

RE-ENTRY HOUSING AND MENTAL HEALTH: HOW PREVIOUSLY INCARCERATED INDIVIDUALS COULD QUALIFY FOR PROTECTIONS UNDER THE FAIR HOUSING ACT'S DEFINITION OF HANDICAP

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"It was once said that the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy and the handicapped."

— Hubert H. Humphrey¹

I. INTRODUCTION

At a community mental health center, a homeless client explains to his mental health therapist the struggle to find housing. The client shares, "I'm a felon, and no place will accept me because of my past." The therapist asks, "[h]ow does it feel to experience rejection because of your past?" He responds, "[i]t makes me feel like I am nothing. I feel like I don't deserve a place to live, like my life doesn't even matter . . . no matter how hard I try to turn things around, people still only see me as a criminal."²

Returning to the community from jail or prison is a complex transition for individuals and communities; this transition is called reentry.³ Without housing, there can be no successful community reentry.⁴ The challenges recently released individuals face as they try to piece together their lives outside prison walls are complicated by their struggle to secure housing. Formerly incarcerated individuals are nearly ten times more likely to experience homelessness than the

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1. Hubert S. Humphrey, Vice Pres. United States, Address at the Hubert H. Humphrey Dep't of Health & Hum. Servs. Building Dedication (Nov. 4, 1977). Hubert Humphrey was a former Vice President of the United States, and he is generally known for his advocacy of civil rights.

2. This depicted session is based upon the writer's professional experiences as a licensed mental health therapist.

3. *Reentry/Transition*, NAT'L INST. OF CORRS., <https://nicic.gov/resources/resources-topics-and-roles/topics/reentrytransition> [<https://perma.cc/R83V-P8GM>] (last visited Feb. 3, 2025) ("[r]eentry refers to the transition of offenders from prisons or jails back into the community"); *Overview of Reentry*, NAT'L INST. OF JUST. (June 7, 2013), <https://nij.ojp.gov/topics/articles/overview-reentry> [<https://perma.cc/Y2F7-7UQ4>] ("[o]ffender reentry, the transition from life in jail or prison to life in the community").

4. Kimberly Burrowes, *Can Housing Interventions Reduce Incarceration and Recidivism?*, HOUSING MATTERS (Feb. 27, 2019), <https://housingmatters.urban.org/articles/can-housing-interventions-reduce-incarceration-and-recidivism> [<https://perma.cc/93QK-NAQM>].

general public.⁵ Without stable housing, previously incarcerated individuals are less likely to be successful in reentry or to connect to needed services and support systems. A successful transition from jails and prisons into secure housing can reduce the risk of rearrest, relapse, or other negative behavioral outcomes that might land an individual back in a correctional institution.⁶ Housing is a protective factor for previously incarcerated individuals and is an important aspect of public health and safety.

Reentry housing takes many forms, including group homes, halfway houses, sober living homes, or transitional living facilities.⁷ In recent years, many housing advocates expected the overall quantity of reentry housing to rise because of government plans to reduce prison overcrowding, implementation of alternative measures to decrease rates of recidivism, and sentencing time reductions for non-violent crimes.⁸ However, political pushback on these matters has halted such attempts for reforming re-entry transitions services.⁹ Amid a rising national housing affordability crisis, individuals face tougher obstacles to a successful reentry.¹⁰ In addition, local jurisdictions and community members often object to reentry housing being built in their neighborhoods, raising public safety concerns.¹¹

The Fair Housing Act (“FHA”), enacted as Title VIII of the Civil Rights Act of 1968, originally prohibited housing discrimination based on race, color,

5. Lucius Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people*, PRISON POL’Y INITIATIVE (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html> [https://perma.cc/7VM5-S2W5].

6. THE REENTRY COORDINATION COUNCIL, COORDINATION TO REDUCE BARRIERS TO REENTRY: LESSONS LEARNED FROM COVID-19 AND BEYOND, 8 (2022), <https://www.justice.gov/opa/press-release/file/1497911/dl> [https://perma.cc/B3RK-2ZS4].

7. BUREAU OF JUST. ASSISTANCE, REENTRY HOUSING OPTIONS: THE POLICYMAKERS’ GUIDE 1–3 (2010), <https://www.cmcainternational.org/wp-content/uploads/2019/10/reentry-housing-options-policymakers.pdf> [https://perma.cc/CV2N-ZZXL].

8. See, e.g., The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

9. See, e.g., *Trump Promises to Militarize Police, Reincarcerate Thousands, and Expand Death Penalty*, AM. C.L. UNION (July 19, 2024), <https://www.aclu.org/news/criminal-law-reform/trump-promises-to-militarize-police-reincarcerate-thousands-and-expand-death-penalty> [https://perma.cc/CM54-8WDY].

10. Justin Dorazio, *Strengthening Access to Housing for People With Criminal Records Is Key to Successful Reentry*, CTR. FOR AM. PROGRESS (Apr. 17, 2023), <https://www.americanprogress.org/article/strengthening-access-to-housing-for-people-with-criminal-records-is-key-to-successful-reentry/> [https://perma.cc/H4HB-EJJD].

11. See, e.g., Shakkira Harris, *‘It’s gonna save lives’: Neighbors weigh in on proposed recovery home for women on Indy’s north side*, WRTV INDIANAPOLIS (Apr. 8, 2022, 2:24 PM), <https://www.wrtv.com/news/local-news/indianapolis/north-side/its-gonna-save-lives-neighbors-weigh-in-on-proposed-recovery-home-for-women-on-indys-north-side> [https://perma.cc/9BHX-D66U]; James Jarvis, *Plan to support group homes for people in recovery meets resistance*, ARLNOW (Oct. 10, 2024, 1:15 PM), <https://www.arlnow.com/2024/10/10/plan-to-support-group-homes-for-people-in-recovery-meets-pushback-from-some-residents/> [https://perma.cc/FW7W-S3RM].

religion, sex, or national origin.¹² In 1988, the FHA was amended to extend its protections to include familial status and disability.¹³ The FHA defines disability or “handicap”¹⁴ as: “(1) a physical or mental impairment which substantially limits one or more of [a] person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.”¹⁵ Under this statutory definition of disability, an individual is required to satisfy only a single criterion or meaning of disability. The “regarded as,” or third prong, was intended to be interpreted broadly. Congress’ intent was to address conscious and unconscious perceptions by society of an individual’s physical or mental impairment, whether real or perceived.¹⁶ The focus of this third prong extends beyond the severity of an actual disability or impairment.¹⁷ Rather, the “regarded as” prong protects individuals from housing discrimination related to biases or prejudices about their disability or assumed disability.¹⁸

While the FHA prohibits housing discrimination, previously incarcerated individuals are not afforded protection under the Act. Since having a criminal record is not a federally protected characteristic, local governments or ordinances may use an individual’s criminal history as a basis to deny or reject housing opportunities for those individuals.¹⁹ While the FHA broadly extends to a range of considered “handicaps,” not every debilitating mental or physical condition elicits the protections from housing discrimination. Some types of mental health conditions can be considered handicaps under the FHA.²⁰ Individuals in recovery for drug or alcohol addiction have also been considered protected on the basis of handicap.²¹ Since handicap includes individuals recovering from substance or alcohol use, sober living homes are afforded

12. 42 U.S.C. §§ 3601–3619; see John Hamer, *Handicap Discrimination, Zoning, and the Federal Fair Housing Act*, 13 ME. B.J. 166, 166 (1998).

13. 42 U.S.C. §§ 3601– 3619; see Hamer, *supra* note 12.

14. For persons with disabilities, terminology is not insignificant. For years, persons with disabilities were referred to by dehumanizing terms such as “the handicapped” or “the retarded.” The Americans with Disabilities Act (“ADA”) uses the term “disability,” as does Section 504 of the Rehabilitation Act, while the FHA uses the term “handicap.” Despite the variations, the definitions mirror one another. The term “handicap” is used, within this paper, to be consistent with the FHA. However, it is necessary to note that the term “handicap” is disfavored among disability rights advocates, and the term “disability” is preferred. Person-first language (“people with. . .”) is considered the best practice to avoid stigmatizing language, and it is important to ask people or groups of individuals on their preference.

15. 42 U.S.C. § 3602(h).

16. Title II Regulations Supplementary Information, 54 Fed. Reg. 3232, 3245 (July 29, 1991) (Department of Justice’s final admin. rule under the American with Disabilities Act).

17. 24 C.F.R. § 100.201(d)(2) (2026); Title II Regulations Supplementary Information, 54 Fed. Reg. 3232, 3245 (July 29, 1991) (Department of Justice’s final admin. rule under the American with Disabilities Act).

18. Title II Regulations Supplementary Information, 54 Fed. Reg. 3232, 3245 (July 29, 1991) (Department of Justice’s final admin. rule under the American with Disabilities Act).

19. See 42 U.S.C. § 3604(f)(1)–(3).

20. 24 C.F.R. § 100.201(a)(2) (2026).

21. *Id.*

protection under the FHA.²² If a group home markets itself as a recovery home for substance use, then it will have a better chance of withstanding pushback from communities and meet the requirements of an FHA claim. In contrast, a group home solely focused on reentry may struggle to succeed without the strong support and advocacy of its community. However, many questions remain unanswered regarding the FHA's applicability on residential reentry homes or group homes for previously incarcerated individuals without a substance use disorder or qualifying mental health condition.²³

This Note argues that reentry housing, specifically group homes for the formerly incarcerated, should qualify for the FHA's protection under the "regarded as" prong of handicap. Previously incarcerated individuals should be afforded protection from housing discrimination based on actual or purported mental health conditions that contributed to their involvement with the justice system, emerged while incarcerated, or developed post-release. Part I of this Note includes an introduction. Part II provides a general overview of the FHA and an overview of the meaning of handicap or disability discrimination, including a discussion of legislative intent. Part III analyzes the existing FHA protections and their application to the reentry population, discusses the requirements plaintiffs must meet to prove FHA violations, and examines the housing claims available for reentry group homes. It also elaborates on the proposal that previously incarcerated individuals in need of housing should be afforded protection under the FHA's definition of "handicap." Specifically, the "regarded as" prong of the FHA's handicap definition may allow for such protection. Part IV provides the Note's conclusion.

II. BACKGROUND

A. General Protections Under the Fair Housing Act

The enactment of the FHA in 1968 prohibited housing discrimination based on race, color, religion, or national origin.²⁴ The FHA Amendments of 1988 extended the definition of "protected class" to include the "handicapped," or rather, individuals with disabilities.²⁵ The Amendments also added "familial status" as a protected group to prevent discrimination against people based on their family situation.²⁶ Thus, as amended in 1988, the FHA prohibits discriminatory conduct relating to race or color, religion, sex, national origin,

22. Matthew M. Gorman, Anthony Marinaccio & Christopher Cardinale, *Fair Housing for Sober Living: How the Fair Housing Act Addresses Recovery Homes for Drug and Alcohol Addiction*, 42 URB. LAW. 607, 608–09 (2010).

23. *Id.* at 614.

24. Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73 (1968).

25. 42 U.S.C. §§ 3604(c)–(f); 3605; 3606; 3617; 3631 ("FHA Amendments of 1988").

26. 42 U.S.C. §§ 3604(a)–(e); 3605; 3606; 3617; 3631.

familial status, or disability.²⁷ The Department of Housing and Urban Development (“HUD”) is responsible for administering the FHA.²⁸

The FHA prohibits housing providers, landlords, sellers, property owners, and other participants in the housing market from engaging in discriminatory housing practices against any members of a protected class. First, these actors may not refuse to sell or rent a dwelling, or refuse to negotiate for its sale or rental, on discriminatory grounds.²⁹ Second, they may not discriminate against any person in the terms, conditions, or privileges associated with the sale or rental of a dwelling.³⁰ Third, they may not advertise or publish any notice or statement relating to the sale or rental of a dwelling that expresses a preference, limitation, or discrimination based on a protected class.³¹ Fourth, they may not engage in conduct that makes a dwelling unavailable to a member of a protected class.³² Fifth, they may not induce or attempt to induce, for financial gain, any person to sell or rent a dwelling in a manner that would restrict access for members of a protected class.³³ Finally, the FHA prohibits denying a dwelling to any buyer or renter because that individual, or any person associated with them, is a member of a protected class.³⁴

B. Understanding Handicap

In the 1985 Supreme Court case *City of Cleburne v. Cleburne Living Center*, the Court held that group home residents were not a suspect class, despite the City’s “irrational prejudice” against those with mental disabilities.³⁵ The Cleburne Living Center, a group home for residents with mental disabilities, filed suit against the City of Cleburne.³⁶ The group home alleged that a zoning ordinance violated the Equal Protection Clause because it discriminated against residents with mental disabilities.³⁷ In its ruling, the Supreme Court refused to apply strict scrutiny to discrimination against those residents with disabilities.³⁸ After this decision, housing advocates sought legislative remedies for people with handicaps or disabilities.³⁹ To remedy this shortcoming, the FHA was amended to expressly include people with disabilities in the scope of protections

27. 42 U.S.C. § 3604. Some states have adopted additional housing protections, such as source of income discrimination or recognition of sexual orientation as a protected status.

28. 42 U.S.C. § 3608.

29. 42 U.S.C. § 3604(a).

30. 42 U.S.C. § 3604(b).

31. 42 U.S.C. § 3604(c).

32. 42 U.S.C. § 3604(d).

33. 42 U.S.C. § 3604(e).

34. 42 U.S.C. § 3604(f)(1).

35. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442, 450 (1985).

36. *Id.* at 435–37.

37. *Id.* at 437.

38. *Id.* at 446–47.

39. F. Willis Caruso, *Fair Housing Modifications and Accommodations in the '90s*, 29 J. MARSHALL L. REV. 331, 333 (1996).

afforded.⁴⁰

The 1988 FHA Amendments adopted the broad definition of “handicapped” from the Rehabilitation Act of 1973 and the Americans with Disabilities Act.⁴¹ From the House Report, the intent of Congress is clear on the goal of the 1988 FHA Amendments:

[It] 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 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.⁴²

The FHA’s definition of “handicap” has three statutory prongs:

- (1) a physical or mental impairment which substantially limits one or more of such person’s major life activities,
 - (2) a record of having such an impairment, or
 - (3) being regarded as having such an impairment,
- but such term does not include current, illegal use of or addiction to a controlled substance.⁴³

The first prong defines a disability as a physical or mental impairment that substantially limits one or more of an individual’s major life activities.⁴⁴ This prong adopts the general understanding that a disability creates a substantial limitation to an individual’s daily functioning. The term “major life activity” includes “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”⁴⁵ The question of whether a substantial limitation of a major life activity exists is a matter of fact for courts to determine, often considering medical diagnoses.

While the FHA broadly extends to a range of considered handicaps, not every mental or psychological condition is covered under FHA protections.⁴⁶ Rather, jurisdictions vary, often on a case-by-case or fact-specific basis, on

40. 42 U.S.C. § 3604; *see supra* note 14 (noting that “handicap” is an outdated term and that current best practice favors the use of “disability” and person-first language, such as “people with disabilities”).

41. *See* 29 U.S.C. § 705(20); *see also* 42 U.S.C. § 12102(1).

42. Fair Housing Amendments Act Committee Report, H.R. REP. NO. 711, 100th Cong., 2d Sess. 3355 (1988).

43. 42 U.S.C. § 3602(h).

44. 42 U.S.C. § 3602(h)(1).

45. 24 C.F.R. § 100.201(b) (2026).

46. Brian J. Connolly & Dwight H. Merriam, *Planning and Zoning for Group Homes: Local Government Obligations and Liability Under the Fair Housing Amendments Act*, 47 URB. LAW. 225, 233 (2015).

whether a certain condition should be considered a handicap. The term “physical or mental impairment” includes a wide range of physiological conditions and mental or psychological disorders.⁴⁷ It is important to note that the FHA does not protect people who currently engage in the use of alcohol or illegal drug use, even if that alcohol use or drug use would otherwise meet the qualifications of substantially limiting a major life activity. Within the handicap definition, this exclusion is written as, “. . . such term does not include current, illegal use of or addiction to a controlled substance.”⁴⁸ However, individuals that are in recovery for drug or alcohol addiction have been considered handicapped under the FHA.⁴⁹ The legislature’s attempt to distinguish between these two groups fails to recognize the recovery process; recovery from substance use is a continuous journey, with risks of relapse being a part of the process. Individuals actively struggling with substance use or dependence greatly benefit from housing stability to support their recovery. Under this regulatory language, the FHA neglects to offer housing protection for a group of individuals who need it most. Possibly, this provision is driven by motivations that ultimately favor landlords over the individuals it purports to help.

The second prong protects individuals with disabilities who have a record of, or a history of, a physical or mental impairment. An individual having a record of such impairment “means [that individual] has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”⁵⁰ This prong recognizes that an individual may fit the statutory description if they have a history of a disability or impairment. Often, courts will consider medical diagnoses or an individual’s history of medical treatment as pertinent facts.

If an individual’s “handicap” does not meet the conditions of the first two prongs within the definition, the third prong of handicap may still apply. The third prong is the focus of this Note. The rationale for the third prong was articulated by the Supreme Court in *Sch. Bd. of Nassau Cnty., Fla. v. Arline*.⁵¹ The Court concluded that, by including this test in the Rehabilitation Act of 1973, “Congress acknowledged that society’s accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.”⁵² This third prong provides protection for

47. 24 C.F.R. § 100.201(a) (2026).

48. 42 U.S.C. § 3602(h).

49. *See*, *Valley Hous. LP v. City of Derby*, 802 F. Supp. 2d 359, 384 (D. Conn. 2011); *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450, 459 (D.N.J. 1992); *Oxford House, Inc. v. Browning*, 266 F. Supp. 3d 896, 910–11 (M.D. La. 2017).

50. 24 C.F.R. § 100.201(c) (2026).

51. *Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 284 (1987); Title II Regulations Supplementary Information, 54 Fed. Reg. 3232, 3245 (July 29, 1991) (Department of Justice’s final admin. rule under the American with Disabilities Act).

52. *Arline*, 480 U.S. at 284; Title II Regulations Supplementary Information, 54 Fed. Reg. 3232, 3245 (July 29, 1991) (Department of Justice’s final admin. rule under the American with Disabilities Act).

people that may otherwise be treated adversely as a result of stigmatizing perceptions held by others. An individual who is denied housing or benefits “because of myths, fears, and stereotypes associated with disabilities would be covered under this third test whether or not the person’s physical or mental condition would be considered a disability under the first or second test in the definition.”⁵³

The third prong of handicap, being “regarded as” having an impairment, encompasses three interpretations: (1) an individual’s physical or mental impairment is treated by another person as a substantial limit to one or more major life activities; (2) an individual’s physical or mental impairment substantially limits one or more major life activities because of the attitudes of others; or (3) an individual does not have any impairments but is treated by another person as having an impairment.⁵⁴

Under the first interpretation, if a housing entity “excludes or takes action to treat a person worse than it otherwise would because of some physical or mental condition the person has,” the individual is regarded as having a substantially limiting impairment.⁵⁵ In such circumstances, it is immaterial whether the condition in fact limits a major life activity. Rather, the dispositive inquiry is whether the individual was treated as if they had such a limitation. If so, that treatment alone is sufficient to satisfy the third prong.

The second interpretation, where an impairment is substantially limiting due to the attitudes of others, captures the role of stigma, bias, and social perception. In this context, “regarded as” having an impairment includes circumstances in which a person “[h]as a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of others toward such impairment.”⁵⁶ It recognizes that a condition may become disabling not solely because of its inherent characteristics, but because of how others respond to it. In this sense, the “regarded as” prong explicitly accounts for the socially constructed dimensions of disability.

Finally, the third interpretation applies where an individual has no impairment but is nevertheless treated as though they do.⁵⁷ Under this regulatory language, if a housing entity “excludes or takes action to treat a person worse than it otherwise would because of some physical or mental condition the person has or is believed to have, then the covered entity has treated the person as having a substantially limiting impairment.”⁵⁸ Here, liability attaches when a

53. Title II Regulations Supplementary Information, 54 Fed. Reg. 3232, 3245 (July 29, 1991) (Department of Justice’s final admin. rule under the American with Disabilities Act).

54. 24 C.F.R. § 100.201(d) (2026).

55. *ADA Policy Brief Series #15: Supreme Court’s Decisions Discussing “Regarded As” Prong of the ADA Definition of Disability*, NAT’L COUNCIL ON DISABILITY 11 (May 21, 2003), <https://www.ncd.gov/report/ada-policy-brief-series-15-supreme-courts-decisions-discussing-regarded-as-prong-of-the-ada-definition-of-disability/> [<https://perma.cc/JC59-P43E>].

56. 24 C.F.R. § 100.201(d)(2) (2026).

57. *Id.*

58. NAT’L COUNCIL ON DISABILITY, *supra* note 55.

housing provider acts on the belief, accurate or not, that the individual has a physical or mental condition and, on that basis, subjects them to adverse treatment. The existence of an actual impairment is therefore irrelevant; what matters is the perception and the resulting discriminatory conduct. In such circumstances, the individual is “regarded as” having a disability.

C. Group Homes for People with Disabilities

Previously incarcerated individuals should be afforded the same FHA protections as residents of sober living homes. Sober living homes are often a primary housing option for individuals reentering society, particularly those recovering from substance use disorders. Rates of substance abuse and dependence are significantly higher among the reentry population,⁵⁹ and such housing may be among the few viable options available to individuals with criminal records. Because individuals in recovery from drug or alcohol addiction are considered “handicapped” under the FHA,⁶⁰ sober living homes, and their residents, are protected from discriminatory housing practices.

The 1988 FHA Amendments’ prohibitions against handicap or disability discrimination intended, amongst its other objectives, to prevent restrictions on communal housing opportunities like group homes for people with disabilities. The House Judiciary Committee report explicitly states that the 1988 Amendments Act was intended to apply to “state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps.”⁶¹ Congress was aware of instances where local governments had applied laws and regulations in a discriminatory manner against “congregate living arrangements for persons with handicaps.”⁶² Beyond governmental discrimination based on “an irrational prejudice” against people with disabilities, Congress expressed concern about possible neutral laws or rules that would have a discriminatory impact on housing opportunities for those with disabilities.⁶³ The House Judiciary Committee expressed the breadth of this concern: “The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.”⁶⁴

Despite these intentions to prevent restrictions on communal housing options for people with disabilities, the FHA’s protections extend only to housing units or facilities that are considered a “dwelling.” A dwelling is defined

59. See *infra* section III(B) (A Lack of Understanding of Mental Health Conditions as It Relates to the Formerly Incarcerated).

60. See, e.g., *Oxford House v. Township of Cherry Hill*, 799 F. Supp. 450, 459 (D.N.J. 1992); *Corp. of Episcopal Church in Utah v. W. Valley City*, 119 F. Supp. 2d 1215, 1219 (D. Utah 2000).

61. H.R. REP. NO. 100-711, at 24 (1988).

62. H.R. REP. NO. 100-711, at 23 (1988).

63. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

64. H.R. REP. NO. 100-711, at 24 (1988).

as, “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.”⁶⁵ The FHA does not elaborate further on this definition. Thus, courts have leaned on their own interpretation, resulting in various definitions of what may classify as a dwelling, in many instances excluding group homes.

Many courts have not considered transitional or short-term living facilities as a dwelling under the FHA.⁶⁶ Other courts have been willing to extend the protections of the FHA to a broader definition of short-term rehabilitation facilities or nursing homes.⁶⁷ The broader interpretation of a dwelling has allowed various group homes to bring claims against local jurisdictions under the FHA. The term “group home” is not a legal term but generally refers to housing occupied by groups of unrelated individuals. There are many kinds of group homes: youth group homes, homes for people with intellectual or developmental disabilities, substance-abuse recovery homes, sober living homes, halfway homes, re-entry homes, or low-income homes. Some group homes are sponsored by organizations that offer various services for individuals living in the home, such as counseling, supportive services, case management, transportation, food, healthcare, or medical treatment.⁶⁸

The Third Circuit developed a two-step analysis for what is considered a dwelling for purposes of applying FHA protections: (1) whether the facility is intended or designed for occupants intending to remain in the facility for a significant period of time, and (2) whether those occupants would view the facility as a place to return to during that period.⁶⁹ Although this analysis

65. U.S.C. § 3602(b).

66. *Patel v. Holley House Motels*, 483 F.Supp. 374, 381 (S.D. Ala. 1979) (holding that a motel was not a dwelling); *Schneider v. County of Will* 190 F.Supp.2d 1082, 1087 (N.D. Ill. 2002) (holding that a proposed bed and breakfast is not a dwelling); *Johnson v. Dixon*, 786 F.Supp. 1, 4 (D.D.C. 1991) (holding that homeless and emergency shelters are not characterized as a dwelling).

67. *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996) (proposed nursing home was a dwelling); *Connecticut Hosp. v. City of New London*, 129 F. Supp. 2d 123, 134–36 (D. Conn. 2001) (holding that temporary outpatient treatment housing for people recovering from alcohol and substance use is a dwelling); *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216 (11th Cir. 2008) (holding halfway houses are dwellings); *United States v. Hughes Mem’l Home*, 396 F.Supp. 544, 549 (W.D. Va. 1975) (holding a children’s home with a four-year average stay was a dwelling); *Baxter v. City of Belleville*, 720 F.Supp. 720, 731 (S.D. Ill. 1989) (holding hospice for terminally ill HIV patients was a dwelling); *United States v. Commonwealth of Puerto Rico*, 764 F.Supp. 220, 223–25 (D.P.R. 1991) (applying FHA to case challenging the closure of a nursing home).

68. *Exploring Different Types of Group Homes: A Guide to Starting Your Own Group Home*, GROUP HOMEHUB (Feb. 24, 2024), <https://grouphomehub.com/exploring-different-types-of-group-homes-a-guide-to-starting-your-own/> [https://perma.cc/GQ9M-3DYV] (The Author draws on professional experience as a mental health practitioner working with individuals in group home settings).

69. *Lakeside Resort Enters., LP v. Bd. of Sup’rs of Palmyra Twp.*, 455 F.3d 154, 158–60 (3d Cir. 2006).

requires a court's discretion, it provides more guidance than the FHA's definition of a dwelling. The first step requires a court's discretion to determine what constitutes a significant period of time. Since no blanket rule or guideline exists on this analysis, courts vary on defining what constitutes a significant period of time.⁷⁰ For example, migrant farm workers living in cabins for five months constituted a dwelling under the FHA.⁷¹ In contrast, individuals living in group homes for alcohol and drug treatment for six weeks also constituted a dwelling.⁷² The second step requires a court's discretion to decide whether occupants view or perceive their group home or facility as a place to return to. A place to return to may be defined as an occupant's feeling of being at home.⁷³ Courts may also analyze how and in which way the occupants use the facility as their home.⁷⁴ Often, courts consider tasks like cooking and cleaning as evidence that the occupant treated the facility as their home.⁷⁵

The FHA's definition of a dwelling has led to inconsistencies in applying protections to group homes, particularly affecting temporary or transitional facilities like sober living homes and reentry group homes. Since jurisdictions differ in their interpretations of whether a group home qualifies as a dwelling, these types of group homes face challenges when seeking the FHA's protections. By analyzing the duration of stay and whether occupants perceive the facility as home, the Third Circuit's two-step analysis provides a more comprehensive framework for determining whether a facility qualifies as a dwelling. This analysis is particularly relevant for reentry group homes, where residents often stay for a significant period to achieve stability. Additionally, individuals in reentry homes perceive these facilities not just as a place to stay, but as a vital space for recovery and reintegration after incarceration. Given this understanding, reentry group homes, much like sober living homes, should be classified as dwellings under the FHA, as both serve as essential housing for communal recovery.

70. *United States v. Columbus Country Club*, 915 F.2d 877, 884–85 (3d Cir. 1990) (seasonal or summer homes were considered dwellings); *Connecticut Hosp. v. City of New London*, 129 F.Supp.2d 123, 132, 135 (D. Conn. 2001) (residents living in group homes for alcohol and drug treatment, in which average length of stay is six weeks, are dwellings); *Villegas v. Sandy Farms, Inc.*, 929 F.Supp. 1324, 1328 (D. Or. 1996) (cabins occupied by migrant farm workers during the five-month harvest season are dwellings).

71. *Villegas*, 929 F.Supp. at 1328.

72. *Connecticut Hosp.*, 129 F.Supp.2d at 132, 135.

73. *Lakeside Resort Enters.*, 455 F.3d at 159.

74. *Gorman, Marinaccio & Cardinale*, *supra* note 22, at 610.

75. *Lakeside Resort Enters.*, 455 F.3d at 159–60 (“residents would eat meals together, return to their rooms in the evening, receive mail at the facility and make it their ‘residence’ while they were there . . . residents hung picture on their walls and had visitors”).

III. ANALYSIS

A. Existing FHA Protections Do Not Apply to the Reentry Community

Despite the many protections the FHA affords, its application does not account for the housing needs of the reentry population. The FHA's direct threat provision is frequently invoked to improperly justify the exclusion of previously incarcerated individuals from housing. First, the direct threat provision provides no protections for individuals with a handicap or disability if they pose a direct threat to the safety of others or their property.⁷⁶ Second, the law does not reflect an understanding of mental health conditions that are caused by a person's contact with the justice system. Thus, existing FHA protections enforced by local jurisdictions ought to apply to group homes for the reentry population. The following Section analyzes these existing barriers.

1. Direct Threat Provision Wrongfully Justifies Housing Discrimination

The FHA has an exception to its general protection against housing discrimination for people with disabilities: the direct threat provision. The FHA affords no protections to individuals with a handicap or disability who present a direct threat to the persons or property of others.⁷⁷ This direct threat provision was included in the 1988 Amendments Act "to allay the fears of those who believe that the nondiscrimination provisions of this Act would force landlords and owners to rent or sell to persons whose tenancies could pose such a risk."⁷⁸ Therefore, "a dwelling need not be made available to an individual whose tenancy can be shown to constitute a direct threat and a significant risk of harm to the health or safety of others."⁷⁹

Courts generally decide whether an individual with a mental condition poses a direct threat on a fact-specific, case-by-case basis. "Generalized assumptions, subjective fears, and speculation are insufficient to prove the requisite direct threat."⁸⁰ Courts are required to examine objective evidence for proof of dangerous behavior. For example, homeowners brought a claim against state officials to prevent two group homes for individuals with mental illness from being built in their residential areas.⁸¹ Based on the profile of the prospective residents that were to live in the group homes, the homeowners claimed that these individuals posed a "heightened risk of dangerousness to the community."⁸² The plaintiffs based the risk of danger argument on the prospective residents' history of involuntary commitments, past failures in

76. 42 U.S.C. § 3604(f)(9).

77. *Id.*

78. H.R. REP. NO. 100-711, at 28 (1988).

79. *Id.* at 30.

80. H.R. REP. NO. 100-711, at 29 (1988).

81. *Township of West Orange v. Whitman*, 8 F.Supp.2d 408, 411-13 (D.N.J. 1998).

82. *Id.* at 428.

community settings, and psychiatric diagnoses.⁸³ However, the court found that plaintiffs could not meet the burden of proving individualized dangerousness, which must be met to deny these people housing.⁸⁴ Thus, the residents could not be excluded from the protections of the FHA.⁸⁵

A belief of direct threat does not satisfy the requirement for objective evidence.⁸⁶ Evaluating the behavior of a tenant through the scope of a resident's subjective fears would be "contrary to the clear legislative intent that there be proof by objective facts of a direct threat."⁸⁷ The risk assessment of dangerousness should be based on an objective analysis by health care professionals of the prospective tenant's or homeowner's behavior.⁸⁸

There is no single type of behavior that constitutes a direct threat; rather, it encompasses a range of conduct. The following examples illustrate situations in which a landlord or housing provider successfully argued that a tenant should be evicted based on concerns about their behavior. Conduct involving physical harm or clear threats to the safety of other tenants will typically qualify as a direct threat. For example, a tenant who strikes and injures another resident would likely meet this standard.⁸⁹ However, a tenant may also be deemed a direct threat based on a significant risk of harm, even in the absence of actual injury. In one instance, a tenant who engaged in altercations with other residents, chased children with a knife, listened to loud and vulgar music, and made inappropriate sexual comments was found to pose a direct threat to his neighbors.⁹⁰ In another, a tenant's behavior was deemed a direct threat where he appeared nude in front of other residents, repeatedly failed to secure a building entrance, verbally attacked others, and displayed misogynistic signs in his apartment window.⁹¹

Congress intended for the direct threat provision to be interpreted in light of the Supreme Court's decision, *Sch. Bd. of Nassau Cnty., Fla. v. Arline*, which was decided one year before the passage of the 1988 FHA Amendments.⁹² In that case, the Court held that a teacher with a disability—tuberculosis—could not be fired because of her contagious condition if she were "otherwise qualified" for the position.⁹³ Even if the teacher did pose a threat to the health and safety of others, she would be "otherwise qualified" if that threat could be eliminated by a reasonable accommodation.⁹⁴ Due to the statutory protections

83. *Id.*

84. *Id.*

85. *Id.*

86. *Wirtz Realty Corp. v. Freund*, 721 N.E.2d 589, 598–99 (Ill. App. 3d 1999).

87. *Id.* at 597.

88. *Id.* at 598–99.

89. *See Roe v. Hous. Auth. of Boulder*, 909 F.Supp. 814, 817 (D. Colo. 1995).

90. *Foster v. Tinnea*, 705 So.2d 782, 785–87 (La. Ct. App. 1997).

91. *Arnold Murray Constr., L.L.C. v. Hicks*, 621 N.W. 2d 171, 173, 176 (S.D. 2001).

92. *Arline*, 480 U.S. at 273.

93. *Id.* at 284.

94. *Id.* at 287–89.

to people with disabilities under the FHA, courts require that landlords provide reasonable accommodations. In interpreting *Sch. Bd. of Nassau Cnty., Fla. v. Arline*,⁹⁵ courts have emphasized that individuals may not be denied housing based on disability alone, even if they pose a direct threat to the health and safety of others. However, if a landlord can show that no reasonable accommodation for a tenant would eliminate or sufficiently mitigate a direct threat to the health or safety of others, then an accommodation need not be granted.

It is not entirely clear what kind of showing courts require before they conclude that a reasonable accommodation would not minimize or eliminate the risk posed by the tenant's behavior. Yet, the caselaw suggests that very little evidence or inquiry is required by the courts.⁹⁶ In *Foster v. Tinnea*, the court held that a tenant who suffered from brain damage was not entitled to a reasonable accommodation because his rude comments to other tenants constituted a direct threat.⁹⁷ The court concluded that the landlord was entitled to refuse the tenant's lease renewal because no reasonable accommodation could eliminate or minimize the risk which the tenant posed to other residents.⁹⁸ In *Arnold Murray Construction, L.L.C. v. Hicks*, the court held that a tenant who suffered from a brain injury was not entitled to a reasonable accommodation because his emotional outbursts, verbal threats, and other behavior posed a direct threat to his neighbors.⁹⁹ The court concluded that no reasonable accommodation would eliminate or diminish the risk that the tenant posed to other tenants, and thus, an eviction was allowed.¹⁰⁰ In both cases, the court looked at the danger or behavior of the tenants but did not discuss possible accommodations for the mental health concerns. Rather, if the landlord can demonstrate that no reasonable accommodation would eliminate or acceptably minimize the "threat" posed by the tenant, then the landlord is not required to implement such an accommodation.¹⁰¹

The direct threat provision poses a significant problem for the reentry population. Even though an individual's mental health condition qualifies as a disability, that same individual can be denied housing because of a landlord's perception that the tenant's behavior poses a risk to others. The landlord may be influenced by the knowledge of the individual's previous incarceration when assessing the risk, which points to the importance of the law to protect this vulnerable population. In practice, an applicant can be deemed "an undesirable applicant because of [their] extensive criminal record."¹⁰²

95. *Id.* at 273.

96. *See, e.g., Foster v. Tinnea*, 705 So.2d 782, 786 (La. Ct. App. 1997); *Arnold Murray Constr., L.L.C. v. Hicks*, 621 N.W. 2d 171, 176 (S.D. 2001).

97. 705 So.2d at 784–87.

98. *Id.* at 786.

99. 621 N.W. 2d at 173–76.

100. *Id.* at 176.

101. *Id.*

102. *Talley v. Lane*, 13 F.3d 1031, 1035 (7th Cir. 1994) (holding that the housing authority's determination based on the applicant's legal history is a discretionary decision).

The direct threat provision was not intended to deny housing for individuals with a disability based on assumptions, fears, or speculation, but rather, it was intended for the following purpose:

Generalized assumptions, subjective fears, and speculation are insufficient to prove the requisite direct threat [. . .] If a landlord determines, by objective evidence that is sufficiently recent to be credible, and not from unsubstantiated inferences, that the applicant will pose a direct threat to the health or safety of others, the landlord may reject the applicant as a tenant. In assessing information, the landlord may not infer that a history of a physical or mental illness or disability, or treatment for such illnesses or disabilities, constitutes proof that an applicant will be unable to fulfill his or her tenancy obligations.¹⁰³

The concern of landlords or housing owners was accommodated by the direct threat exception to the FHA. It provided for the possibility that “a dwelling need not be made available to an individual whose tenancy can be shown to constitute a direct threat and a significant risk of harm to the health or safety of others.”¹⁰⁴ However, “if a reasonable accommodation could eliminate the risk, entities covered under this Act are required to engage in such accommodation pursuant to . . . the Act.”¹⁰⁵ The problem is that the application of the direct threat provision has reached beyond “objective evidence . . .” to answer the question on whether “. . . [an] applicant will pose a direct threat to the health or safety of others.”¹⁰⁶ Rather, the direct threat provision has provided housing owners and landlords the means to discriminate against individuals with a criminal record without considering the individual’s protected disability under the FHA.

Housing providers and landlords routinely conduct criminal background checks as part of their tenant screening processes and deny housing because of the existence of a criminal conviction, even if the individual would otherwise be qualified. It is estimated that more than 100,000,000 people, nearly one out of every three adults, have some sort of criminal record, including a history of arrest, conviction, and incarceration;¹⁰⁷ However, the exact number of applicants rejected due to their criminal record remains unclear.¹⁰⁸ Quantifying the impact of criminal record exclusions is challenging, as there is no way to determine how

103. H.R. REP. NO. 100-711, at 29–30 (1988).

104. *Id.* at 29.

105. *Id.* at 28.

106. *Id.* at 30.

107. SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012, U.S. DEP’T OF JUST. 2 (2024), <https://www.ojp.gov/pdffiles1/bjs/grants/244563.pdf> [<https://perma.cc/H8SN-GH32>].

108. *No Second Chance, People with Criminal Records Denied Access to Public Housing*, HUM. RTS. WATCH (Nov. 18, 2004), <https://www.hrw.org/report/2004/11/18/no-second-chance/people-criminal-records-denied-access-public-housing> [<https://perma.cc/59CM-9J9N>].

many applicants are denied. Additionally, it is impossible to estimate how many individuals refrain from applying due to ineligibility before the application process even begins. In a response to a Freedom of Information Act request, HUD reported that 46,657 applicants for project-based housing were denied housing in 2002 because of “one strike” criteria.¹⁰⁹ “One strike” refers to federal housing law and policy that excludes people with certain types of criminal records from eligibility for federal public housing programs.¹¹⁰ Yet, this data represents only a fraction of rejected applicants.

Legal actions may reveal a representation of how frequently applicants or prospective tenants are rejected because of their criminal record. New York City’s Commission on Human Rights filed a lawsuit against PRC Management, LLC for their blanket policy of denying housing to prospective tenants with criminal histories without considering the nature, severity, or date of their arrest or criminal conduct.¹¹¹ PRC Management, LLC controlled 100 buildings, including 5,000 units citywide.¹¹² In 2018, a settlement was reached based on the Commission’s investigation.¹¹³ The “Commission required PRC Management, LLC, to pay fines and damages, create and distribute new screening and application policies, train staff on new policies and law, and invite applicants previously denied housing because of their criminal history to reapply[;]” thus, a positive result for thousands of New Yorkers.¹¹⁴ Savannah Chatham County Fair Housing Council, Inc. brought legal action against CHG Westgate and American Management Company Inc. for instituting a blanket “ninety nine-year rule” which barred tenants if a person in the family has a record or a felony or misdemeanor within the past ninety nine years.¹¹⁵ The Defendants owned ninety four units in ten buildings, along with two buildings that received Section 8 financing.¹¹⁶ In 2018, a settlement was reached.¹¹⁷ Although these examples do not include estimates of applicant rejections or denials, the settlements highlight the widespread nature of rejections and denials of prospective tenants based on blanket bans of criminal records.

109. *Id.*

110. *Id.*

111. *NYC Commission on Human Rights Settles Landmark Housing Discrimination Case with Bronx Management Company*, NYC COMM’N ON HUM. RTS. (Dec. 6, 2018) <https://www.nyc.gov/assets/cchr/downloads/pdf/press-releases/PRESS%20RELEASE%20-%20Criminal%20History%20Disparate%20Impact%20Press%20Release%20120618.pdf> [https://perma.cc/PS5K-893K]

112. *Id.*

113. *Id.*

114. *Id.*

115. *Sams v. Ga West Gate, LLC*, No. CV415-282, 2017 WL 436281, at *1–2 (S.D. Ga. Jan. 30, 2017).

116. Jan Skutch, *Fair-housing suit settled with Garden City defendants*, SAVANNAH MORNING NEWS (Jan 15, 2018, 5:30 PM), <https://www.savannahnow.com/story/news/crime/2018/01/15/fair-housing-suit-settled-garden-city-defendants/13842279007/> [https://perma.cc/7QUW-P2U8] (noting that Westgate was HUD Section 8–financed affordable housing, a federal rental subsidy program subject to HUD regulations).

117. *Id.*

Research finds that an individual's criminal history, including those individuals with mental health conditions or substance use concerns, is not predictive of housing stability for this population and largely unrelated to predicting housing problems.¹¹⁸ Therefore, excluding people with criminal records will not necessarily make housing safer. To combat the idea that violent offenses are the reason these exclusions are needed, a recent study analyzed fifteen offenses or types of prior convictions and the effects on housing outcomes.¹¹⁹ Negative housing outcomes analyzed in this study included losing housing due to lease violations, leaving without notice, or non-payment of rent.¹²⁰ Importantly, the study found that an individual's criminal background, including assault, fraud, property offenses, major drug-related offenses or violent offenses, did not significantly increase the likelihood of negative housing outcomes.¹²¹ Most categories had no significant impact on housing outcomes, including minor public order offenses, prostitution, alcohol-related offenses (e.g., public consumption/open bottle), DUI/DWI, and a number of other categories.¹²² The study only found mild increase in risk on negative housing outcomes with the following four categories: major drug-related offenses, property offenses (e.g., theft, burglary), assault, and fraud.¹²³ This study undermines the common belief that offense type significantly affects an individual's housing success.¹²⁴ Thus, the study challenges common misconceptions about using criminal background checks as a predictor for negative housing outcomes.

It is more accurate that negative outcomes increase for individuals who are unable to find or are denied housing. Successful transitions from jails and prisons into secure housing can reduce the risk of rearrest, relapse, or any negative behavioral outcomes.¹²⁵ A study found that the risk of recidivism increased by 35% for individuals without an address at the start of probation and

118. Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 PSYCHIATRIC SERVS. 224, 227–28 (2009).

119. Cael Warren, *Success in Housing: How Much Does Criminal Background Matter?*, WILDER RSCH. 12–13 (2019), https://www.wilder.org/sites/default/files/imports/AEON_Housing_Success_CriminalBackground_Report_1-19.pdf [<https://perma.cc/BZP4-4NH3>].

120. *Id.* at 10; Notably, the study's definition of negative housing outcomes, such as nonpayment of rent, lease violations, or vacating a unit without notice, captures conduct that is often shaped by broader social and economic conditions rather than individual dangerousness. These outcomes frequently reflect underlying social determinants of health, including housing instability, poverty, barriers to employment, limited access to mental health or substance use treatment, and lack of community support. As a result, such outcomes are not reliable indicators of a tenant's propensity to pose a safety risk to others but rather may signal systemic challenges and barriers.

121. *Id.* at 19.

122. *Id.* at 17.

123. *Id.* at 19.

124. *Id.* at 19.

125. REENTRY COORDINATION COUNCIL, *supra* note 6.

44% for individuals who experienced homelessness during probation.¹²⁶ These findings expand on prior research that finds homelessness, after incarceration, is a recidivism risk factor.¹²⁷

The existing legal channels available for individuals with criminal records to challenge instances of housing discrimination are limited. A housing provider's policies or practices regarding the review of an individual's criminal history before making a housing decision may violate the FHA. In situations where criminal records are considered in housing decisions, the housing provider typically claims the safety of the property and other residents as the primary concern.¹²⁸ In 2016, HUD issued guidance to Public Housing Authorities (PHAs) on the FHA and criminal records.¹²⁹ In its 2016 guidance, HUD highlighted two policies or practices, in particular, that are likely illegal under the FHA: (1) exclusions based on prior arrests that did not result in convictions; and (2) blanket bans based on prior convictions.¹³⁰

First, exclusions based on prior arrests that did not result in convictions likely violate the FHA. Not only will these exclusions almost certainly have a disparate impact on protected classes, but they also will never be justified because an arrest indicates nothing more than a suspicion of having committed a crime; therefore, the mere fact of an arrest, without conviction, should not be relevant for housing decisions like denying a prospective tenant's application.

Further, blanket bans based on prior convictions likely violate the FHA. If a housing provider automatically denies anyone or all applicants with a conviction history, this likely is a violation of the statute. Housing providers often impose a blank ban on people with convictions without considering a variety of factors like the type of conviction, the length of time that has elapsed since the criminal conduct, and other mitigating factors. Other similarly problematic policies enforced by housing providers may include bans involving broad categories of convictions or the use of unreasonably long lookback periods for criminal records screenings. Like exclusions based solely on arrests, these bans almost certainly have a disparate impact on protected classes.

126. Leah A. Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstance on Recidivism: Evidence from a Sample of People on Probation in San Francisco*, 47 CRIM. JUST. & BEHAV. 1097, 1111 (2020).

127. See Valerie A. Clark, *Predicting Two Types of Recidivism Among Newly Released Prisoners: First Addresses as "Launch Pads" For Recidivism or Reentry Success*, 62 CRIME & DELINQ. 1364 (2016); see also Benjamin Steiner, Mathew D. Makarios, & Lawrence F. Travis, *Examining the Effects of Residential Situations and Residential Mobility on Offender Recidivism*, 61 CRIME & DELINQUENCY 375 (2015).

128. U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 4 (2016), https://www.hud.gov/sites/documents/hud_ogcguidappfhastandcr.pdf [<https://perma.cc/JK5K-XU9F>].

129. PHAs are local agencies that determine public housing eligibility based on general guidelines published by the federal Department of Housing and Urban Development (HUD); see U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 128.

130. U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 128 at 5–6.

Although convictions generally serve as sufficient evidence of criminal conduct, blanket bans fail to accurately assess former convicts on an individualized basis rather than on assumptions or generalizations about who may pose a safety risk.

Beyond these recognized policies or practices considered by the HUD to be a violation under the FHA, a previously incarcerated individual can request a reasonable accommodation if they have a recognized disability that resulted in their criminal charges or conviction. In cases where criminal conduct is connected to an individual's disability, a housing provider may need to provide a reasonable accommodation in the form of modifying its policies or practices around criminal records; however, this is not a guarantee. When requesting a reasonable accommodation, individuals should explain how their disability contributed to the criminal conduct. For example, in *Simmons v. T.M. Assocs. Mgmt., Inc.*, the plaintiff's complaint alleged a failure to make a reasonable accommodation when the apartment complex did not reconsider his application because of his criminal record.¹³¹ The court concluded that the apartment complex could not deny the plaintiff's proposed reasonable accommodation for his mental health disability even though he had a conviction for indecent exposure.¹³² The court determined there was no "ironclad rule" that a criminal conviction bars an individual protection afforded by disability anti-discrimination statutes.¹³³ Since there are so few existing housing claims under the FHA for individuals with legal or criminal records, it leaves previously incarcerated individuals without helpful precedent in many jurisdictions. Using the "regarded as" prong of the FHA's definition of handicap, however, may open the door for plaintiffs that have been denied housing because of their criminal conviction to bring a claim of disability discrimination on a larger scale.

HUD expanded on this guidance by issuing another memo in 2022, with guidelines encouraging Public Housing Authorities to make their 2023 housing policies as inclusive as possible for people with criminal records or legal histories.¹³⁴ It remains to be seen how PHAs will incorporate this, especially under the new conservative Presidency. Although PHAs are only one form of low-income housing, there are still limitations to HUD's guidance, which does not address housing for the formerly incarcerated in the private market.

131. *Simmons v. T.M. Assocs. Mgmt., Inc.*, 287 F. Supp. 3d 600, 601–02 (W.D. Va. 2018).

132. *Id.* at 602–04.

133. *Id.* at 604.

134. See U.S. DEP'T OF HOUS. & URB. DEV., IMPLEMENTATION OF THE OFFICE OF GENERAL COUNSEL'S GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2022), <https://www.hud.gov/sites/dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf> [https://perma.cc/Y5XX-X5SG].

2. A Lack of Understanding of Mental Health Conditions as It Relates to the Formerly Incarcerated

The law does not adequately reflect the realities of mental health conditions among individuals who have had contact with the justice system. Although the FHA recognizes certain mental health conditions as protected disabilities, that protection is often illusory for previously incarcerated individuals. In practice, even when an individual's mental health condition qualifies as a disability, housing providers may still deny housing based on the individual's criminal history. As a result, individuals with criminal records are frequently excluded from housing opportunities notwithstanding their protected status under the FHA. This disconnect reveals a critical gap in both the FHA and the surrounding case law, which fail to account for the intersection of mental health-related disabilities and criminal history. The result is a significant barrier to housing for the reentry population—one that undermines the FHA's broader anti-discrimination goals. This Section addresses that gap by first examining the prevalence of mental health conditions among justice-involved individuals, then reviewing the extensive body of research on how incarceration exacerbates or produces such conditions, and finally analyzing the structural and social barriers, particularly during reentry, that shape mental health outcomes and housing instability.

To paint a picture of this disparity, it is necessary to provide figures on the prevalence of mental health conditions within this population. People with mental illness and/or substance use disorder suffer disproportionate rates of incarceration, with an estimated two million people with mental illness and substance use disorder being booked into jails every year.¹³⁵ It is estimated that 64% of people in local jails suffer from mental illness.¹³⁶ The rate of serious mental illness is four to six times higher in jail than in the general population.¹³⁷ The prevalence of incarcerated individuals with substance use disorders is seven times higher compared to those in the general population.¹³⁸ It can be assumed that these mentioned estimates are much higher because it is well documented

135. SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., EXECUTIVE ORDER SAFE POLICING FOR SAFE COMMUNITIES: ADDRESSING MENTAL HEALTH, HOMELESSNESS, AND ADDICTION REPORT 1, <https://www.samhsa.gov/sites/default/files/safe-policing-safe-communities-report.pdf> [https://perma.cc/WL6R-VXUQ].

136. Press Release, The White House, Office of the Press Sec'y, FACT SHEET: Launching the Data-Driven Justice Initiative: Disrupting the Cycle of Incarceration (June 30, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-launching-data-driven-justice-initiative-disrupting-cycle> [https://perma.cc/WU5G-6FP2].

137. Ram Subramanian, et al., *Incarceration's Front Door: The Misuse of Jails in America*, VERA INST. OF JUST., https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf [https://perma.cc/S3LY-KVVZ] (last updated July 29, 2015).

138. THE COUNCIL OF STATE GOV'T JUST. CENTER, *The Justice and Mental Health Collaboration Program (JMHC) FAQs*, <https://csgjusticecenter.org/projects/justice-and-mental-health-collaboration-program-jmhcp/faqs/> [https://perma.cc/KW3J-B527] (last visited Mar. 9, 2025).

that mental health conditions are significantly under reported due to a variety of factors like stigma and biases.¹³⁹

Once incarcerated, people face additional challenges beyond their criminal sentencing and punishment that leads to developing mental health symptoms or worsening mental health conditions. Many jailed individuals do not receive necessary mental health treatment to alleviate these concerns.¹⁴⁰ More importantly, the circumstances of the carceral environment are inherently damaging, and mental health interventions are simply unable to mitigate the lived experience of incarceration. Consequently, many individuals develop mental health conditions while incarcerated.

Abundant literature explains how the circumstances of incarceration further worsen mental health conditions or lead individuals to develop mental health conditions. Many of the defining features of incarceration are linked to negative mental health outcomes: compounding impacts of little autonomy;¹⁴¹ poor nutrition;¹⁴² overcrowding;¹⁴³ limited medical care;¹⁴⁴ decreased social connectedness;¹⁴⁵ and strict prison rules.¹⁴⁶ Other factors contribute to worsening mental health amongst incarcerated individuals. For example, solitary confinement, which is used in forty-four states and in federal government facilities,¹⁴⁷ can result in a wide range of mental health symptoms.¹⁴⁸ Individuals held in solitary confinement exhibit a range of negative physiological and psychological reactions: anger; perceptual distortions and hallucinations; increased anxiety and nervousness; fears of

139. See Yoichiro Takayanagi, et al., *Accuracy of Reports of Lifetime Mental and Physical Disorders: Results from the Baltimore Epidemiological Catchment Area Study*, 71 JAMA PSYCHIATRY 273–80 (2014); Joyce Mason, et al., *Health Reporting from Different Data Sources: Does it Matter for Mental Health?*, 26 J. MENTAL HEALTH POL’Y & ECON. 33–57 (2023); Francesca Mongelli, Penelope Georgakopoulou & Michele T. Pato, *Challenges and Opportunities to Meet the Mental Health Needs of Underserved and Disenfranchised Populations in the United States*, 18 FOCUS 16–24 (2020).

140. See Fuller Torrey et al., *The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey*, TREATMENT ADVOCACY CTR & NAT’L SHERIFFS ASS’N, at 8 (2014); SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., *supra* note 135, at 1.

141. Vanjani Rahul, *On Incarceration And Health — Reframing The Discussion*, 376 THE NEW ENGLAND J. OF MED. 2411–13 (2017).

142. Jerome Sarris, et al., *Nutritional Medicine as Mainstream in Psychiatry*, 2 THE LANCET PSYCHIATRY 271, 271–74 (2015); NAT’L RSCH. COUNCIL AND INST. OF MED., HEALTH AND INCARCERATION: A WORKSHOP SUMMARY, at 8 (2013).

143. NAT’L RSCH. COUNCIL AND INST. OF MED., HEALTH AND INCARCERATION: A WORKSHOP SUMMARY, at 8 (2013).

144. *Id.* at 7–14.

145. See Priya Wickramaratne et al., *Social Connectedness as a Determinant of Mental Health: A Scoping Review*, 17 PLOS ONE (2022).

146. Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARVARD C.R.-C.L. L. REV. (2006).

147. AM. C. L. UNION, *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the United States*, at 2 (2014), https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf [<https://perma.cc/39W2-EPLD>]

148. *Id.* at 4.

persecution; lack of impulse control; severe and chronic depression; appetite loss and weight loss; withdrawal; blunting of affect and apathy; talking to oneself; sleeping problems and nightmares; confusing or distortions in thought processes; self-mutilation; and lower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement.¹⁴⁹

Beyond the effects of solitary confinement, incarcerated individuals experience other environmental factors that contribute to high rates of mental health conditions. A major contributing factor is violence in prisons and jails.¹⁵⁰ Incarcerated individuals experience and witness violence within their living environment, leading to development of acute or chronic trauma diagnoses, like post-traumatic stress disorder. One study analyzed violent episodes in jails during a six-month period and found that 35% of men and 24% of women experience physical violence. Similarly, 10% of men and 24% of women are sexually harassed or assaulted in prison.¹⁵¹ Research also suggests that persistent fear of the possibility of violence can account for mental health symptoms, including hypervigilance, which is key in anxiety-related diagnoses, including anxiety disorders and post-traumatic stress disorder.¹⁵² Thus, violence within the carceral setting is considered a contributing factor to mental health conditions, even if an inmate does not experience direct physical or sexual violence.

Once an individual is released from jail or prison, it is implausible to imagine that mental health conditions are immediately alleviated. Of course, individuals are eager for release from incarceration; however, the problems that people encounter post-release indicate that this eagerness is often short lived because of the difficulties encountered. During the time after release from jail or prison, it is critical for this population to receive support and resources. The

149. See Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME AND JUST. 441–528 (2006); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450, 1452–53 (1983); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 130–33 (2003); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8 (1988); Holly A. Miller, *Reexamining Psychological Distress in the Current Conditions of Segregation*, 1 J. OF CORRECTIONAL HEALTHCARE 39, 48 (1994); Stanley L. Brodsky & Forest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988); Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 CRIM. BEHAV. & MENTAL HEALTH 85, 91 (1997); Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. OF ABNORMAL PSYCHOL. 54, 57–58 (1972).

150. Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL’Y INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> [<https://perma.cc/LUP5-PRRX>].

151. Nancy Wolff, Jing Shi & Jane A. Siegel, *Patterns of Victimization Among Male and Female Inmates: Evidence of an Enduring Legacy*, 24 VIOLENCE AND VICTIMS 469–84 (2009).

152. Paul Boxer, Keesha Middlemass & Tahlia Delorenzo, *Exposure to Violent Crime during Incarceration: Effects on Psychological Adjustment following Release*, 36 CRIM. JUST. & BEHAV. 793, 802 (2009).

risk of death by suicide or opioid overdose dramatically increases in the first days and weeks after an individual is released from jail or prison, illustrating the seriousness of potential risks.¹⁵³

Nationally, about 80% of individuals released from prison have a chronic medical, substance use, or psychiatric condition.¹⁵⁴ Due to the lack of access to mental health services and supports in the community, individuals are at a higher risk of repeated incarceration.¹⁵⁵ Research has shown that people with severe mental illness coupled with a criminal record are more likely to be discriminated against in mental health care settings.¹⁵⁶ Also, many patients with incarceration histories have described hospitals as mirroring a carceral-like environment, negatively impacting their care.¹⁵⁷ As defined in mental health diagnoses, avoidance or anxiety around certain places, persons, or experiences are clinical symptoms of trauma.¹⁵⁸ For example, a diagnosis of post-traumatic stress disorder includes “persistent avoidance of stimuli associated” with the traumatic event or experience.¹⁵⁹

The threat or actual experience of violence while incarcerated affects an individual’s mental health post-release. Researchers examined the effects of exposure to violent crime while incarcerated on longer term psychological adjustment following release.¹⁶⁰ The study found a connection between violent experiences while incarcerated to an increasing severity of antisocial behavior and emotional distress post-release.¹⁶¹ This research is indicative of trauma symptoms and diagnoses among the reentry population.

Mental health professionals have identified recurring mental health conditions or diagnoses could appear while working with the reentry population. Generally, formerly incarcerated individuals may experience distress, anxiety, depression, and a decline in self-esteem.¹⁶² Some diagnoses like substance abuse

153. Ingrid Binswanger et al., *Mortality After Prison Release: Opioid Overdose and Other Causes of Death, Risk Factors, and Time Trends From 1999 to 2009*, 159 ANN INTERN MED. 592–600 (2013); Ingrid Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 357 N ENGL J. MED. 157–65 (2007).

154. Shira Shavit et al., *Transitions Clinic Network: Challenges And Lessons In Primary Care For People Released From Prison*, 36 HEALTH AFFAIRS 1006–15 (2017).

155. Glena Wrenn et al., *The Fierce Urgency of Now: Improving Outcomes for Justice-Involved People With Serious Mental Illness and Substance Misuse*, 69 PSYCHIATRIC SERV., at 829–30 (2018).

156. Nishar Brumfield et al., *“It’s a revolving door”: understanding the social determinants of mental health as experienced by formerly incarcerated people*, 11 HEALTH JUST., at 2 (2023).

157. *Id.* at 2.

158. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5TH ED., TEXT REVISION (DSM-5-TR), at 302 (2022).

159. *Id.* at 302.

160. Boxer et al., *supra* note 152, at 794.

161. *Id.* at 802 (noting that antisocial behavior is indicated by general antisocial tendencies, recent aggressive behavior, and aggressive personality, and emotional distress is indicated by depressive symptoms, anxious symptoms, and recent episodes of emotional distress).

162. Jason Schnittker et al., *Out and down: Incarceration and psychiatric disorders*, 53 J. HEALTH AND SOC. BEHAV. 448, 449–50 (2012).

or personality disorders are popularly associated with this population. Other diagnoses prevalent in this population include mood disorders, like major depressive disorder, bipolar disorder, or persistent depressive disorder. In one study, major depressive disorder was found to be more prevalent than substance use disorder amongst former inmates.¹⁶³ Interestingly, this study found that across six different types of disabilities, the consequences of mood disorders are more strongly associated with disability compared to substance use disorders or impulse control disorders.¹⁶⁴

Formerly incarcerated individuals must also navigate a variety of social and economic factors post-release.¹⁶⁵ One study conducted through interviews of formerly incarcerated adults found that screenings for criminal records were not only stigmatizing, but also an “enduring mark that serves to justify the ongoing denial of rights and resources for those that have been to prison.”¹⁶⁶ Formerly incarcerated people are systematically prohibited from employment opportunities and quality housing because of these background checks and criminal history screenings. In response to this stress or strain, individuals are likely to experience negative emotions, like depression, resentment, anxiety, and anger.¹⁶⁷ Material hardship, along with the accompanying negative emotions, are linked to an increase in criminal behavior.¹⁶⁸ Individuals have reported that discrimination from employment and housing due to a criminal record cannot be ameliorated or cured with therapy and medications.¹⁶⁹ Said differently, therapy and medication cannot remedy such significant basic needs, like housing or employment; both of these are considered social determinants of health.¹⁷⁰ According to the definition adopted by the Center for Disease Control and Prevention, social determinants of health (“SDOH”) are the “conditions in the environments where people are born, live, learn, work, play, worship, and age that affect a wide range of health, functioning, and quality-of-life outcomes and risks.”¹⁷¹ By this definition, research considers incarceration, justice system involvement, and conditions of confinement as SDOH.¹⁷²

Although not a recognized psychiatric disorder, the National Incarceration

163. *Id.* at 455.

164. *Id.* at 459.

165. Leah A. Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstance on Recidivism: Evidence from a Sample of People on Probation in San Francisco*, 47 CRIM. JUST. & BEHAV. 1097–1115, at 1099 (2020).

166. Danya Keene et al., *Stigma, Housing and Identity After Prison*, 66 SOCIOLOGICAL REV. 799–815 (2018).

167. Leah A. Jacobs & Aaron Gottlieb, *supra* note 162, at 1099.

168. *Id.* at 1099.

169. Shivani Nishar et al., *“It’s a revolving door”: understanding the social determinants of mental health as experienced by formerly incarcerated people*, 11 HEALTH JUST., at 2 (2023).

170. *Id.*

171. *Social Determinants of Health (SDOH)*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Jan. 17, 2024), <https://www.cdc.gov/socialdeterminants/index.htm> [<https://perma.cc/6PXF-CVHV>].

172. Nishar Brumfield et al., *supra* note 156, at 2.

Association has advocated for recognition of the mental health effects of reentry, calling it post-incarceration syndrome (PICS).¹⁷³ It defines PICS as:

[A] psychiatric disorder that affects individuals who have been incarcerated and then are released back into society. It is characterized by a range of psychological, emotional, and social difficulties that can arise as a result of being imprisoned. These difficulties can include depression, anxiety, post-traumatic stress disorder (PTSD), difficulty adjusting to life outside of prison, and difficulty forming and maintaining relationships.¹⁷⁴

This is a modern attempt to describe the psychological challenges that individuals who have been incarcerated may face upon reentry into the community. According to this definition, one of the causes of PICS is stigma, which may contribute to poor mental health states, isolation, and shame.¹⁷⁵ PICS attempts to create a diagnostic understanding of this complex transition and the known mental health implication for this population, perhaps constituting its own mental health diagnosis that could qualify an individual for FHA protections.

3. Restrictions and Obstacles for Group Homes

Group homes can bring to light conflicting interests.¹⁷⁶ On one hand, sober living homes and recovery homes foster collective recovery, as many group homes for those with disabilities require a greater number of unrelated people to live together to provide a supportive environment or to be economically feasible.¹⁷⁷ On the other hand, as many community residents and local jurisdictions argue, group homes create a lack of safety in their community.

“Single-family” zoning provides unique challenges, and often prevent a group home from receiving zoning permits in a neighborhood where only nuclear families or small groups of unrelated persons are permitted.¹⁷⁸ Many zoning ordinances define “family” to include people living together, resembling a family unit. In *City of Edmonds v. Oxford House, Inc.*, the zoning provision for single-family units excluded a group home for eight or more adults recovering from alcohol and drug use.¹⁷⁹ The provision defined “family” as “related by genetics, adoption, or marriage, or a group of five or fewer

173. *Post Incarceration Syndrome (PICS)*, NAT’L INCARCERATION ASS’N, <https://joinnia.com/post-incarceration-syndrome/> [<https://perma.cc/2FXE-MRXM>] (last visited Mar. 9, 2025).

174. *Id.*

175. *Id.*

176. Gorman, Marinaccio & Cardinale, *supra* note 22, at 612.

177. John Hamer, *Handicap Discrimination, Zoning, and the Federal Fair Housing Act*, 13 ME. B. J. 166, 168 (1998).

178. *Id.* at 168.

179. 514 U.S. 725, 728 (1995).

[unrelated] persons.”¹⁸⁰ The Court addressed the question of whether an ordinance setting maximum occupancy limits and regulating who may live in a single-family home qualifies as an exemption under § 3607(b)(1) of the FHA.¹⁸¹ The FHA permits any reasonable statute or ordinance that sets the maximum number of occupants.¹⁸² The Supreme Court held that the City’s zoning provision did not clearly set a maximum occupancy because it did not cap the number of people who may live in a dwelling, but rather, defined who may compose a “family” in a single family residential area.¹⁸³ Therefore, the Court held that the exemption in the FHA did not apply to the City’s provision and a question of discrimination remained for the lower courts.¹⁸⁴ However, the dissent argued that the “the majority’s discussion . . . is completely irrelevant to the question presented in *this* case.”¹⁸⁵ The dissent found that the “five occupant limit” readily qualifies as a “restrictio[n] regarding the maximum number of occupants permitted to occupy the dwelling.”¹⁸⁶ While the majority found that the definition of family is not a maximum occupancy restriction, it left open the issue on whether a restriction based on the number of unrelated individuals was valid under the FHA.¹⁸⁷

Conditional use permits are another land use designation that pose an obstacle for group homes trying to operate in a particular neighborhood. Municipalities can conditionally permit uses in a district, contingent on the requested use and various criteria. Subjecting group homes to conditional use approval may violate the FHA when a municipality treats group homes differently from similarly situated single-family residences.¹⁸⁸ There are varying judicial outcomes in deciding whether variance or permit restrictions constitute

180. *Id.*

181. *Id.*

182. *Id.* at 736–38.

183. *Id.* at 738.

184. *Id.*

185. *Id.* at 746.

186. *Id.* at 738–39.

187. See *Courage to Change Ranches Holding Co. v. El Paso Cnty., Colorado*, 73 F.4th 1175, 1193–94 (10th Cir. 2023) (holding that the County’s five-person occupancy limit for disabled people in a single-family residential are facially discriminatory); *Dr. Gertrude A. Barber Ctr., Inc. v. Peters Twp.*, 273 F. Supp. 2d 643, 656–57 (W.D. Pa. 2003) (holding that a home for four people with disabilities established a disparate treatment claim against the Townships for its three-person occupancy cap for nonrelated people); compare with *Keys Youth Servs., Inc. v. City of Olathe, KS*, 248 F.3d 1267, 1275–76 (10th Cir. 2001) (holding that the City’s occupancy cap of eight unrelated disabled persons living together as a family was reasonable in light of legitimate public safety concerns regarding a group home for ten adolescent males); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252–53 (8th Cir. 1996) (holding that an eight person limitation was valid because it was relationally related to a legitimate government interest of controlling traffic congestion and noise in residential areas).

188. John Hamer, *Handicap Discrimination, Zoning, and the Federal Fair Housing Act*, 13 ME. B. J. 166, 168–69 (1998).

a violation under the FHA.¹⁸⁹ Required spacing and distance requirements between a group home and other facilities is also an obstacle for their operation. Some courts have ruled that requiring minimum separation distances between group homes constitutes disparate treatment discrimination, as group homes are treated differently from similarly situated single-family residences.¹⁹⁰ Subjecting group homes to requirements beyond those applicable to other single-family residences may constitute disparate treatment discrimination, according to some courts.¹⁹¹ The relevant test that is applied in these cases balances the enforcement agency's safety rules or interest of public safety against the cost or burden on the group home and its residents.

In other instances of FHA violations as they pertain to group home settings, a Maryland court invalidated three county regulations—the neighbor notification rule, the review board hearing requirement, and the “exceptional person” rule.¹⁹² The group homes that challenged these provisions provided community based housing and support services to elderly people.¹⁹³ The County required group home providers to send notification letters to each neighboring property owner of a proposed group home site and neighborhood civic organizations.¹⁹⁴ In these notification letters, the group home was required to include a variety of

189. *Bryant Woods Inn, Inc. v. Howard Cnty., Md.*, 124 F.3d 597, 605–06 (4th Cir. 1997) (holding that a County did not violate the FHA by its refusal of a zoning variance for a group home seeking to expand from eight to fifteen residents); *Brandt v. Vill. of Chebanse, Ill.*, 82 F.3d 172, 175 (7th Cir. 1996) (holding that the village's denial of a variance to permit the demolition of a single family dwelling to create a four-unit dwelling for people with handicaps was not a violation under the FHA); *Compare with, Judy B. v. Borough of Tioga*, 889 F.Supp. 792, 802–04 (M.D. Pa. 1995) (holding that the denial of zoning variance for a group home for people recovering from drug addictions and mental illnesses violated the FHA).

190. *Larkin v. State of Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 292 (6th Cir. 1996) (holding 1,500-foot spacing requirement violated the FHA); *Nevada Fair Hous. Ctr., Inc. v. Clark Cnty.*, 565 F. Supp. 2d 1178, 1187 (D. Nev. 2008) (finding that the 1,500-foot spacing requirement between group homes were facially discriminatory in violation of the FHA); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 846 (N.D. Ill. 2001) (holding that City violated the FHA by denying a residential facility for mentally ill people because of its 1,000-foot spacing requirement).

191. John Hamer, *Handicap Discrimination, Zoning, and the Federal Fair Housing Act*, 13 ME. B.J. 166, 170-171 (1998); *See Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1504 (10th Cir. 1995) (holding that a requirement for twenty-four supervision on a group home for people with mental disabilities could only be justified if there was additional evidence and warranted remand); *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 48 (6th Cir. 1992) (holding that the City's fire and safety requirements on a residence for women with mental disabilities violates the FHA); *Oxford House, Inc. v. Browning*, 266 F. Supp. 3d 896, 914–916 (M.D. La. 2017) (ruling in favor of group's home FHA challenge because Fire Marshall's safety requirements on plaintiff were not required of single-family residences); *New Horizons Rehabilitation, Inc. v. State*, 400 F. Supp. 3d 751, 770 (S.D. Ind. 2019) (holding that a commercial fire suppression system requirement on a group home is unreasonable); *Cf., Summers v. City of Fitchburg*, 940 F.3d 133, 142 (1st Cir. 2019) (upholding town's enforcement of state law requiring sprinklers at plaintiff's group homes).

192. *Potomac Grp. Home Corp. v. Montgomery Cnty., Md.*, 823 F. Supp. 1285, 1302 (D. Md. 1993).

193. *Id.* at 1288.

194. *Id.*

information, including the type of group home planned, an identification of the type of “exceptional person” who will live there, and contact information for the County to address complaints or questions about the proposed group home.¹⁹⁵ The Code required that only an “exceptional person” may live in a group home.¹⁹⁶ The “exceptional person” rule required a resident of a group home to be both physically and mentally capable of exiting the home in an emergency without assistance.¹⁹⁷ In addition, the County required the group home to be subjected to an evaluation by a program review board.¹⁹⁸ Ultimately, the court concluded that these three provisions violated the FHA because it created discriminatory impediments which would prevent disabled persons, like the elderly group home residents, from living where they choose.¹⁹⁹ In addition, the County’s rationales for the challenged provisions were found to be inadequate.²⁰⁰

In Ohio, a court struck down a one-year moratorium on the establishment of new adult care facilities because there was evidence of intentional discrimination.²⁰¹ The City justified the one-year moratorium by claiming it was to “to provide ‘a calming down period’” and it was passed for the “preservation of public health [and] safety.”²⁰² The City referenced that the moratorium was passed to “control a problem of overconcentration of mentally handicapped residents.”²⁰³ The court found that the City’s actions were indefensible, and the one year moratorium discriminated against group homes for adults with mental disabilities, in violation of the FHA.²⁰⁴

In the state of Indiana, there are different definitions of what a family is or how many unrelated individuals may live together in a dwelling. For example, in Evansville, Indiana, family is defined as “an individual or married couple and the children thereof with not more than two other persons related directly to the individual or married couple by blood or marriage; or a group of not more than five unrelated persons, living together as a single housekeeping unit in a dwelling unit.”²⁰⁵ In South Bend, Indiana, family is defined more narrowly as:

One or more persons related by blood, legal adoption, or marriage, living and cooking together as a single housekeeping unit; or, a number of persons, but not exceeding two, who are not related by blood, legal adoption, or marriage, living and cooking together as a single

195. *Id.*

196. *Id.* at 1291.

197. *Id.*

198. *Id.* at 1289.

199. *Id.* at 1301.

200. *Id.*

201. *Epicenter of Steubenville, Inc. v. City of Steubenville*, 924 F. Supp. 845, 853–54 (S.D. Ohio 1996).

202. *Id.* at 850.

203. *Id.*

204. *Id.* at 850–51.

205. EVANSVILLE, IND. MUN. CODE § 15.15.010 (2024).

housekeeping unit, shall be deemed to constitute a family.²⁰⁶

These examples of zoning variations within the same state indicate the discrepancy amongst jurisdictions.

In Indiana, variances, conditional use permits, and safety requirements also present problems for group homes. Since 2023, the American Civil Liberties Union of Indiana (ACLU-IN) has filed six complaints against Indiana Department of Homeland Security.²⁰⁷ All the plaintiffs of these cases consist of organizations that provide treatment and sober living homes to men with substance abuse disorders. The Indiana Department of Homeland Security inspected these group homes and imposed Class 1 structure requirements, such as the installation of fire suppression systems. The ACLU-IN argues that these group homes should be classified as Class 2 structures, like traditional or nuclear family homes, rather than Class 1. The ACLU-IN contends that the additional burdens and requirements placed on these group homes are not applied to comparable single-family homes, claiming that the Indiana Department of Homeland Security has intentionally discriminated against these group homes, particularly against men in substance abuse recovery. This, the ACLU-IN asserts, violates the Rehabilitation Act, the FHA, and the Americans with Disabilities Act (“ADA”).

Ken Falk, ACLU-IN legal director, emphasized the importance of group homes, especially as it relates to the reentry population. He explained,

Many of these people come out of a prison setting. Many of them come out of a short term, three-day stay to basically detox . . . If there’s not a place for them to go, a place for them to learn how to be healthy again, then they risk the endless cycle of going back into their addiction. That’s why the homes are so important.²⁰⁸

Recent developments in this litigation underscore the strength of these claims. As of March 11, 2026, the U.S. District Court for the Southern District of Indiana ruled in favor of four group home operators and their residents, holding that the State unlawfully discriminated against them in violation of the

206. SOUTH BEND, IND. MUN. CODE § 21-02.02 (2024).

207. *See* Next Step Recovery Home, Inc. v. State of Ind. et al., No. 1:24-cv-00353 (S.D. Ind. Feb. 26, 2024); Inspiration Ministries, Inc. v. State of Indiana et al., Docket No. 1:23-cv-02027 (S.D. Ind. Nov 09, 2023); Firebrand Ministries, Inc. v. State of Indiana et al., Docket No. 1:24-cv-00630 (S.D. Ind. Apr 10, 2024); Place Of Grace, Inc. v. State of Indiana et al., Docket No. 1:24-cv-01272 (S.D. Ind. Jul 29, 2024); Behind the Wire Ministries, Inc. v. State Of Indiana et al., Docket No. 1:24-cv-00143 (S.D. Ind. Jan 23, 2024); Harmony Home of Huntington, Inc. v. State of Indiana et al., Docket No. 1:24-cv-01228 (S.D. Ind. Jul 22, 2024).

208. Abigail Ruhman, *Court: Indiana Dept. of Homeland Security Likely Discriminated Against People with Disabilities*, IPB NEWS (Nov. 10, 2024, 8:00 AM), <https://www.lpm.org/news/2024-11-10/court-indiana-dept-of-homeland-security-likely-discriminated-against-people-with-disabilities> [<https://perma.cc/85XE-6PLZ>].

ADA, the FHA, and the Rehabilitation Act.²⁰⁹ This decision reinforces the argument that regulatory frameworks, even when framed as neutral safety measures, can function as discriminatory barriers to housing for individuals with disabilities, including those in substance use recovery.

There are innumerable forms that land use discrimination takes against group homes for the disabled. Each form of discrimination poses problems for formerly incarcerated individuals that are looking for housing options, placing yet another impediment for successful integration back into the community.

B. Requirements to Prove FHA Violations and Housing Claims

Standing extends not only to individual plaintiffs, but also to entities that seek to provide housing to individuals who fall within the FHA's definition of "handicap," when their efforts are impeded by discrimination directed at prospective residents. In such cases, the plaintiff bears the initial burden of establishing a *prima facie* case of housing discrimination, including demonstrating the existence of a qualifying handicap under the FHA.²¹⁰

Three legal theories are available to a plaintiff in an FHA claim involving group homes and local zoning regulations.²¹¹ The plaintiff may allege that (1) the local government engaged in intentional discrimination, or disparate treatment, against persons with disabilities, (2) the zoning regulation in question had a disparate impact, or discriminatory effect on persons with disabilities, or (3) the local government failed to make a reasonable accommodation for a person or group based on a disability.

1. Intentional Discrimination

Plaintiffs who wish to prove a claim of intentional discrimination need to show that the local government ordinance or action is either facially discriminatory or motivated by discriminatory intent.²¹² For example, if the ordinance or action by a local government clearly states that group homes for people with disabilities are only permitted in industrial or commercial zoning districts then it would be analyzed as intentional discrimination. This type of ordinance would ban group homes in residential areas, serving as evidence of intentional discrimination aimed at keeping people with disabilities separate from traditional neighborhoods. Once a plaintiff establishes a *prima facie* case

209. *Federal Court Finds Indiana Unlawfully Discriminated Against Recovery Homes*, ACLU IN (Mar. 11, 2026), <https://www.aclu-in.org/press-releases/federal-court-finds-indiana-unlawfully-discriminated-against-recovery-homes/> [<https://perma.cc/WP8G-5QZ8>] (Four of the six ACLU-IN cases, *see supra* note 207: Place of Grace, Harmony Home of Huntington, Inspiration Ministries, and Next Step Recovery Home).

210. Connolly & Merriam, *supra* note 46, at 242–43.

211. Connolly & Merriam, *supra* note 46, at 244; *see e.g.*, *Gamble v. City of Escondido*, 104 F.3d 300, 304–05 (9th Cir. 1997).

212. Connolly & Merriam, *supra* note 46, at 244.

of facial discrimination by demonstrating that the protected group has been subject to explicit discriminatory treatment, the government has the opportunity to demonstrate that the challenged provision or action is permissible because of a legitimate reason.²¹³ Most of the federal appellate courts have found that a facially discriminatory ordinance is legitimate if the restriction in question responds to legitimate safety concerns, so long as the safety concerns are not based on stereotypes.²¹⁴ Once the defendant has successfully articulated a legitimate reason for its facially discriminatory zoning policy, the plaintiff can show that the local government intentionally discriminated against the protected, disabled class of residents, or that the reason offered by the government for the discrimination is a mere pretext for discrimination.²¹⁵

If the ordinance or action by a local government is outwardly neutral, then it can still be challenged as discriminatory intent. A plaintiff may succeed on a discriminatory intent claim if they are able to provide evidence that the local government acted upon discriminatory comments made to the public.²¹⁶

2. Disparate Impact

Disparate impact, also referred to as discriminatory effect, applies to a law that is facially neutral, but in practice has a disproportionate impact on a protected group.²¹⁷ The use of disparate impact in claims has been a source of controversy amongst the courts. In 2015, The Supreme Court resolved in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* that disparate impact analysis is permissible in FHA claims.²¹⁸ These claims are difficult for plaintiffs to establish because courts require plaintiffs to demonstrate a causal connection between the rule or policy and the discriminatory effect.²¹⁹

In analyzing disparate impact, the federal courts of appeals developed a variety of tests to determine whether a zoning action has a disparate impact on a protected group. One disparate impact test comes from the Seventh Circuit Court of Appeals' decision in *Metropolitan Housing Development Corp. v.*

213. See, e.g., *Larkin v. Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 290 (6th Cir. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1498 (10th Cir. 1995).

214. *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007); *Larkin v. Mich. Dep't of Social Servs.*, 89 F.3d 285, 290 (6th Cir. 1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503–04 (10th Cir. 1995).

215. *Connolly & Merriam*, *supra* note 46, at 245.

216. *Connolly & Merriam*, *supra* note 46, at 252; See, e.g., *Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Comm'n of Town of Fairfield*, 790 F. Supp. 1197, 1212 (D. Conn. 1992).

217. *Connolly & Merriam*, *supra* note 46, at 252.

218. *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545–46 (2015).

219. *Connolly & Merriam*, *supra* note 46, at 255; *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 539–41 (2015).

Village of Arlington Heights.²²⁰ This test relies on four factors to determine whether a regulation has a disparate impact.²²¹ The first factor is the strength of the plaintiff's showing of discriminatory effect; the second factor looks to whether there is any evidence of discriminatory intent, even if such evidence is not sufficient to show discriminatory intent; the third factor considers the defendant's asserted interest in the challenged action; and the fourth factor is whether the plaintiff seeks to compel the defendant governmental entity to affirmatively provide housing for the protected group in question, or whether the plaintiff is simply seeking to remove barriers to housing for the protected group.²²² Other federal appellate courts have adopted versions of this test.²²³ Two other circuit courts employ an alternative approach to disparate impact in housing, applying a burden-shifting framework.²²⁴ Under this approach, after a plaintiff establishes a prima facie case, then the burden shifts to the defendant to justify that its policy or practice had a legitimate, non-discriminatory objective.²²⁵

3. *Failing to Make a Reasonable Accommodation*

The FHA requires local zoning authorities or local governments to make reasonable accommodations for people with disabilities. Under the statute, authorities are required "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."²²⁶ The reasonable accommodation prong of the FHA has generated a significant amount of conflicting litigation.²²⁷ Under the statute, there are three issues inherent in reasonable accommodation analysis: (1) the reasonableness of the accommodation requested, (2) the necessity of the accommodation to afford persons with disabilities the opportunity to use the dwelling, and (3) whether the person with a disability has been given the opportunity to enjoy the dwelling on

220. 558 F.2d 1283, 1290 (7th Cir. 1977).

221. *Id.* at 1290–93.

222. *Id.*

223. *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1231 (10th Cir. 2007); *Arthur v. City of Toledo, Ohio*, 782 F.2d 56, 575 (6th Cir. 1986); *Smith v. Town of Clarkton, N. C.*, 682 F.2d 1055, 1065 (4th Cir. 1982).

224. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148–50 (3d Cir. 1977); *Gallagher v. Magner*, 619 F.3d 823, 833–34 (8th Cir. 2010).

225. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148–50 (3d Cir. 1977); *Gallagher v. Magner*, 619 F.3d 823, 833–34 (8th Cir. 2010).

226. 42 U.S.C. § 3604(f)(3)(B).

227. *Smith & Lee Assocs., Inc. v. City of Taylor, Mich.*, 102 F.3d 781, 799 (6th Cir. 1996) (holding that the City's denial of a reasonable accommodation of a group home in a single-family residential district was a violation of the Fair Housing Act); *compare with*, *Bryant Woods Inn, Inc. v. Howard Cnty., Md.*, 124 F.3d 597 (4th Cir. 1997) (holding that the County did not violate the FHA by its refusal to make a reasonable accommodation for a group home seeking to expand from eight to fifteen residents).

an equal basis as nondisabled persons.²²⁸ As an initial matter, to bring a reasonable accommodation claim, a plaintiff must actually have requested or attempted to request a reasonable accommodation.²²⁹ Before pursuing legal action, a group home operator, or its residents making a reasonable accommodation claim, must first request the accommodation through the local government's established procedures. In cases where a plaintiff intends to build a facility or group home and informs the local government that the prospective residents have one or more disabilities, the government is considered to have been given adequate notice.²³⁰

A plaintiff making a reasonable accommodation claim must first show that the desired accommodation is reasonable.²³¹ Although there is not a clear test for whether an accommodation is reasonable, courts generally rely on whether an accommodation is both efficacious and proportional to its implementation cost, and that the implementation costs are "reasonable."²³² When a group home requests an accommodation to operate in a residential single-family district, the request is typically considered reasonable.²³³ While legitimate public safety concerns can be considered when evaluating a group home's request, a local government cannot use testimony from neighbors opposing the group home as sufficient evidence to deem the accommodation unreasonable.²³⁴ Denying a group home's application due to public safety concerns must not be based on general stereotypes about disabled individuals, but rather, on specific concerns regarding individual residents who may pose safety risks.²³⁵

When courts consider the necessity of the accommodation, the plaintiff must demonstrate that without the accommodation, they will be denied an equal opportunity to obtain housing. By one court's definition, a reasonable accommodation involves "changing some rule that is generally applicable so as to make its burden less onerous on the handicapped individual."²³⁶ The challenge lies in defining what qualifies as equality of opportunity under the FHA. Often, equal opportunity for people with disabilities means the opportunity for those residents or group homes to reside in a residential neighborhood, just like other people without disabilities. In those instances, the plaintiff bears the responsibility of showing that group homes are not allowed in a specific district and that the defendant or local jurisdiction did not provide a reasonable accommodation in its zoning laws to enable the successful operation of the group home.²³⁷ The plaintiff must prove that the ordinance in

228. Connolly & Merriam, *supra* note 46, at 257.

229. *Id.* at 258.

230. *Id.*

231. *Id.*

232. *Id.* at 258–59.

233. *Smith & Lee Assocs., Inc. v. City of Taylor, Mich.*, 102 F.3d 781, 799 (6th Cir. 1996).

234. Connolly & Merriam, *supra* note 46, at 259.

235. *Id.*

236. *Oxford House, Inc. v. Twp. of Cherry Hill*, 799 F.Supp. 450, 462 n.25 (D.N.J.1992).

237. Connolly & Merriam, *supra* note 46, at 261.

question is a neutral rule that the local government failed to reasonably adjust to allow the group home to operate.²³⁸

The federal appellate courts are divided on which party bears the burden of showing the reasonableness or unreasonableness. Six circuits place the burden on the local government to demonstrate that the plaintiff's request is unreasonable or that the request would impose an undue hardship in some circumstances.²³⁹ Two circuits place the burden on the plaintiff, as a person with a disability or entity, to demonstrate affirmatively that the accommodation requested is reasonable.²⁴⁰ In determining whether an accommodation is reasonable, courts generally balance the competing interests of the group home and local government. To make this determination, courts generally rely on whether an accommodation is both efficacious for the governing board and its negative effects are proportional to its implementation on the group home.²⁴¹ Zoning regulations, variance procedures, and special use or conditional permit requirements may create additional challenges for group homes to succeed on a reasonable accommodation claim.²⁴²

C. Housing Claims Available for Reentry Group Homes

Reentry group home should likewise qualify for the FHA's protection under the "regarded as" prong of handicap. The intent and rationale of the "regarded as" prong third was to provide protection for people that may otherwise be treated adversely because of stigmatizing perceptions held by others.²⁴³ Since "handicap" encompasses individuals recovering from substance or alcohol abuse, sober living homes are protected under the FHA.²⁴⁴ Like the use of "regarded as" to prove handicap discrimination in cases regarding sober living homes, the same analysis could apply to group homes for previously incarcerated individuals. The opposition from local communities towards sober living homes reflects the challenges that reentry group homes encounter in residential neighborhoods, which would likewise create challenges for group

238. *Id.*

239. *Jackan v. New York State Dep't of Labor*, 205 F.3d 562, 566 (2d Cir.2000); *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442, 459 (3d Cir. 2002); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 783-84 (7th Cir. 2002); *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 950 (8th Cir.1999); *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002); *White v. York Int'l Corp.*, 45 F.3d 357, 361 (10th Cir.1995).

240. *Bryant Woods Inn, Inc. v. Howard Cnty., Md.*, 124 F.3d 597, 604 (4th Cir. 1997); *Elderhaven, Inc. v. City of Lubbock, Tex.*, 98 F.3d 175, 178 (5th Cir. 1996).

241. *Connolly & Merriam*, *supra* note 46, at 257; *see Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (discussing hardship in the context of reasonable accommodations in an ADA case).

242. *Connolly & Merriam*, *supra* note 46, at 261-63.

243. Title II Regulations Supplementary Information, 54 Fed. Reg. 3232, 3245 (July 29, 1991) (Department of Justice's final admin. rule under the American with Disabilities Act).

244. *See, e.g., Gorman et al.*, *supra* note 22, at 608-09.

homes for the formerly incarcerated.

A lot can be learned from the case, *SoCal Recovery, LLC v. City of Costa Mesa*,²⁴⁵ where the City of Costa Mesa passed ordinances in 2014 that made it unlawful for sober living homes to operate without a permit. It required sober living homes to be located more than 650 feet away from any other sober living home or licensed drug and alcohol treatment center.²⁴⁶ The plaintiffs, SoCal Recovery, LLC, operated sober living homes in the City and submitted permit applications and reasonable accommodation requests so they could continue to operate their sober living homes, despite operating within 650 feet from other sober living home or licensed drug and alcohol treatment center.²⁴⁷ The City denied permits, denied reasonable accommodation requests, and issued citations to SoCal Recovery for violating the ordinances.²⁴⁸

SoCal Recovery sued the City, arguing that the ordinances and the City's enforcement practices discriminated against them on the basis of disability under the FHA.²⁴⁹ On appeal, the court reversed the district court's grant of summary judgment because the wrong legal standard was applied to analyze both the "actual disability" prong and "regarded as" prong.²⁵⁰ This court's analysis on the "regarded as" prong provides helpful insight; to establish disability under the "regarded as" disability prong, "the analysis turns on how an individual is perceived by others."²⁵¹ SoCal Recovery needed to show that the City "subjectively believed that all the residents (or even some specific residents) of [SoCal' Recovery's] sober living homes were disabled."²⁵² The appellate court found the language in the permit denial letters to describe the individuals as disabled.²⁵³ Also, the planning commission stated that the homes would be "'materially detrimental to other properties within the area,' 'to the health, safety and general welfare of the public,' and 'to the residential character of the City's neighborhoods' because '[t]he operation of a group home on contiguous parcels would result in the overconcentration of such facilities in [the] neighborhood.'"²⁵⁴ The City Council reasoned the denial of the permit on the grounds that the overconcentration of such facilities in the neighborhood "'could lead to negative impacts in the neighborhood.'"²⁵⁵ Additionally, the court found that City's actions were based on unfounded fears and stereotypes because of the oral testimony given at public hearings and written statements by

245. 56 F.4th 802, 802 (9th Cir. 2023).

246. *Id.* at 804–05.

247. *Id.* at 805.

248. *Id.*

249. *Id.*

250. *Id.* at 812.

251. *Id.* at 817.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

community residents opposing the sober living homes.²⁵⁶ Some described the individuals living in the sober living homes as “‘capable of mayhem and violence,’ and as the cause of ‘[c]rime and homelessness,’” and in addition, sober living homes made people feel “‘uncomfortable.’”²⁵⁷ The appellate court decided that this type of evidence should be considered in a “regarded as” having a disability analysis.²⁵⁸ Also, the Sixth Circuit²⁵⁹ and Fourth Circuit²⁶⁰ have decided that this type of public speech about sober living home residents is evidence that the government regarded the individuals as having a disability.²⁶¹

This case’s analysis of the “regarded as” prong of disability provides a useful application to a similarly situated group that faces discrimination comparable to that experienced by previously incarcerated individuals. In *SoCal Recovery, LLC v. City of Costa Mesa*, discrimination was based on unfounded fears and stereotypes.²⁶² Like sober living homes, reentry group homes should fall within the FHA’s protections under the “regarded as” prong of handicap. For the same reasons, previously incarcerated individuals should also qualify for protection, as they are often “regarded as” having a disability.

D. Reentry Group Homes Should Qualify for the FHA’s Protections Under the “Regarded As” Prong of Handicap

Reentry housing, in the form of group homes, should qualify for the FHA’s protection under the “regarded as” prong of handicap. Many previously incarcerated individuals encounter housing discrimination based on mental health conditions that contributed to their involvement with the justice system, emerged while incarcerated, or developed post-release. Regardless of mental health conditions, previously incarcerated individuals should qualify for the FHA’s protection because they are “regarded as” having a disability. Following this reasoning, there should be housing protections available for individuals with criminal records.

To reiterate, the FHA defines “handicap” as: (1) a physical or mental impairment that substantially limits one or more of an individual’s major life activities; (2) a record of, or a history of, a physical or mental impairment; or (3) regarded as having such an impairment.²⁶³ If the mental health condition of a previously incarcerated individual does not meet, or are not considered to meet the first two prongs, then the third prong should apply. The intent and rationale of this third prong was to provide protection for people that may otherwise be

256. *Id.* at 819.

257. *Id.*

258. *Id.*

259. *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 342 (6th Cir. 2002).

260. *U.S. v. S. Mgt. Corp.*, 955 F.2d 914, 919 (4th Cir. 1992).

261. *SoCal Recovery, LLC v. City of Costa Mesa*, 56 F.4th 802, 819 (9th Cir. 2023).

262. *Id.* at 819.

263. 42 U.S.C. § 3602(h)(1)–(3).

treated adversely as a result of stigmatizing perceptions held by others. By including this third prong, “Congress acknowledged that society’s accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.”²⁶⁴

“Regarded as” having an impairment could mean that an individual “[h]as a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of others toward such impairment.”²⁶⁵ This specifically relates to stigma, biases, or beliefs of individuals. It plainly acknowledges the circumstances when a disability is a substantial limitation of a major life activity because of how others view the individual’s condition.

It is undisputed that society’s myths and fears about the mental state of previously incarcerated individuals are as debilitating as the actual mental health concerns that exist within this population. Thus, a previously incarcerated individual “who is denied services or benefits by a public entity because of myths, fears, and stereotypes associated with disabilities would be covered under this third [prong] whether or not the person’s physical or mental condition would be considered a disability under the first or second [prong] in the definition.”²⁶⁶

A formerly incarcerated individual is likely to have a mental impairment regardless of whether it results in a substantial limitation of a major life activity. To restate, major life activities “means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”²⁶⁷ For example, a formerly incarcerated individual may be diagnosed with depression after being released from prison but is still able to care for one’s self and perform work tasks; their depression does not meet the severity of limiting a major life activity. However, this individual’s housing application might be denied because the landlord believed the individual was unable to perform basic tasks as a tenant, like cleaning or upkeeping the apartment. It does not matter that this individual has a condition that does not result in a substantial limitation of a major life activity; the landlord treated the individual as having a substantially limiting condition, which should qualify them for protection under the FHA.

The “regarded as” prong of the definition of handicap represents a broad approach that “would extend statutory protection to anyone who has been excluded or disadvantaged on the basis of a physical or mental impairment, whether real or perceived.”²⁶⁸ The statutory interpretations focus on how individuals are treated, rather than technical distinctions about the significance

264. *Arline*, 480 U.S. at 284; Title II Regulations Supplementary Information, 54 Fed. Reg. 3232, 3245 (July 29, 1991) (Department of Justice’s final admin. rule under the American with Disabilities Act).

265. 24 C.F.R. § 100.201 (2024).

266. Title II Regulations Supplementary Information, 54 Fed. Reg. 3232, 3245 (July 29, 1991) (Department of Justice’s final admin. rule under the American with Disabilities Act).

267. 24 C.F.R. § 100.201 (2024).

268. NAT’L COUNCIL ON DISABILITY, *supra* note 55, at 12.

or type of impairment that makes a person disabled. Instead, the focus is on whether discrimination exists, not on the characteristics of the person being discriminated against.

Previously incarcerated individuals face housing discrimination because of society's fears, stereotypes, or beliefs.²⁶⁹ These assumptions or beliefs are based on the concern that a previously incarcerated individual will harm property or other people, and the individual is viewed as lacking impulses or having uncontrolled behavior with a propensity for committing crimes. These beliefs or assumptions about previously incarcerated individuals are misconceptions about their mental state and future physical actions. Prospective tenants with criminal records face housing discrimination because of their mental health or assumptions about their mental health; whether the condition is actual or purported, these individuals face discrimination due to a perceived mental disability.

For formerly incarcerated individuals, stigma or stereotypes associated with their incarceration and criminal histories presents additional barriers to housing access. At the structural or policy level, individuals with a criminal record may be restricted from housing options.²⁷⁰ Socially, previously incarcerated individuals face stigmatizing perceptions or stereotypes from the general public, including assumptions that they are dangerous, dishonest, lazy, or unintelligent.²⁷¹ Such beliefs about this population may contribute to property owners' or discriminatory behaviors, such as denials of housing applications once mandatory criminal background checks reveal tenants' conviction histories.²⁷²

IV. CONCLUSION

Previously incarcerated individuals face housing discrimination not simply because of their criminal records, but because of deeply rooted fears, myths, and prejudices about their perceived mental state. These stigmatizing assumptions, whether grounded in actual or purported conditions, have enabled local governments and housing providers to justify exclusionary practices under the guise of public safety. Yet the "regarded as" prong of the FHA's definition of handicap exists precisely to guard against this form of discrimination, where perception, rather than diagnosis, drives unequal treatment. Mental health research reinforces this point, demonstrating that stereotypes about formerly incarcerated individuals meaningfully hinder access to stable housing. In

269. Danya Keene et al., *Stigma, Housing and Identity After Prison*, 66 SOCIOLOGICAL REV. 799–815 (2018).

270. Zoe Feingold, *The Stigma of Incarceration Experience: A Systematic Review*, 27 PSYCH., PUB. POL'Y & L. 550–69, at 550 (2021).

271. See Paul Hirschfield & Alex Piquero, *Normalization and Legitimation: Modeling Stigmatizing Attitudes Toward Ex-Offenders*, 48 CRIMINOLOGY 27–55, at 30 (2010).

272. See Danya Keene et al., *Stigma, Housing and Identity After Prison*, 66 SOCIOLOGICAL REV. 799–815 (2018); David Harding et al., *Making Ends Meet After Prison*, 33 J. OF POL'Y ANALYSIS & MGMT. 440–70 (2014).

practice, a criminal record operates as a proxy for perceived disability, creating substantial and unjustified barriers to housing regardless of an individual's actual condition.

These dynamics extend to reentry group homes, which face resistance rooted in the same unfounded fears that have long targeted sober living facilities. As a result, reentry housing is often excluded from FHA protections through assertions of "direct threat," despite a lack of individualized or evidence-based assessments. Notably, group homes framed around substance use recovery are more likely to survive legal and community scrutiny, while those designed specifically for reentry struggle to gain similar recognition. This disparity exposes a critical gap in existing FHA doctrine.

Although case law has yet to fully address the application of the FHA to reentry group homes, the statute's text and purpose strongly support their inclusion under the "regarded as" prong. Courts should recognize that discrimination against formerly incarcerated individuals is frequently rooted in perceived mental impairment, bringing such claims squarely within the FHA's protections. Interpreting the statute in this way would not expand the FHA beyond its intended scope but rather fulfill its core mandate: to eliminate discrimination driven by stigma and stereotype. Without such recognition, formerly incarcerated individuals will continue to face systemic barriers to housing, undermining both successful reentry and the broader goals of fair housing law.