Greens Garden Apartments</i> , 136 F.3d 293 (1998)	9, 15
<i>Tennessee v. Lane</i> , 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 820 (2004)	14
<i>United States v. Housing Authority of the City of Chickasaw</i> , 504 F. Supp. 716 (S.D. Ala. 1980).....	4

State Cases

Citizens for a Balanced City v. Plymouth Congregational Church,
672 N.W.2d 13 (Minn. App. 2003)..... 5

Federal Statutes

42 U.S.C. § 12131(2) (1995)..... 13

42 U.S.C. § 12182(a)..... 7

42 U.S.C. § 12182(b)(2)..... 8

42 U.S.C. § 1437f(o)(6) (2003)..... 4

42 U.S.C. § 1437f(r)(1) (2003) 5, 6, 11

42 U.S.C. § 1437f(r)(1)(A) (2003)..... 1, 8

42 U.S.C. § 3604(a)..... 3

42 U.S.C. § 3604(f) 3

Federal Regulations

24 C.F.R. § 8.33 (2004)..... 3

24 C.F.R. § 982.207(b)(1)(i) (2004) 4

24 C.F.R. § 982.207(b)(1)(iii) (2004) 5

24 C.F.R. § 982.353(b) (2004)..... 1

24 C.F.R. § 982.355(e)(6) (2004)..... 13

24 C.F.R. § 982.53 (2004)..... 6

28 C.F.R. § 35.130(b)(7) (2004) 3, 8

“Department of Justice, Title II Regulations,” 56 Fed. Reg.
35694 (July 26, 1991)..... 8

State Rules

Minn. R. Civ. App. P. 110.05.....1

Other Authorities

H.R. REP. 102-1017, H.R. REP. NO. 1017, 102d Cong., 2d Sess.
1992, 1992 U.S.C.C.A.N. 3483..... 11

HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, ¶ 13.3 6

HUD NOTICE PIH 2005-1 (HA) (December 8, 2004)..... 13

I. PERMITTING PORTABILITY CANNOT BE CONSIDERED A FUNDAMENTAL ALTERATION OF RESPONDENT'S PROGRAM WHEN PORTABILITY IS THE RULE, NOT THE EXCEPTION, IN THE SECTION 8 PROGRAM.

Respondent argues that accommodating appellant's disability will fundamentally change the nature of its Section 8 program. It points out that the Housing Authority currently has several persons on its Section 8 waiting list who did not reside in Big Stone County at the time they submitted their applications and seems to argue that, if forced to serve those persons, the viability of its program will be imperiled.¹

However, the ability of Section 8 participants to use housing assistance in many communities – a feature called “portability” – is a fundamental characteristic of the Section 8 Voucher program. Limitation of the choice and flexibility available to program participants under portability is the exception, not the rule. 42 U.S.C. § 1437f(r)(1)(A) (2003); 24 C.F.R. § 982.353(b) (2004).

It is, therefore, difficult to understand how implementing a feature of the program that is the norm can fundamentally change or threaten the viability of respondent's program. All thirty-four Voucher holders by respondent's count, for example, can use their housing assistance outside the jurisdiction of the Housing Authority after twelve

¹ Respondent includes information regarding waiting list applicants in two documents attached to its Brief as “Appendix 1” and “Appendix 2.” The information is discussed in respondent's Brief at pages 7 and 14, and *amici curiae's* Brief at pages 4, 14-15, and 18-19. In addition, *amici curiae* add unattributed extra-record factual information regarding disabled applicants for the Minneapolis Public Housing Authority and Metropolitan Council Section 8 programs, at page 15. None of this information was part of the record properly before the Court of Appeals, nor was it part of the hearing record considered by the Hearing Officer below. Appellant has filed a motion to strike this information and sections of briefs discussing it from respondent and *amici curiae's* Briefs and from consideration by this Court pursuant to Minn. R. Civ. App. P. 110.05.

months under respondent's limitation rule. Supp. Rec. 11. In fact, under respondent's rule, participants who lived or worked in Big Stone County at the time of their application can use the housing assistance in any other jurisdiction *immediately*, whether that jurisdiction is within the State of Minnesota or not, urban or rural. *Id.* That is the very nature of the portability feature in the Section 8 program. Consequently, consideration of appellant's reasonable accommodation request will not fundamentally alter respondent's program.

Respondent alternatively argues at page 11 of its Brief that the goal of its policy is to preserve housing assistance for persons residing within Big Stone County. However, there is no reason to believe that this goal is by allowance of portability for disabled program participants as a reasonable accommodation, where appropriate. One does not know, for example, how many program participants *not* on current waiting lists applied as non-residents. Also, one cannot assume that non-residents, whether on a waiting list or current participants, will not want to reside within the jurisdiction of the Housing Authority. In addition, one cannot determine which of the persons on respondent's waiting list have disabling conditions that reasonably require they reside elsewhere, even should they request it. Finally, there is no reason to speculate that persons would plan to travel, for example, all the way from Columbus, Ohio, or Chicago, Illinois, to Ortonville, Minnesota, to take housing assistance obtained there away to some other place. Such anecdotal suppositions are simply preposterous and provide no basis for deciding the merits of the particular reasonable accommodation request in this case, or the making of broad policy.

In order to justify a refusal to grant an otherwise reasonable request for modification of a program rule as a reasonable accommodation, respondent must demonstrate that the request entails fundamental alteration or would pose undue financial and administrative burdens to its program. 24 C.F.R. § 8.33 (2004); 28 C.F.R. § 35.130(b)(7) (2004). Respondent has not demonstrated in the record below that making the portability feature of the Section 8 program available to appellant as accommodation in these unique circumstances will fundamentally threaten or imperil its housing assistance program.²

II. FAIR HOUSING CONCERNS FREQUENTLY OVERRIDE PROGRAM GOALS SUCH AS THOSE RAISED BY RESPONDENT.

A. Imperatives for Insuring Fair Housing and Anti-Discrimination Are Incorporated Broadly in Every Area of Housing Enterprises, Particularly Areas Affected By the Activities of Public Agencies.

Even if respondent could demonstrate that its ability to serve local residents might be affected by allowing appellant's accommodation request, fair housing concerns have been held to override the single-minded purpose of meeting this need. Anti-discrimination measures must always be considered as countervailing considerations. Where justified, the interest of the housing authority in maintaining housing assistance in its jurisdiction must yield to these concerns.

² Respondent and *amici curiae*'s arguments focus in chief on the effect accommodation will have on respondent's program. They appear to have disclaimed, therefore, an argument, arising from the Opinion of the Court of Appeals, that the Fair Housing Act, 42 U.S.C. § 3604(a) or (f), does not apply to housing authorities operating Section 8 rental programs.

For example, in *United States v. Housing Authority of the City of Chickasaw*, 504 F. Supp. 716 (S.D. Ala. 1980), the Housing Authority adopted a city residency requirement for applicants for its Low Rent Public Housing program. The stated rationale given for this policy was, among other things, a desire to reserve and maintain available housing assistance for City residents. The court accepted this justification as a lawful and permissible goal. *Id.* at 728-729. At the same time, however, the evidence in the case indicated that Chickasaw city residents were overwhelmingly white, while residents of neighboring communities, including those who wanted to apply for apartments in the new public housing development, were black. As a result, blacks were almost uniformly excluded from the Housing Authority's public housing program. *Id.* At 731. Noting this disparate effect, the court held that, if defendants could not provide a non-discriminatory justification for the requirement, the residency requirement must give way to the concerns of the Fair Housing Act and other legislation designed to prevent and prohibit discrimination. *Id.* at 732.³

Similarly, the housing authority in *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002) used residency preferences favoring local residents in several ways over non-resident applicants. This type of preference was, moreover, explicitly permitted by statute and implementing regulation. 42 U.S.C. § 1437f(o)(6) (2003); 24 C.F.R. § 982.207(b)(1)(i) (2004). Because the local areas of the Housing

³ It should be noted that residency requirements, unlike residency preferences, are no longer permitted. *Cf.*, 24 C.F.R. § 982.207(b)(1)(i) (2004).

Authority's jurisdictional area were racially disproportionate, however, the residency preference disparately affected applicants to defendant's program, based on their race.

The district court found that, even though the intent of the local residency preference was to serve lawful local goals, the policy must defer to countervailing fair housing concerns:

Let me make this clear: [Justification of policy goals] is not an issue of balancing one goal against another "with individual judges deciding which seems to them more worthwhile," which the First Circuit disapproved. *Langlois*, 207 F.3d at 50. Rather, it is an attempt to discern what *Congress* had in mind by listing multiple objectives which may only be harmonized as follows – residential preferences are permissible but only so long as other civil rights laws are complied with.

234 F. Supp. 2d at 67 (emphasis and internal quotation in original). Concern for possible racial impact was also raised in the regulations regarding residency preferences for the Section 8 program. *See* 24 C.F.R. § 982.207(b)(1)(iii) (2004). Accordingly, the Court held that Congress did not intend to authorize residency preferences that conflicted with fair housing objectives and that preferences adopted to further the lawful objective of responding to local needs must defer to fair housing concerns. *Id.*; *see also Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13 (Minn. App. 2003).

In this case, Congress has authorized election of a twelve-month limitation on use of housing assistance for non-resident applicants in the Section 8 program. One objective of the policy might be to further the ability of housing authorities to respond to local need. However, as evidenced by the Fair Housing Amendments Act, the Rehabilitation Act, and the Americans with Disabilities Act, Congress clearly considers accommodation of disability an important concern. Although Section 1437f(r) authorizes the twelve-

month limitation, it makes no provision for setting aside mandatory fair housing duties to accommodate disability in order to exclusively serve local need. Fair housing mandates, whether they concern race, disability, or other forms of impermissible discrimination, must be given full effect when considering the permissibility of limitations, otherwise allowed, to program benefits.

Finally, authority for limiting portability in Section 1437f(r) is itself made explicitly subject to exception by the Secretary of the Department of Housing and Urban Development (HUD). 42 U.S.C. § 1437f(r)(1)(B)(ii) (2003). Although HUD's regulation permitting temporary limitation of portability does not refer to the issue of disability discrimination, or accommodation, HUD *has* noted portability as reasonable accommodation in its program guidance for the Section 8 program. HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, ¶ 13.3. Supp. Rec. 38. HUD there cautions housing authorities against enforcing the twelve-month portability limitation in cases where "special needs" might militate for waiver of the limitation. These "special needs" are precisely cases where a non-resident applicant has demonstrated justification for alteration of the policy because of disability. In addition, HUD requires that all Section 8 programs established under the authority of its Part 982 Voucher program regulations comply with all equal opportunity requirements of the Fair Housing Act, Title II of the ADA, and the Rehabilitation Act of 1973. 24 C.F.R. § 982.53 (2004).

B. Reasonable Modification of Policies Does Not Result in Fundamental Alteration of Programs. Consideration of a Reasonable Accommodation Request is an Individualized Inquiry That Respondent Failed to Make in This Case.

The Supreme Court's most sustained and informative inquiry into the meaning of reasonable accommodation was made in *PGA Tour Inc. v. Martin*, 532 U.S. 661, 121 S. Ct. 1879, 149 L. Ed.2d 904 (2001). Petitioner in *Martin* was a professional golfer with a medical condition that prevented him from walking the extended distances needed to play and complete eighteen holes of golf. A "walking rule," enforced at higher tournament levels of professional golf, prohibited competitors from making use of a golf cart, as he needed, in tournament play. Martin requested modification of the rule from the PGA, a public accommodation, pursuant to Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12182(a). It refused to consider his request, however, or the medical evidence offered in support of it. 552 U.S. at 669; 121 S. Ct. at 1886.

The PGA asserted that the "walking rule" was an essential part of competitive conditions justified for the "highest level of play" in professional golf. The rule introduced factors of fatigue and stress thought by the PGA to be critical to competition of player against player. The PGA thus claimed that waiver of the rule in Martin's case would "fundamentally alter" the nature of the competition conducted at the tournament level at which he sought to play. As a "defense" to its duty to reasonably accommodate

disabled persons under the ADA, 42 U.S.C. § 12182(b)(2), the PGA claimed it was not required to consider Martin's request. *PGA Tour Inc. v. Martin*, at 670-671; 1886-1887.⁴

As the Court viewed it, however, the evidence showed that the element of fatigue proffered as justification for the "walking rule" did not necessarily result from walking so much as from psychological stress, heat or other physical factors at play, without regard to whether a golfer walked or not. *Id.* at 687; 1896. The rule was not, therefore, an "essential rule of competition . . . [that] would fundamentally alter the nature of [the PGA's] tournaments," but, rather, "peripheral" to the activity at issue. *Id.* at 689; 1897.

Similarly, appellant's request to waive respondent's twelve-month limitation rule does not entail a fundamental alteration of respondent's Section 8 program. The *purpose* of the program is to provide assistance to low-income persons in need of housing, and the *general characteristic* of the assistance benefit offered is to make it available for rental of dwellings chosen by program participants, without regard to the location of the dwelling in the jurisdictional area or territory of the housing agency. 42 U.S.C. § 1437f(r)(1)(A) (2003). Portability of assistance is, again, the rule of this program, not the exception. Though limitation of portability is permitted at election of the housing agency, it is peripheral to the fundamental character of the program. Where appropriate to

⁴ The duty to accommodate disabled patrons of public accommodations under Title III of the ADA is directly analogous to the reasonable accommodation duty of Title II. Although Title II's drafters did not include a specific accommodation directive, the House Committee reporting the bill to the floor of Congress noted its expectation that Department of Justice regulations implementing Title II for public agencies would incorporate this important imperative, now found at 28 C.F.R. § 35.130(b)(7) (2004). See U.S. Department of Justice Preamble Statement to promulgation of ADA regulations, 56 Fed. Reg. 35694, 35704 (July 26, 1991), referring to House Report 101-485, H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 52 (1990).

accommodate disability, limitation of portability is subject to modification as a reasonable accommodation.

The modification of program rules sought in this case is to be distinguished, therefore, from the modifications sought in cases cited by *amici curiae*. In *Pottgen v. Missouri State High School Activities Assoc.*, 40 F.3d 926 (8th Cir. 1994), for example, a nineteen-year-old student in a Missouri high school sought waiver of an athletic eligibility rule. The rule set an upper age limit of eighteen for scholastic sports competition. Even though the student remained in high school past age eighteen because of his disability, the court determined that the link between age and physical body development was so strong that waiver of the rule was not justified. Because competitive advantage was linked to body development, modification of the rule, the court held, would fundamentally alter the nature of scholastic sports competition. 40 F.3d at 931.

Somewhat similarly, the Second Circuit in *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (1998), determined that a disabled tenant could not require a private landlord to modify its policy against participating in the Section 8 program as a reasonable accommodation. However, when the basis for a business policy is founded on creditworthiness, an accommodation plan providing for adequate assurance of payment may, for example, require a different result. *Giebeler v. M&B Associates*, 343 F.3d 1143 (9th Cir. 2003); *see also Bentley v. Peace and Quiet Realty*, --- F. Supp. 2d ---, 2005 WL 1023279 (May 3, 2005) (requiring a landlord to permit a disabled tenant to move from one rent-controlled apartment to another, without losing her protections under rent control).

Most importantly, the Supreme Court in *Martin* also held that consideration of reasonable accommodation requests are individualized inquiries. Speaking of the golfing association's review of Martin's request, the Court said:

Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. As previously stated, the ADA was enacted to eliminate discrimination against "individuals" with disabilities, and to that end Title III of the Act requires without exception that any "policies, practices, or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered. To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.

532 U.S. at 688; 121 S. Ct. at 1896 (citations omitted). The Court insisted on inquiry into the specifics of Martin's disability, *and* the relationship between the walking rule and competitive pressure placed on players by golf's "fatigue factor." Without considering his individualized circumstances, the PGA could not determine whether his request for modification of the walking rule would affect that part of competition. In fact, as determined by the District Court, the facts indicated that Martin's use of a golf cart played little if any part in his fatigue relative to other players. *Id.* at 690; 1897.

It is for this reason that respondent cannot claim the accommodation requested by appellant "fundamentally alters" respondent's Section 8 program. Because respondent's legal position at the hearing was that it need not even consider appellant's request, respondent cannot determine whether a fundamental alteration of its program would result from granting of the request.

Amici curiae and respondent assert two reasons that a fundamental alteration of the program will result: First, modification of the limitation rule will result in resources being given to persons some of whom will use the resources outside the jurisdiction of the agency, diverting the resources from local residents. Second, they argue that modification of the rule will stress program finances to such a degree that respondent's program will cease to be able to serve local need.

For separate reasons, neither of these arguments can justify respondent's refusal to consider appellant's individualized circumstances. *Amici curiae's* generalized fear of "waiting-list shopping" is just that: generalized and speculative, without specific reference to a particular person's disability that might make an individualized waiver of the rule reasonable.⁵ Appellant does not challenge a general justification for the rule, nor even, possibly, its reasonableness, or respondent's legal authority under the U.S. Housing Act to elect it. 42 U.S.C. § 1437f(r)(1)(B)(i) (2003). In appellant's particular circumstance, however, it is necessary that the rule be modified, as a result of her disabilities, so that she will be able to use the housing assistance to which she became entitled once she received a Voucher from respondent. This is not a waiting-list case but,

⁵ H. Rep. 102-760, quoted in footnote 5 of *amici curiae's* Brief, reported on legislation later withdrawn when the House receded to the Senate bill and conferees substituted new amendments to replace both versions. See H.R. REP. 102-1017, H.R. REP. No. 1017, 102d Cong., 2d Sess. 1992, 1992 U.S.C.C.A.N. 3483. Special provisions providing for problems of small housing agency programs were not adopted. Although the language ultimately adopted included a twelve-month limitation without exception, it should be noted that this limitation was significantly modified to its present form in 1998, expanding portability substantially, by Section 553 of the Quality Housing and Work Responsibility Act of 1998, P.L. 105-276, Title V, *codified at* 42 U.S.C. § 1437f(r)(1) (2003).

rather, a case about whether a disabled person will be able to use the Section 8 program in the only way reasonably available to her.

At the same instance, respondent cannot justify denial of appellant's request for modification by pointing to financial disaster it says would result from modifying the rule for *other* disabled program participants, later. If respondent wants to claim financial impossibility as a fundamental alteration, it must look only to financial consequences that would result from granting *appellant's* modification request, not the request of some other participant at some other time. It is the nature of the Section 8 program to provide financial assistance needed by eligible participants for rental dwellings; assistance must be made available to appellant as much as to any other participant otherwise eligible, without distinction, until respondent can make out a reasonable case that there is no more assistance available. There is no record evidence to indicate, nor is there reason to believe, that respondent could make such a showing in appellant's individual case.⁶

HUD program directives prohibit housing authorities, in fact, from limiting portability features of the Section 8 program to save funds. It is only in cases in which a housing authority can demonstrate that the additional costs associated with a request for portability are "financially infeasible," considering the program's entire annual budget,

⁶ Respondent's submission to this Court of extra-record evidence regarding persons waiting to be served on program waiting lists is inadequate justification for denial of appellant's request. Even if the Court should consider the information, nothing is known about the financial condition of respondent's program.

It is, for example, at least possible that the possibility of Big Stone County residents porting out of the County with their Vouchers might be caused more often by other factors, such as employment or other opportunities, than by the particular kind of reasonable accommodation request appellant seeks in her case.

that denial of portability is permitted. Housing authorities are required to manage Section 8 program budgets to facilitate portability for program participants. 24 C.F.R. § 982.355(e)(6) (2004); HUD NOTICE PIH 2005-1 (HA) (December 8, 2004), p. 7.

III. RESPONDENT AND *AMICI CURIAE*'S ARGUMENT THAT RESPONDENT TREATS DISABLED AND NON-DISABLED PERSONS ALIKE FAILS TO PROPERLY CONSIDER INDIVIDUAL ACCOMMODATION REQUESTS FOR DISABLED PERSONS.

Respondent repeatedly argues that its twelve-month limitation of use policy for non-residents does not violate the Americans with Disabilities Act (ADA) because it applies the policy to disabled and non-disabled persons alike. However, this argument ignores respondent's legal obligation to consider modification of program policies where reasonably needed by disabled persons to enable them to participate in the program.

Title II of the ADA, applicable to the provision of services and benefits offered by public agencies, states that a "qualified individual with a disability" is an individual who can meet the essential eligibility requirements of the agency's program "*with or without reasonable modifications to rules, policies, or practices*" for the program. 42 U.S.C. § 12131(2) (1995) (emphasis added). Thus, by its very definition of persons for whom accommodations may be needed, a person with a disability may, where reasonably necessary, qualify for a program through modification of program policies.

Justice Ginsburg, joined by Justices Breyer and Souter, noted that modification of program rules, policies, and practices under the ADA represents a recognition on the part of Congress that strict equal treatment is not equivalent to non-discrimination. In addressing the breadth of changes wrought by Congress in the ADA, she pointed out:

Including individuals with disabilities among people who count in composing “We the People,” Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference, not indifference, but accommodation. . . . *See also* . . . Bagenstos, [Subordination, Stigma and “Disability,” 86 Va. L. Rev. 397] at 435 (ADA supporters sought “to eliminate the practices that combine with physical and mental conditions to create what we call ‘disability.’ The society-wide universal access rules serve this function on the macro level, and the requirements of individualized accommodation and modification fill in gaps on the micro level.”)

Tennessee v. Lane, 541 U.S. 509, 536, 124 S. Ct. 1978, 1996, 158 L. Ed. 820 (2004) (J. Ginsburg, concurring). Under this view, some practices of public agencies can result in the *loss* of equal participation. Consideration of such modifications of public policies or practices as may be necessary in individual circumstances is thus justified.

The requirement for individualized modifications of program policies does not necessarily mean, therefore, that a public service or program treats disabled persons “unequally.” In *Essling’s Homes Plus Inc. v. City of St. Paul*, a Fair Housing Amendments Act (FHAA) case, for example, an operator of homes for the disabled asked the City of St. Paul for a variance in application of its zoning code. The City’s code did not allow multiple kitchen facilities in separate floors of dwellings, but plaintiffs asserted that separate kitchens on each floor of their care homes were necessary to meet the needs of mobility-impaired residents living on separate floors. Finding that the variance requested could be necessary, the *Essling’s* court noted:

A reasonable accommodation – by its very nature – constitutes “preferential” treatment for persons with disabilities, and that treatment is necessary to achieve the basic equal-opportunity goals created by laws such as the FHAA.

356 F. Supp. 2d 971, 980 (D. Minn. 2004).

Nor do the cases cited by respondent represent a repudiation of the legal basis or authority for reasonable accommodation. In *DeBord v. Board of Education*, 126 F.3d 1102 (8th Cir. 1997), the part of the court's opinion quoted by respondent, upholding the school district's policy under the Physician's Desk Reference (PDR) as "neutral," relates to application of the policy to all students. Under that policy, the school declined to administer medications in dosages greater than specified in the PDR to any student, not just disabled students. Thus, the policy related to the school's desire to maintain orthodox medical regimens, whether or not disabled or non-disabled students needed unorthodox treatments. On the *separate* question of plaintiff's request for modification of the policy as a reasonable accommodation, the court considered other concerns that might have required change in application of the policy in plaintiff's case. The fact that the court rejected the student's request for accommodation had more to do with the alternative plan offered by the school district than with the "neutrality" of the basic policy, or with any partiality the requested modification might have shown for plaintiff as a disabled person. *Id.* at 1106.

Similarly, in both *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998) and *Hemisphere Building Co. v. Village of Richton Park*, 171 F.3d 437 (7th Cir. 1999), the courts found that it was not necessary to consider reasonable accommodation because the policies under question related to economic discrimination, not discrimination based on disability. *Id.* at 302; *id.* at 440, *respectively*. And, finally, in *Forest City Daly Housing Inc. v. Town of North Hempstead*, 175 F.3d 144 (2d Cir. 1999), the developer suing on behalf of disabled residents of housing sought a special use

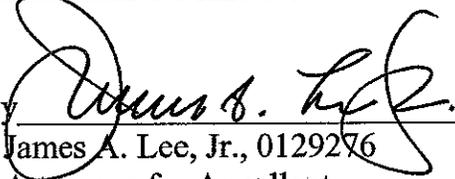
permit to allow it to construct a residential facility in a "Business B" area zoned for commercial use. Although the court agreed with plaintiffs that rezoning was a more appropriate question than the availability of a special use permit, it nevertheless was unable to find that rezoning commercial areas was common in the community. Thus, it determined that the City's refusal to rezone the area was not because of disabilities of plaintiff's residents, but because plaintiff asked for rezoning from commercial to residential use. Thus, modification of the City's classification did not represent reluctance to rezone because of disability.

Like the modifications of program practices or individual treatment contemplated by Justice Ginsburg in *Tennessee v. Lane*, or the District Court in *Essling's Homes*, appellant seeks modification of respondent's twelve-month policy just so she will be able to use the housing assistance benefit provided by respondent's Section 8 program. For the reasons she testified to and documented at her hearing below, she is effectively unable to use her benefit without the modification of the policy she requested in her individual case. She needs this modification because her disabilities require it and she is excluded from participation in the program because of her disabilities.

Respectfully submitted:

LEGAL AID SOCIETY OF MINNEAPOLIS

Dated: 6/6/2005

By 
James A. Lee, Jr., 0129276
Attorneys for Appellant
2100 Plymouth Avenue N, Room 132
Minneapolis, MN 55411
(612) 436-5414