

# **The Pursuit of Integrated Living: The Fair Housing Act as a Sword for Mentally Disabled Adults Residing in Group Homes**

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*Today, many state-licensed group homes for mentally disabled adults have come to resemble their predecessor psychiatric institutions in that they segregate residents from the community at large. In 2010, a court found that private group homes in New York discriminated against the mentally disabled in violation of the Americans with Disabilities Act (ADA). The court ordered the state to establish non-discriminatory housing alternatives where residents could live, and become part of, the community at large. This groundbreaking litigation has prompted similar efforts in other states. In addition to the ADA, the Fair Housing Act (FHA) also protects the mentally disabled from discrimination arising from segregated housing. This Note examines whether the FHA supports a discrimination claim on behalf of the mentally disabled residing in segregated group homes. The differences between the ADA and FHA approaches are analyzed in terms of standing, defenses, and remedies, in order to determine whether a FHA claim increases the chances of successful litigation, in turn furthering the underlying policy goal of ending discrimination in housing.*

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## I. INTRODUCTION

During the deinstitutionalization movement, which began in 1955, the public sector developed community-based housing for the mentally disabled, rejecting policies segregating them in psychiatric institutions.<sup>1</sup> Many states licensed private group homes in an effort to provide more humane treatment.<sup>2</sup> Regrettably, the reality fell far short of the ideal, as state licensed group homes came to resemble their predecessor psychiatric institutions by segregating mentally disabled residents from the community at large.<sup>3</sup> The result has been the denial of the opportunity for mentally disabled residents to interact with non-disabled individuals.<sup>4</sup>

The public has become increasingly aware that private group homes have failed to achieve the goal of providing true communi-

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1. See E. FULLER TORREY, *OUT OF THE SHADOWS* 8 (1997) (“*Deinstitutionalization* is the name given to the policy of moving severely mentally ill people out of large state institutions and then closing part or all of those institutions.”) The bulk of this movement lasted from 1955 until approximately 1975. *Id.*

2. Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Disabilities*, 43 AM. U. L. REV. 925, 928–29 (1994). See also David Ferleger, *The Constitutional Right to Community Services*, 26 GA. ST. U. L. REV. 763, 763 (2010) (“Institutions, by their very structure a closed and segregated society founded on obsolete custodial models[,] can rarely normalize and habilitate the mentally retarded citizen to the extent of community programs created and modeled upon the normalization and developmental approach components of habilitation.” (quoting *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1318 (E.D. Pa. 1978))).

3. Kanter, *supra* note 2, at 930–32.

4. See *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 298–99 (E.D.N.Y. 2009) (“Plaintiff has provided evidence about the regimented nature of the adult homes. For example, individuals with mental illness in the adult homes reside in close quarters entirely with other persons with disabilities and with significant numbers of other persons with mental illness. Residents have testified that they receive treatment from on-site doctors and nurses.”). The court further observed that “[a]ccording to one adult home resident, aides instruct residents as to what to do at various times of the day, including when to eat, bathe, and take medications.” *Id.* at 298. The court also noted that

[r]esidents testified that they are assigned roommates and lack privacy. Adult home residents have testified that they can only receive calls coming through the adult home switchboard and/or on extensions or pay phones in common areas that lack privacy and are often chaotic. Plaintiff has provided evidence that adult homes have visiting hours, and visitors must identify themselves and sign in with the home. Visitors are received in noisy common areas, unless the resident's roommate or management grants permission for visitors to enter their bedroom. Some residents have testified that their adult homes do not permit visitors to join in meals or stay overnight.

*Id.* at 298–99 (internal citations omitted). See also Ira A. Burnim & Jennifer Mathis, *The Olmstead Decision at Ten: Directions to Future Advocacy*, 43 CLEARINGHOUSE REV. 386, 391 (2009).

ty-based living.<sup>5</sup> Recently, an advocacy organization for the mentally disabled challenged a New York State policy in *Disability Advocates v. Paterson*.<sup>6</sup> The district court held that the state's policy of licensing private group homes discriminated against the mentally disabled, in violation of the integration mandate of the Americans with Disabilities Act.<sup>7</sup> The court ordered New York to end discrimination in its housing policies regarding mentally disabled adults by ensuring that adult home residents are provided the opportunity to live in a more integrated setting.<sup>8</sup>

Other disability advocates are attempting to replicate this result in states where private facilities continue to receive the support of government policies.<sup>9</sup> Since these cases are in the initial stages of litigation, there is no telling how they will play out.<sup>10</sup> The underlying policy goal of litigation patterned after the successful *Disability Advocates* suit is to promote integrated housing alternatives for mentally disabled individuals.<sup>11</sup> This Note refers to such a legal proceeding that seeks to advance this goal as a "Paterson case."<sup>12</sup>

Although *Disability Advocates* was brought under the Americans with Disabilities Act (ADA), the Fair Housing Act (FHA) also prohibits housing discrimination against the disabled by forbidding practices that produce or sustain segregated housing; thus, plaintiffs may also bring FHA claims against those who discriminate.<sup>13</sup> The ADA provides that "no qualified individual with a disability shall . . . be subjected to discrimination" by a public

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5. See Clifford J. Levy, *For Mentally Ill, Death and Misery*, N.Y. TIMES, Apr. 28, 2002, at A1. This is the first in a series of three Pulitzer Prize winning articles, delivering the results of a yearlong investigation by the *New York Times* into the conditions in adult homes for the mentally disabled in New York City. The article concludes that the investigation found "neglect, malfeasance and death." *Id.*

6. 598 F. Supp. 2d 289.

7. *Disability Advocates, Inc. v. Paterson*, No. 03-3209, 2010 U.S. Dist. LEXIS 17949, at \*20 (E.D.N.Y. Mar. 1, 2010).

8. *Id.* (ordering defendants to "change the way they manage their mental health services"); see also *Disability Advocates, Inc. v. Paterson*, No. 03-3209, 2010 U.S. Dist. LEXIS 22617, at \*5-6 (E.D.N.Y. Mar. 11, 2010) (denying defendants' motion to stay the order pending appeal).

9. Press Release, Dep't of Justice, Briefs Filed in Florida, Illinois and New Jersey to Support the Supreme Court's *Olmstead* Decision (May 25, 2010), available at <http://www.justice.gov/opa/pr/2010/May/10-crt-612.html>.

10. *Id.*

11. *Disability Advocates*, 598 F. Supp. 2d at 292.

12. Part II of this Note provides an overview of the elements of a Paterson case.

13. 42 U.S.C. § 3604(f).

entity.<sup>14</sup> In contrast, the FHA makes it illegal to discriminate in the sale or rental of housing on the basis of disability.<sup>15</sup> Both laws operate to protect disabled individuals from segregated living situations.<sup>16</sup> If a Paterson claim under the FHA is viable, it could augment a claim under the ADA in future litigation. Litigators seeking to bring a Paterson case could bring suit under both statutes, thus strengthening their chances of success and doubling the potential for recovery.

This Note argues that the FHA supports a Paterson claim of discrimination brought on behalf of the mentally disabled residing in group homes, and proceeds in five parts. Part II discusses the history of state-sponsored housing for mentally disabled adults. Part III provides background on the ADA and FHA. Part IV assesses whether a Paterson claim can be maintained under the FHA. Part IV.A outlines important Supreme Court precedents under the FHA involving discrimination on the basis of race, and Part IV.B extends these principles to the context of disability discrimination under the FHA. Part V analyzes the differences between Paterson litigation brought under the ADA with potential strategies under the FHA, with respect to standing, defenses and remedies. This Note concludes that bringing an additional claim under the FHA increases the chances of successful litigation, which in turn furthers the underlying policy goal of ending housing discrimination against the mentally disabled.

## II. HISTORY OF STATE HOUSING POLICIES FOR MENTALLY DISABLED ADULTS

Part II.A offers a definition of disability, Part II.B briefly recounts the evolution of public housing policies for the mentally disabled, and Part II.C describes the characteristics of group homes.

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14. 42 U.S.C. § 12132 (2006).

15. 42 U.S.C. § 3604(f) (2006).

16. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589 (1999); Andrea Panjwani, *1988 Fair Housing Amendments: A Shield for the Disabled*, 4 J. AFFORDABLE HOUS. & CMTY. DEV. L. 101, 101, 104 (1995).

## A. DEFINITION OF DISABILITY

The term “disabled” refers to an especially diverse group of people including those with hearing, ambulatory, visual, cognitive, or emotional disabilities.<sup>17</sup> An estimated thirty-six million Americans are disabled, representing 12% of the population.<sup>18</sup> The U.S. Department of Housing and Urban Development (HUD), the federal cabinet-level agency responsible for federal housing policy, defines “disability” as “[a] physical or mental impairment that substantially limits one or more of the major life activities of such for an individual.”<sup>19</sup>

The ADA defines “disability” as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”<sup>20</sup> In addition, to meet the eligibility requirements of the public entities portion of the Act, an individual must be a “qualified individual with a disability,” defined as:

An individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.<sup>21</sup>

The FHA does not define the term “disability” but instead defines “handicap” as:

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17. REHAB. RESEARCH & TRAINING CTR. ON DISABILITY STATISTICS & DEMOGRAPHICS, ANNUAL DISABILITY STATISTICS COMPENDIUM: 2010, 1 (2010), available at <http://www.disabilitycompendium.org/Compendium2010.pdf>; see also U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: BARRIERS AT EVERY STEP 53 (2005) [hereinafter BARRIERS], available at [http://www.huduser.org/Publications/pdf/DDS\\_Barriers.pdf](http://www.huduser.org/Publications/pdf/DDS_Barriers.pdf).

18. *Latest U.S. Disability Statistics and Facts*, DISABLED WORLD (July 26, 2011), <http://www.disabled-world.com/disability/statistics/census-figures.php>.

19. *Glossary of HUD Terms*, U.S. DEP’T OF HOUS. & URBAN DEV., [http://www.huduser.org/portal/glossary/glossary\\_all.html#d](http://www.huduser.org/portal/glossary/glossary_all.html#d) (last visited Oct. 25, 2011).

20. 42 U.S.C. § 12102(1) (2006).

21. 42 U.S.C. § 12131(2).

(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.<sup>22</sup>

The FHA's definition of "handicap" is essentially the same as the ADA's definition of "disability,"<sup>23</sup> and this Note uses the terms interchangeably. Also for the purposes of this Note, a Paterson case encompasses only adult individuals with a mental, as opposed to physical, disability, as the *Disability Advocates* litigation was brought on behalf of mentally disabled adults.<sup>24</sup>

## B. EVOLUTION OF PUBLIC HOUSING POLICIES FOR THE MENTALLY DISABLED

Prior to the 1950s, people with mental disabilities were permanently segregated from society in large, remote state psychiatric institutions, a phenomenon known as "institutionalization."<sup>25</sup> The underlying reason for institutionalization was, in large part, the fear of and social stigma attached to persons with disabilities.<sup>26</sup>

The 1950s marked a massive shift in state policies towards the mentally disabled.<sup>27</sup> During what is now known as the deinstitutionalization movement, society became aware of the depravity of

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22. *Id.* § 3602(h).

23. *See supra* notes 20–21. Although the FHA only refers to discrimination on the basis of "handicap," for the purposes of this Note the terms "handicap" and "disability" are used interchangeably.

24. Mental disability, as used in this Note, includes severe mental illness, developmental disability, or chronic psychological impairment. *See* E. FULLER TORREY, *OUT OF THE SHADOWS* 3 (1997) ("Mental illness' is a nonspecific term that covers a broad array of brain disorders, human behaviors, and personality types."). *See also id.* at 4 (defining "severe mental illness," in accordance with the National Advisory Mental Health Council, as including "disorders with psychotic symptoms such as schizophrenia, . . . manic depressive disorder, autism, as well as severe forms of other disorders such as major depression, panic disorder, and obsessive-compulsive disorder." (internal quotation marks omitted)).

25. Kanter, *supra* note 2, at 929.

26. Meghan K. Moore, Note, *Piecing the Puzzle Together: Post-Olmstead Community-Based Alternatives for Homeless People with Severe Mental Illness*, 16 *GEO. J. ON POVERTY L. & POL'Y* 249, 251 (2009).

27. *Id.*

the conditions in public psychiatric institutions and the inhumane treatment of those confined in them.<sup>28</sup> Deinstitutionalization reflected a humanitarian desire to provide housing where residents would have more autonomy, privacy, individualized treatment, and contact with the neighborhood and non-disabled individuals.<sup>29</sup> Ultimately, disabled individuals could attain self-sufficiency and enter mainstream society.<sup>30</sup>

The movement's proponents mistakenly assumed that housing policies to transition institutionalized individuals to life in the outside world were unnecessary.<sup>31</sup> The deinstitutionalization movement quickly became popular with politicians who found it appealing to eliminate the public expense of institutionalizing patients under the guise of the progressive ideal of increasing autonomy and equality.<sup>32</sup> This led states to pressure public institutions to downsize even though there were no alternatives in place for discharged individuals.<sup>33</sup> As a result, thousands of institutionalized patients were discharged.<sup>34</sup> From 1955 to 1994, the

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28. YIN-LING IRENE WONG ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, PREDICTING STAYING IN OR LEAVING PERMANENT SUPPORTIVE HOUSING THAT SERVES HOMELESS PEOPLE WITH SERIOUS MENTAL ILLNESS 20 (2006) [HEREINAFTER WONG ET AL.], available at <http://www.huduser.org/Publications/pdf/permhsgstudy.pdf>.

29. TORREY, *supra* note 1, at 85.

30. See Clifford J. Levy, *Here, Life is Squalor and Chaos*, N.Y. TIMES, Apr. 29, 2002, at A1.

31. TORREY, *supra* note 1, at 85.

32. *Id.*

33. See *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 297 (E.D.N.Y. 2009) (recounting the testimony of disability policy professionals working for New York State during deinstitutionalization). The court noted that "the placement of large numbers of people with mental illness into adult homes was the result of a conscious State policy to discharge patients from psychiatric hospitals into these facilities due to the absence of other housing alternatives at a time when psychiatric centers were under pressure to downsize." *Id.* (internal quotation marks omitted). The court summarized the testimony of another expert that "to meet the growing need for housing created by the large numbers of discharges from state psychiatric hospitals, the state licensed private providers to create adult homes using under-utilized facilities, such as hotels, motels, YMCAs, and other similar buildings." *Id.* Finally, the court noted that "[a]dult homes developed in a response to a need — lack of community based housing resources . . . . Deinstitutionalization happened and the community resources weren't up to speed with state operated bed reductions." *Id.* (internal quotation marks omitted).

34. TORREY, *supra* note 1, at 86–87 (1997). During deinstitutionalization, approximately 92% of mentally ill patients in public psychiatric hospitals were discharged.

number of people in public psychiatric institutions declined approximately eightfold.<sup>35</sup>

States eventually adopted a variety of approaches to replace institutions,<sup>36</sup> such as licensing private group homes, with the goal of providing community based housing and treatment for mentally disabled individuals.<sup>37</sup> Group homes are permanent living facilities that board and provide services for disabled individuals.<sup>38</sup> Private group homes are operated by non-government entities for profit.<sup>39</sup> Although many group homes represent an adequate housing option for disabled individuals, many private group homes operate under deplorable conditions.<sup>40</sup> They are often large, isolated, permanent living facilities.<sup>41</sup>

Unfortunately, such group homes have come to resemble their precursor state psychiatric institutions in two main respects. First, they are run in a regimented manner that denies individual choice.<sup>42</sup> For example, the district court in *Disability Advocates* recounted evidence that “aides instruct residents as to what to do at various times of the day, including when to eat, bathe, and

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35. WONG ET AL., *supra* note 28, at 20 (stating that the population declined “from an estimated 560,000 patients in 1955 to about 72,000 in 1994.” (internal citation omitted)). See also TORREY, *supra* note 1, at 8 (“In 1955, there were 558,239 severely mentally ill patients in the nation’s public psychiatric hospitals. In 1994, this number had been reduced by 486,620 patients, to 71,619 . . .”). This decline occurred even as the nation’s population increased). *Id.*

36. Although group homes were a partial alternative to public institutions, many disabled individuals were discharged without another place to turn. See TORREY, *supra* note 1, at 10 (“[D]einstitutionalization has helped create the mental illness crisis by discharging people from public psychiatric hospitals without ensuring that they received the medication and rehabilitation services necessary for them to live successfully in the community. . . . Consequently, approximately 2.2 million severely mentally ill people do not receive any psychiatric treatment.”). See also *id.* at 3 (“On any given day, approximately 150,000 of them are homeless, living on the streets or in public shelters. Another 159,000 are incarcerated in jails and prisons, mostly for crimes committed because they were not being treated. . . . A very large number have died prematurely as a result of accidents and suicide.”). See also WONG, *supra* note 28, at 20–21 (noting that the immediate discharge of patients from public hospitals in Pennsylvania was met with a lack of preparedness that left many of them without support and homeless, and that in the 1990s the State shifted funding to “a variety of community living arrangements, including supported apartments, group homes, scattered apartments, and structured long-term residences”).

37. Kanter, *supra* note 2, at 926.

38. *Id.* at 932.

39. See generally Levy, *supra* note 5

40. *Id.*

41. *Id.* at 389–91.

42. Kanter, *supra* note 2, at 932.



take medications.”<sup>43</sup> The court also cited “evidence that adult homes have visiting hours, and visitors must identify themselves and sign in with the home.”<sup>44</sup>

Second, residents are confined and segregated, depriving them of the opportunity to interact with the outside world.<sup>45</sup> The district court in *Disability Advocates* found evidence that “individuals with mental illness in the adult homes reside in close quarters entirely with other persons with disabilities and with significant numbers of other persons with mental illness.”<sup>46</sup> Further, the court observed that “[s]ome residents have testified that their adult homes do not permit visitors to join in meals or stay overnight.”<sup>47</sup>

The new era has not ended the discrimination, isolation, or mistreatment,<sup>48</sup> and segregation of the mentally disabled persists within the smaller facilities and group homes themselves.<sup>49</sup> As former president of the American Psychiatric Association John Talbot observed, the result of deinstitutionalization has simply been that “the chronic mentally ill patient [has] his locus of living and care transferred from a single lousy institution to multiple wretched ones.”<sup>50</sup> Reflecting this disillusionment, the movement from state psychiatric hospitals to state-supported private facilities has been renamed “transinstitutionalization.”<sup>51</sup> Unfortunately, despite the growing public awareness in recent years of the deplorable conditions in adult group homes, states have been reluctant to reallocate funding to invest in housing alternatives.<sup>52</sup>

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43. *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 298 (E.D.N.Y. 2009).

44. *Id.* at 299 (internal citations omitted).

45. Kanter, *supra* note 2, at 932.

46. *Disability Advocates*, 598 F. Supp. 2d at 298.

47. *Id.* at 299.

48. Kanter, *supra* note 2, at 930.

49. *Id.*

50. TORREY, *supra* note 1, at 88 (quoting J.A. Talbott, *Deinstitutionalization: Avoiding the Disasters of the Past*, 30 HOSP. & COMM. PSYCH. 621, 621–24.(1979) (internal quotation marks omitted)).

51. Burnim & Mathis, *supra* note 4, at 391.

52. *Id.* at 387.

C. CHALLENGING PRIVATE GROUP HOMES: *DISABILITY  
ADVOCATES V. PATERSON*

In 2002, an investigation by the New York Times found that state-regulated adult homes in New York City “have developed into places of misery and neglect, just like the psychiatric institutions before them.”<sup>53</sup> Responding to this situation, Disability Advocates, Inc., an organization acting on behalf of mentally disabled residents of group homes in New York, brought an action against New York State.<sup>54</sup> *Disability Advocates v. Paterson* sought to alter the state’s policy of licensing and supporting group homes, and instead promote an alternative form of housing known as “supportive housing.”<sup>55</sup>

Supportive housing consists of housing units that are scattered throughout communities in ordinary apartment buildings<sup>56</sup> and allow residents to receive certain support services.<sup>57</sup> Examples of services include “help with cooking, shopping, budgeting, medication management and making appointments . . . .”<sup>58</sup> The support services are designed with the expectation that residents will receive more support initially and that the need for services will decrease overtime.<sup>59</sup> As residents live throughout the community instead of in a centralized place, mobile teams deliver these services to different buildings as necessary.<sup>60</sup> Finally, the housing is intended to be permanent and independent.<sup>61</sup>

Supportive housing is mainly designed for individuals with a high degree of independent living skills.<sup>62</sup> But the level of support provided can vary depending on the needs of the particular resident, making supportive housing a flexible option for many disabled individuals.<sup>63</sup> In fact, the court in *Disability Advocates* found that virtually all group home residents could successfully

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53. Levy, *supra* note 5.

54. *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 292 (E.D.N.Y. 2009).

55. *Id.* at 302–304 (using the term “supported housing”); *see also* WONG ET AL., *supra* note 28, at 22.

56. *Disability Advocates*, 598 F. Supp. 2d at 302.

57. *Id.* at 302–04.

58. *Id.* at 304.

59. *Id.* at 303.

60. WONG ET AL., *supra* note 28, at 22.

61. *Id.*

62. *Disability Advocates*, 598 F. Supp. 2d at 303.

63. *Id.* at 303–04.

transition to a supportive housing environment.<sup>64</sup> Compared with group homes, supportive housing also affords residents more autonomy and interaction with non-disabled individuals because residents occupy apartments in the mainstream community.<sup>65</sup> In *Disability Advocates*, the court ordered New York to provide all qualified adult group home residents the opportunity to move to supportive housing.<sup>66</sup>

The ultimate goal of the *Disability Advocates* litigation was state provision of integrated housing alternatives such as supportive housing.<sup>67</sup> The goal of a “Paterson case,”<sup>68</sup> as developed in this Note, is to advance the policy of supportive housing as a less segregated alternative to group homes. The objective is not the elimination of all group homes, but rather the provision of supportive housing options so that individuals may choose which setting they want to live in.<sup>69</sup> Group homes are both appropriate and desirable for some individuals, while other individuals may prefer or find themselves more suited to supportive housing.<sup>70</sup> Therefore, a Paterson case seeks to compel the provision of supportive housing options.

The elements of a Paterson case are as follows. The subjects are mentally disabled individuals currently residing in segregated group homes. These individuals must both be qualified to, and desire to, live in a setting that would afford more opportunities for independent living and community involvement. The main allegation is that these individuals are unlawfully discriminated against, in violation of their right to have an opportunity to live in a more integrated and autonomous setting. The imme-

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64. *Id.* at 331–33.

65. *Id.* at 302–04.

66. *Disability Advocates, Inc. v. Paterson*, No. 03-3209, 2010 U.S. Dist. LEXIS 17949, at \*20 (E.D.N.Y. Mar. 1, 2010) (“In order to rectify the violations found by the court, Defendants must change the way they manage their mental health services so that Plaintiff’s constituents have the choice — a real and meaningful choice — to receive the services to which they are entitled in supported housing instead of an adult home.”). *See also* *Disability Advocates, Inc. v. Paterson*, No. 03-3209, 2010 U.S. Dist. LEXIS 22617, at \*5–6 (E.D.N.Y. Mar. 11, 2010) (denying defendants’ motion to stay the order pending appeal, stating that “[plaintiffs’ constituents] are being warehoused in adult homes — an ongoing violation of their civil rights. These individuals . . . will suffer substantial harm every day that they remain unnecessarily institutionalized in the adult homes.”).

67. *Disability Advocates*, 598 F. Supp. 2d 289.

68. This Note invents the term “Paterson case” as a term of art.

69. *Disability Advocates*, 598 F. Supp. 2d at 302.

70. *Id.*

diate goal of a Paterson claim is to compel the government or housing provider to afford these disabled individuals an opportunity to move to supportive housing, as a more integrated alternative to group homes. More broadly stated, a Paterson claim aims to compel states and society to recommit to equality for the mentally disabled, reform quasi-institutional housing facilities, and ensure genuine community-based housing.

### III. BACKGROUND ON THE AMERICANS WITH DISABILITIES ACT AND FAIR HOUSING ACT

Part III presents background information on the ADA and FHA. Part III.A outlines the main provisions of the ADA and its interpretation in *Olmstead v. L.C. ex rel. Zimring* and *Disability Advocates*. Part III.B provides a brief introduction to the FHA.

#### A. AMERICANS WITH DISABILITIES ACT

Congress enacted the Americans with Disabilities Act (ADA) in 1990.<sup>71</sup> The statute was designed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>72</sup> The ADA targets discrimination in critical areas administered or funded by government entities, including employment and housing: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>73</sup> The ADA also instructs the Attorney General to promulgate regulations to implement the statute.<sup>74</sup> One regulation, referred to as the “integration mandate,” requires public entities to provide services in the “most integrated setting appropriate to the needs of qualified individu-

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71. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in 42 U.S.C. §§ 12101–12213 and 47 U.S.C. §§ 225, 611).

72. 42 U.S.C.A. § 12101(b)(1) (West 2009); *see also* 42 U.S.C. § 12102 (defining disability as “a physical or mental impairment that substantially limits one or more major life activities . . . ; a record of such an impairment; or being regarded as having such an impairment”).

73. 42 U.S.C. § 12132 (2006).

74. *Id.* § 12134(a).

als with disabilities.”<sup>75</sup> The regulation defines “most integrated setting” as “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”<sup>76</sup> This means a public entity may not institutionalize a disabled individual so long as he or she is clinically able to receive treatment in the community.<sup>77</sup>

The main ADA case relevant to the topic of housing discrimination against the mentally disabled is the Supreme Court’s decision in *Olmsted v. L.C. ex rel. Zimring*.<sup>78</sup> This case held that confining disabled individuals in institutionalized settings violates the ADA when such individuals are qualified and desire to live elsewhere.<sup>79</sup> The decision required the State of Georgia to transfer two mentally disabled individuals who were institutionalized at Georgia Regional Hospital to a community-based setting.<sup>80</sup> The Court recognized that “unjustified isolation” constitutes illegal discrimination in violation of the ADA.<sup>81</sup> The Court also held that the public services provision of the ADA requires government programs to place mentally disabled individuals in more integrated community housing settings, so long as they are qualified and desire to move.<sup>82</sup>

*Disability Advocates* relied on the precedent set in *Olmstead*. This time it was not a psychiatric institution, but the group homes themselves that unjustifiably segregated the disabled.<sup>83</sup> The court faced the issue of whether group homes in New York segregated the mentally disabled and denied individual choice.<sup>84</sup> The litigation specifically targeted large adult homes where a

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75. 28 C.F.R. § 35.130(d) (2011).

76. 28 C.F.R. pt. 35 app. B § 35.130.

77. Moore, *supra* note 26, at 252. *See also* *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

78. 527 U.S. 581.

79. *Id.*

80. *Id.* at 593.

81. *Id.* at 597.

82. *Id.* at 587; *but see id.* at 603–04 (noting that the state raised the defense that the proposed changes require it to make a fundamental alteration to its existing policies). This defense will be addressed in Part IV.C of this Note.

83. 598 F. Supp. 2d 289, 292 (E.D.N.Y. 2009).

84. *Id.* In this opinion, the court denied defendant’s motion for summary judgment. After a subsequent bench trial, the court held that the state discriminated against individuals with mental disabilities by placing them in the group homes at issue. *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 187–88 (E.D.N.Y. 2009).

high percentage of the residents had mental disabilities.<sup>85</sup> The court observed that residents in state licensed group homes “reside in close quarters entirely with other persons with disabilities.”<sup>86</sup> In addition, residents’ everyday activities were strictly managed and controlled, and they had little privacy.<sup>87</sup> There was ample evidence that a substantial percentage of the residents were “qualified”<sup>88</sup> to live in less restrictive supportive housing alternatives and desired to do so.<sup>89</sup> Under the ADA’s integration mandate, New York had an obligation to provide services for disabled individuals in the most integrated setting appropriate to their needs.<sup>90</sup> The court held that New York’s policy of licensing and overseeing group homes discriminated against the mentally disabled in violation of the ADA, and ordered New York to create supportive housing units sufficient to accommodate all adult home residents who wish to move.<sup>91</sup> The decision was not a *per se* ban on group homes, but rather a mandate that New York develop supportive housing options for those individuals who desire to live in a community setting.<sup>92</sup> Cliff Zucker, executive director of Disability Advocates, Inc., described the result as follows:

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85. 598 F. Supp. 2d at 292 (noting that the suit targets only adult homes “[with] more than 120 residents, more than 25% of whom have mental disabilities”).

86. *Id.* at 298.

87. *Id.* at 298–99.

88. The parties heavily disputed the meaning of “qualified” under the ADA precedents. The court explained that

the State has an obligation to provide services and programs in community-based settings only if the individual with disabilities ‘meets the “essential eligibility requirements” for habilitation in a community-based program’ . . . . Defendants contend that although [Disability Advocates, Inc.] has submitted the names of 1536 adult home residents whom it contends are qualified to move to supported housing, Plaintiff has failed to ‘establish’ that any of them are actually qualified to move. Defendants base their arguments on a critique of the methodologies of [Disability Advocates, Inc.]’s experts, and further argue that [Disability Advocates, Inc.]’s constituents fail to meet the ‘essential eligibility requirements’ of supported housing.

*Disability Advocates*, 598 F. Supp. 2d at 331–32 (internal citations omitted) (quoting *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 602 (1999)).

89. *Disability Advocates*, 598 F. Supp. 2d at 306.

90. *Id.* at 317.

91. *Disability Advocates, Inc. v. Paterson*, No. 03-3209, 2010 U.S. Dist. LEXIS 17949 (E.D.N.Y. Mar. 1, 2010); *see also* *Disability Advocates, Inc. v. Paterson*, No. 03-3209, 2010 U.S. Dist. LEXIS 22617 (E.D.N.Y. Mar. 11, 2010) (denying defendants’ motion to stay the order pending appeal).

92. Admittedly, this may be an expensive solution, but perhaps no more or even less expensive than running group homes. The expenses were hotly disputed. The plaintiffs claimed that it would require fewer resources for New York State to run supportive hous-

The court's order will stop the unnecessary warehousing of people with mental illnesses in institutional adult homes. For decades, people who can live in the community and receive services there have been stuck in these dismal institutions, when living in their own apartments and receiving services there would both enrich their lives and save the state money.<sup>93</sup>

Other states share similar circumstances as New York: they also have discharged large percentages of their mentally disabled population from state psychiatric institutions and licensed private group homes as a partial substitute.<sup>94</sup> Advocacy groups are bringing similar litigation in these states.<sup>95</sup> Given the likelihood that this effort will continue, it is important to determine if an additional claim under the Fair Housing Act could expand plaintiffs' options in future Paterson cases. If so, these plaintiffs should bring both claims concurrently in the same complaint, thereby bolstering the chances of success.

## B. THE FAIR HOUSING ACT

The Fair Housing Act (FHA) declares, “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>96</sup> Congress enacted the FHA in 1968 to prohibit discrimination in the sale or rental of housing on the basis of race, color, religion, or national origin.<sup>97</sup>

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ing programs than the budget allocated to run group homes, and that supportive housing was therefore a less expensive alternative. The defendants argued that developing supportive housing would be extremely expensive. See *Disability Advocates, Inc. v. Paterson* 2010 U.S. Dist. LEXIS 17949, at \*8.

93. *Judge Grants Enormous Victory for New York Adult Home Residents; Orders State to Provide Supported Housing for All Qualified Residents Who Want It*, BAZELON CTR. FOR MENTAL HEALTH LAW (Mar. 1, 2010), <http://www.bazelon.org/LinkClick.aspx?fileticket=MXNFXelOlj8%3D&tabid=184> [hereinafter BAZELON].

94. TORREY, *supra* note 1, at 86–87; see also Kanter, *supra* note 2, at 929.

95. Press Release, Dep't of Justice, Office of Pub. Affairs, Briefs Filed in Florida, Illinois and New Jersey to Support the Supreme Court's Olmstead Decision (May 25, 2010), available at <http://www.justice.gov/opa/pr/2010/May/10-crt-612.html>.

96. 42 U.S.C. § 3601 (2006).

97. 42 U.S.C. § 3604 (2006).

This goal reflects the ideals of the civil rights movement in its effort to end racial discrimination in American society.<sup>98</sup>

The Fair Housing Amendments Act of 1988 (FHAA) amended the FHA to add handicap and familial status as protected classes.<sup>99</sup> The FHA, as amended by the FHAA, aims to end housing discrimination against the disabled by giving them both the right to establish a home of their choosing and the right to integrate into mainstream society.<sup>100</sup> The dual focus on independence and integration is abundantly clear from the FHAA's legislative history.<sup>101</sup> To accomplish this, the amendment extended the

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98. Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 WASHBURN L.J. 149, 149 (1969); see also Robert G. Schwemm & Michael Allen, *For the Rest of their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 143 (2004) (noting that the Act responded to the Kerner Commission Report's conclusion that American society was becoming increasingly racially segregated).

99. 42 U.S.C. § 3602 (2006). Familial status is defined by the Act as "one or more individuals (who have not attained the age of 18 years) being domiciled with — (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person." *Id.* The definition also includes "any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years." *Id.*

100. See Panjwani, *supra* note 16, at 101.

101. See H.R. REP. NO. 100-711, at 6 (1988) [hereinafter HOUSE REPORT], reprinted in 1988 U.S.C.A.N. 2173, 2174, 2179 ("Prohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life."). The report also notes that the bill "clearly prohibits the use of stereotypes and prejudice to deny critically needed housing to handicapped persons. The right to be free from housing discrimination is essential to the goal of independent living." *Id.* See also 134 CONG. REC. S10463, S10465 (daily ed. Aug. 1, 1988) (statement of Sen. Harkin) (noting that disability is added as a protected class, and that "[h]ousing is a fundamental requirement for living independently and economic self-sufficiency," and that "[e]very American deserves the opportunity to live with or close to his or her family rather, than to live in an institution or segregated housing"); *id.* at S10468 (statement of Sen. Dole) ("Disabled Americans want to be part of the mainstream; and I can think of no more fundamental first step toward mainstream living than fairness in housing."); 134 CONG. REC. S10539 (daily ed. Aug. 2, 1988) (statement of Sen. Harkin) ("What we have been trying to do with the handicapped community in this country over the last dozen years or more is to try to get a more enlightened attitude toward the handicapped that they should be fully integrated into our society to the maximum extent possible; not segregated off to someplace else."); *id.* at S10545 (statement of Sen. Simpson) ("If we are to permit individuals with disabilities to realize their full potential and become independent and self-sufficient, then we must expand the scope of the Fair Housing Act to encompass housing transactions.") (speaking in favor of the Kennedy-Spector substitute that was adopted); *id.* at S10551-52 (statement of Sen. Weicker) ("Congress has long recognized that it is in the national interest to integrate individuals with disabilities into all aspects of American life. . . . The major barrier faced by people with disabilities today — discrimination — is not going to go away until we find ways to end their segregation and isolation from the rest of society."); *id.* at S10556 (statement of Sen. Cranston) ("Ensuring nondiscrimination



FHA's prohibition of discrimination in housing to include discrimination on the basis of disability.<sup>102</sup> Section 3604(f)(1) makes it illegal "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter" on the basis of disability.<sup>103</sup> Meanwhile, section 3604(f)(2) prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provisions of services or facilities in connection with such dwelling" on the basis of disability.<sup>104</sup> Following this expansive prohibition of housing discrimination in all dwellings,<sup>105</sup> subject to few exceptions,<sup>106</sup> courts have uniformly applied the FHA to group homes.<sup>107</sup> In contrast with the ADA's broad purpose of addressing disability discrimination in many areas, the FHA only targets housing.<sup>108</sup>

The FHA may be used by a disabled individual, another person or group associated with a disabled individual, or HUD to bring a claim against a defendant for housing discrimination.

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in housing means ensuring an essential element of independence and integration into the community for disabled individuals.").

102. 42 U.S.C. § 3604(f).

103. *Id.* § 3604(f)(1) ("[It shall be unlawful] [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of — (A) that buyer or renter, (B) a person residing in or intending to reside in the dwelling after it is sold, rented or made available; or (C) any person associated with that buyer or renter.")

104. *Id.* § 3604(f)(2) ("[It shall be unlawful] [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provisions of services or facilities in connection with such dwelling, because of a handicap of — (A) that person; or (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that person.").

105. *Id.* § 3602(b) (defining "dwelling" 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"); *see also* Schwemm & Allen, *supra* note 98, at 149–50 ("In addition to the obvious coverage of houses and apartments, this definition includes every other kind of 'residence,' a concept that has been held to cover any accommodation intended by its occupant for more than a brief stay.").

106. For example, 42 U.S.C. § 3604(f)(9) exempts "an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." *But see* Schwemm & Allen, *supra* note 98, at 162 ("This direct threat defense, however, rarely succeeds in defeating a claim of handicap discrimination under the FHA." (internal quotation marks omitted)).

107. Schwemm & Allen, *supra* note 98, at 152.

108. 42 U.S.C.A. § 12101(b)(1) (West 2009) (describing the ADA's purpose as providing "a clear and comprehensive national mandate for the elimination of discrimination against individual with disabilities"); *but see* 42 U.S.C. § 3601 (describing the goal of the FHA as providing "fair housing throughout the United States").

For example, in *U.S. v. Space Hunters, Inc.*,<sup>109</sup> the defendant was a housing information vender and referral service.<sup>110</sup> For a fee, prospective tenants received information on available rental housing in New York City.<sup>111</sup> Keith Toto, a hearing impaired individual in search of an apartment, called Space Hunters through a relay service operator.<sup>112</sup> He was insulted and informed that Space Hunters does not consult with disabled people.<sup>113</sup> Toto filed a complaint with HUD,<sup>114</sup> and following an investigation, HUD brought suit against Space Hunters and its owner, alleging discrimination in the housing market in violation of the FHA.<sup>115</sup> The jury returned a verdict in favor of HUD and awarded Toto \$1500 in compensatory damages.<sup>116</sup>

In *Preferred Properties, Inc. v. Indian River Estates, Inc.*,<sup>117</sup> a non-profit organization successfully brought suit for a defendant's refusal to sell property based on the disability of the intended future residents of the property.<sup>118</sup> The plaintiff, Preferred Properties, purchased and operated rental housing for disabled individuals.<sup>119</sup> The defendant, Indian River Estates, owned a twenty-three lot subdivision of undeveloped residential property in Ohio.<sup>120</sup> Preferred Properties executed an option contract to purchase eight lots in the subdivision.<sup>121</sup> The president of Indian River Estates refused to honor the contract, after observing "the tremendous community opposition to handicapped housing,"<sup>122</sup> and stating, "[p]erhaps, some day in the future things will be different, but we do not want to pay the price for a social experiment that the community opposes."<sup>123</sup> Preferred Properties succeeded in its claim that Indian River estates violated the FHA "by refusing to sell property based upon the disabilities of future resi-

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109. 429 F.3d 416 (2d Cir. 2005).

110. *Id.* at 419.

111. *Id.*

112. *Id.* at 420.

113. *Id.*

114. *Id.*

115. *Id.* at 423.

116. *Id.*

117. 276 F.3d 790 (6th Cir. 2002).

118. *Id.* at 794.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 795.

123. *Id.*

dents.”<sup>124</sup> The jury awarded Preferred Properties \$31,500 in compensatory damages and \$125,000 in punitive damages.<sup>125</sup>

These cases demonstrate the breadth of the FHA in targeting any actions related to housing that discriminate on the basis of a protected class. This raises the question of whether the FHA’s broad prohibition of housing discrimination on the basis of disability could support a Paterson case.

#### IV. AN FHA-BASED PATERSON CASE

This Part discusses whether a Paterson claim is sustainable under the FHA. Part IV.A discusses the Supreme Court precedents under the FHA involving discrimination on the basis of race. These cases occurred before Congress amended the FHA to add disability. Part IV.B discusses the extension of these precedents to the context of disability and argues that the FHA supports a Paterson claim.

##### A. RACE DISCRIMINATION LITIGATION UNDER THE FHA

The main allegation in a Paterson case is that the residents of group homes have been unlawfully discriminated against, in violation of their right to a more integrated living environment such as that found in supportive housing.<sup>126</sup> Thus, whether the FHA supports a Paterson claim essentially hinges on whether the FHA, similarly to the ADA, grants a right to members of a protected class to be free of segregated housing practices. Supreme Court precedent under the original FHA unquestionably establishes that the Act’s prohibition of racial discrimination includes practices that deny individuals an integrated living environment.<sup>127</sup> These cases affirmed the broad remedial nature of the FHA before the FHAA added disability as a protected class.<sup>128</sup> The Supreme Court has never revisited these principles or dealt directly with the same issues with respect to disabled individuals

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124. *Id.* at 796.

125. *Id.*

126. *See supra* Part II.C.

127. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

128. *See supra* note 127 and accompanying text.

under the FHA. These prior race discrimination precedents therefore remain relevant to the question of whether the FHA grants a right to disabled individuals to be free of segregated housing practices.

Several Supreme Court precedents establish the right to be free from racially discriminatory housing practices. The first major case was *Trafficante v. Metropolitan Life Insurance Co.*<sup>129</sup> Two tenants of an apartment complex, one African-American and one Caucasian, brought a claim alleging that their owner had discriminated on the basis of race, in violation of the FHA.<sup>130</sup> Fewer than one percent of the tenants in the complex were black,<sup>131</sup> so the complaint alleged that the tenants had “lost the social benefits of living in an integrated community.”<sup>132</sup> The Court agreed that the landlord’s actions in actively discriminating on the basis of race constituted an illegal deprivation of the “important benefits from interracial associations.”<sup>133</sup> Broadly interpreting the FHA, the Court affirmed that the Act conferred a valid claim for discrimination when the plaintiff was denied the right to integrated living.<sup>134</sup> In doing so the Court recognized that discrimination harms individuals who lose the opportunity to live in an integrated neighborhood.<sup>135</sup> In this respect, the FHA differed from other civil rights statutes of its time: rather than exclusively prohibiting discrimination, the Court read into the FHA an affirmative right to integrated living.<sup>136</sup>

In 1979, the Court again embraced the concept of a right to integrated living under the FHA in *Gladstone, Realtors v. Village of Bellwood*.<sup>137</sup> In that case, the Court recognized an FHA claim alleging that residents of Bellwood “had been denied their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated so-

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129. 409 U.S. 205 (1972).

130. *Id.* at 206–207.

131. *Id.* at 208 n.5.

132. *Id.* at 208.

133. *Id.* at 209–10.

134. *Id.* at 209.

135. *Id.*

136. The Court did not define the ultimate goal of the integration mandate. This makes the FHA an extremely powerful piece of legislation. Kanter, *supra* note 2, at 936.

137. 441 U.S. 91 (1979).

ciety.”<sup>138</sup> And in *Havens Realty Corp. v. Coleman*,<sup>139</sup> the Court affirmed that the FHA prohibits any discriminatory practices, including those that deny the right to integrated living.<sup>140</sup> The Court held in favor of plaintiffs’<sup>141</sup> claim that they had been deprived of their right to the “benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices.”<sup>142</sup> These precedents establish that the FHA’s prohibition of discrimination operates to protect those who have lost the benefits of integrated living in the context of race.

#### B. DISABILITY DISCRIMINATION LITIGATION UNDER THE FHA

If *Trafficante* and its progeny apply in the context of disability, a Paterson claim can be maintained under the FHA.<sup>143</sup> In an FHA-based Paterson claim, the allegation would be that a state’s policy of segregating disabled individuals in quasi-institutional group homes, when they are qualified and desire to live in supportive housing, denies their affirmative right to integrated living. The residents of group homes suffer the loss of the benefits of living in an integrated community solely on the basis of their disability. Determining whether the right to integrated living in fact extends to disabled individuals, as a protected class under the FHA, requires analyzing the structure and purpose of the Act as well as examining the distinctive characteristics of disability discrimination.

The main difficulty with extending the holdings of *Trafficante* and its progeny to the context of disability is that the FHA addresses racial discrimination and disability discrimination in different provisions.<sup>144</sup> Subsections 3604(a) and (b) make it unlawful to discriminate on the basis of race, color, religion, sex, familial

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138. *Id.* at 91.

139. 455 U.S. 363 (1982).

140. *Id.* at 376.

141. The plaintiffs in *Havens* included an African-American individual who was denied housing in an apartment on the basis of race, a non-profit fair housing organization, and two employees of the non-profit who were involved in gathering evidence of discrimination on the part of the owner of the apartment complex. *Id.* at 368.

142. *Id.* at 376.

143. See *supra* notes 128–42 and accompanying text.

144. 42 U.S.C. § 3604 (2006).

status, or national origin.<sup>145</sup> Subsection 3604(f) prohibits discrimination on the basis of disability.<sup>146</sup> The Court in the *Trafficante* precedents was principally interpreting what are now subsections 3604(a) and (b).<sup>147</sup> Furthermore, the FHAA added both familial status and handicap to the FHA in 1988, but included familial status in the list of protected classes in subsections 3604(a) and (b) while inserting handicap in its own provision, subsection (f).<sup>148</sup> This suggests that the handicap subsection should not be interpreted the same way as the subsections regarding race and the other protected classes.

Yet, there is no indication that this distinction was meant to deny or limit the protections available to disabled individuals, relative to those available to other protected classes. Rather, the following factors all indicate that the FHAA should be interpreted as extending the protections of the FHA and prior Supreme Court precedents to disabled individuals: (1) a textual analysis; (2) the unique nature of disability as a protected class; (3) federal court precedent; and (4) the remedial purpose of the Act.

### 1. *Language of the FHAA*

The statutory language indicates that disabled individuals deserve the same basic protections as members of other protected classes. Provisions 3604(a)–(b) and 3604(f) all fall under the same operative section prohibiting discrimination, indicating they are related.<sup>149</sup> Additionally, the language of the subsections dealing with disability is similar to the language of the provisions dealing with the other protected classes.<sup>150</sup> Subsection (f)(1) parallels, to some extent, the operative language in subsection (a).<sup>151</sup> Subsection 3604(f)(1) makes it unlawful “[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap . . . .”<sup>152</sup> This follows a portion of the language in subsection 3604(a), declaring

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145. *Id.* § 3604(a)–(b).

146. *Id.* § 3604(f).

147. *See supra* notes 128–42 and accompanying text.

148. 42 U.S.C. § 3604.

149. *Id.* § 3604.

150. *Id.*

151. *Id.*

152. *Id.* § 3604(f)(1).

it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>153</sup> Further, subsection (f)(2) mirrors the language used in subsection (b).<sup>154</sup> Subsection 3604(f)(2) makes it unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap . . . .”<sup>155</sup> This traces the language in subsection 3604(b) which declares it unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”<sup>156</sup> This indicates that the same definition of discrimination applies, except to the extent the term is altered by subsection (f)(3).<sup>157</sup>

## 2. *The Unique Nature of Disability as a Protected Class*

Separating disability from the other protected classes serves important functions that reflect Congress’ awareness of the unique nature of disability; namely that while all persons have a race, national origin, or sex, not all people have a disability.<sup>158</sup> For example, the FHA protects *all* people from discrimination on the basis of sex.<sup>159</sup> In contrast, someone must have a disability in order to trigger the protections of the Act regarding disability discrimination.<sup>160</sup> Rather than adding “handicap” to the list of protected classes, the drafters instead repeated the same operative

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153. *Id.* § 3604(a).

154. *Id.* § 3604.

155. *Id.* § 3604(f)(2).

156. *Id.*

157. *Id.* § 3604(f)(3) expands the concept of discrimination to address specific issues associated with disability. This includes the need for “reasonable modifications” to physical structures and “reasonable accommodations” in rules and policies to afford a disabled resident full use and enjoyment of a dwelling. *Id.* The section also sets “design and construction” requirements to render dwellings accessible to physically disabled individuals. *Id.*

158. *See* Schwemm & Allen, *supra* note 98, at 179–80.

159. 42 U.S.C. § 3604(a).

160. *Id.* § 3604(f).

language in new sections prohibiting discrimination “because of a handicap” of a prospective buyer or renter.<sup>161</sup> A narrowly tailored definition of “handicap” excluding non-disabled individuals from discrimination protection is appropriate.

Although the FHA and FHAA are themselves silent on this issue, legal scholars have argued that the isolation of disability in separate provisions was meant to exclude non-disabled individuals from bringing reverse-discrimination claims.<sup>162</sup> Legislating separate provisions for disability allows housing providers to discriminate in favor of disabled individuals, meaning it allows housing providers to *prefer* people with disabilities over non-disabled individuals.<sup>163</sup> This recognizes that some housing, including government run programs, is designed, and available exclusively, for individuals with disabilities.<sup>164</sup> Separate provisions were sensible in light of Congress’ prolonged and heated debate over whether racial preference in housing to further integration, known as integration maintenance, should be permitted under the Act.<sup>165</sup> Placing disability in a separate provision avoided the necessity of deciding this extremely sensitive and controversial issue.

Furthermore, the language of subsection 3604(f) also stipulates that it is unlawful to discriminate on the basis of a handicap against any “buyer or renter,” “person residing in or intending to reside in that dwelling,” or “any person associated with that buyer or renter.”<sup>166</sup> This language, added in the FHAA, expands the FHA to prohibit discrimination against those who seek to rent or

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161. *Id.* § 3604(f)(1) (emphasis added).

162. *See* Schwemm & Allen, *supra* note 98, at 179–80.

163. *Id.* at 179 (“The reason for treating handicap discrimination in this special way was apparently to make clear that the amended FHA would not condemn housing that is made available especially for people with disabilities . . .”).

164. *Id.* At first blush this recognition seems to counter a Paterson claim that alleges housing solely for disabled individuals violates the FHA. However, a Paterson claim only argues that the state should provide integrated housing alternatives so that those who are qualified and desire to move to a more integrated setting are able to do so. It is this refusal that constitutes the unlawful discrimination, not the provision of group homes in itself.

165. *See* 134 CONG. REC. H4898 (daily ed. June 29, 1988). A proposed amendment to what is now 42 U.S.C. § 3604 sparked intense controversy over the use of racial preference to further integrated housing; the amendment read “[n]othing in this Act requires, permits, or authorizes any preference in the provision of any dwelling based on race, color, religion, gender or national origin.” *Id.* at H4902. The amendment was ultimately rejected by the House. *Id.* at H4912.

166. 42 U.S.C. § 3604(f)(1).



buy a house to be occupied by disabled individuals.<sup>167</sup> The House Report confirms this objective.<sup>168</sup> For example, this alteration prohibits a landlord from refusing to rent an apartment to a non-disabled adult because her child is disabled.<sup>169</sup> It also bars an owner who refuses to sell a building to an organization intending to provide housing for the disabled.<sup>170</sup> This further demonstrates that the separate provisions serve to target the special nature of disability as a protected class. Additionally, subsection f(3) explicitly outlines further ways in which disabled individuals are uniquely discriminated against.<sup>171</sup> For instance, subsection f(3) defines discrimination to include the failure to construct a dwelling so that it is accessible to physically handicapped individuals.<sup>172</sup>

Separating the provisions dealing with disability from those dealing with the other protected classes preserves the distinctive features of disability without disturbing the core meaning of discrimination. Subsection f(3) was intended to augment f(1) and (2).<sup>173</sup> In other words, the distinctive qualities of disability does not mean that it deserves less protection against discrimination than the other protected classes, but that it deserves different protections layered on top of the common, basic protections. Provision f should be interpreted as accomplishing the same broad prohibition of discrimination for disabled individuals established under the prior Supreme Court precedents, while tuning the language to reflect certain pitfalls confronted by disabled persons but not by other protected classes. The main distinction rests in the definition of “disability” not “discrimination.” The purpose of providing disabled individuals at least the same protections afforded other groups supports applying the Supreme Court holdings in *Trafficante* and its progeny in the context of disability. Following this interpretation, the above precedents establishing a

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167. Panjwani, *supra* note 16, at 101.

168. HOUSE REPORT, *supra* note 101, at 2185 (“The Committee intends these provisions to prohibit not only discrimination against the primary purchaser or named lessee, but also to prohibit denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants, or other associates who have disabilities.”).

169. *Id.*

170. *Id.*

171. 42 U.S.C. § 3604(f)(3).

172. *Id.* § 3604(f)(3)(C).

173. HOUSE REPORT, *supra* note 101, at 2185.

right to integrated living under the FHA apply to disability discrimination as well.<sup>174</sup>

### 3. Federal Court Precedent

Although there are no precedents directly on point, at least one appellate court has left open the potential for the FHA to provide an affirmative right to integrated living to disabled individuals. The Eighth Circuit has held that the goal of integrating the mentally disabled into mainstream society is consistent with the FHA.<sup>175</sup> In *Familystyle v. City of St. Paul*, the court upheld Minnesota's policy of requiring group homes to be dispersed and scattered throughout the community as a condition for receiving a license to operate.<sup>176</sup> The court specifically noted that "[t]he state's group home dispersal requirements are designed to ensure that mentally handicapped persons needing residential treatment will not be forced into enclaves of treatment facilities that would replicate and thus perpetuate the isolation resulting from institutionalization."<sup>177</sup> Without addressing specifically whether the FHA in fact guarantees disabled individuals the affirmative right to integrated living or requires state programs that foster segregation to be altered, the court stated, "[w]e perceive the goals of non-discrimination and deinstitutionalization to be compatible."<sup>178</sup> The court held that under the FHA it is permissible for a state, through its licensing of group homes, to promote the placement of the mentally disabled "in the least restrictive environment possible."<sup>179</sup> This supports an inference that the FHA's prohibition on discrimination guarantees a right to integrated living for the mentally disabled.<sup>180</sup>

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174. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

175. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991).

176. *Id.* at 95.

177. *Id.* at 95.

178. *Id.* at 93–94.

179. *Id.* at 93.

180. *But see Laflamme v. New Horizons, Inc.*, 605 F. Supp. 2d 378 (D. Conn. 2009). *Laflamme* is a district court case from Connecticut that could be read to suggest that the supportive housing that is key to a Paterson claim may actually violate the FHA. *Id.* at 391. In *Laflamme*, a housing provider's policies assessed disabled individuals for the purposes of determining whether they were qualified to live independently. *Id.* at 380.

#### 4. *The FHA's Remedial Purpose*

Finally, interpreting the FHA to prohibit discrimination that denies disabled individuals a right to integrated living is consistent with the broad remedial purpose of the Act. The Supreme Court has held that remedial statutes should be liberally con-

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The Court held this constituted discrimination in violation of the FHA, because the provider distinguished between different groups of disabled individuals for purposes of admission to a housing program. *Id.* at 394.

The House Committee Report for the FHAA is pertinent, but does not address directly this issue. Thus, it is unclear whether the Act prohibits a landlord from conducting an inquiry into whether a disabled individual applicant is qualified to live independently. The Committee states that "in assessing an application for tenancy, a landlord or owner may ask an individual the questions that he or she asks of all other applicants that relate directly to the tenancy (e.g., questions relating to the rental history or a targeted inquiry as to whether the individual has engaged in acts that would pose a direct threat to the health or safety of other tenants), but may not ask blanket questions with regard to whether the individual has a disability. Nor may the landlord or owner ask the applicant or tenant questions which would require the applicant or tenant to waive his right to confidentiality concerning his medical condition or history. The only exception is that a landlord or owner may ask whether the individual is a current illegal abuser or addict of controlled substances." HOUSE REPORT, *supra* note 101, at 2191.

An interpretation that bars landlords from assessing whether disabled applicants are able to live independently is problematic because supportive housing is by definition designed for disabled individuals with some degree of independent living skills. Any successful program would require an assessment among different disabled individuals as to which were qualified for admission. In fact, the Court in *Disability Advocates* was concerned over the medical and other assessments used to determine admission to supportive housing. However, there are important distinctions between *Laflamme* and the policies at issue in a Paterson claim. First, *Laflamme* dealt with a disabled individual's eviction from her apartment, rather than provision of alternative housing. *Laflamme*, 605 F. Supp. 2d at 384. Second, the housing dealt with in *Laflamme* was not supportive housing or a governmental housing program. *Id.* at 381. Moreover, the decision has not been widely applied and should not be extended. If the FHA were interpreted to prohibit any distinctions or classifications of disabled individuals for the purposes of housing as illegal discrimination, this would directly contradict the Supreme Court's construction of the ADA. *Olmstead* and the ADA precedents mandate that disabled individuals be deemed qualified to live in community housing as a prerequisite to triggering the State's duty to provide it. See *supra* notes 71–95 and accompanying text. Given the desirability of interpreting federal statutes in harmony with each other and the parallel goals of the ADA and FHA to combat discrimination against the disabled, it would be unwise to extend *Laflamme*. Governmental qualification screenings for purposes of providing an effective supportive housing program should not be prohibited as discriminatory. See also *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990) (holding that under the FHA's prohibition of handicap discrimination, a provider of senior housing could not impose a requirement that applicants prove they are capable of living independently.); Schwemm & Allen, *supra* note 98, at 186; Erin Ziaja, Note, *Do Independent and Assisted Living Communities Violate the Fair Housing Amendments Act and the Americans with Disabilities Act?*, 9 ELDER L.J. 313, 321 (2001) (providing in-depth analysis regarding whether the FHA forbids housing providers from imposing an independent living requirement in the context of senior housing).

strued to carry out their important public purposes.<sup>181</sup> Courts have by and large agreed that the FHA merits a “generous construction” due to its “broad and inclusive” terms.<sup>182</sup> This supports an interpretation of the FHAA that guarantees disabled individuals the same right to integrated living that other protected classes enjoy; namely, the right not to be confined in segregated group homes without contact with non-disabled individuals.<sup>183</sup> The regulations to the FHA clarify that the overall behavior the Act is targeting is discrimination that — by restricting individual choice or obstructing choices at the community level — specifically results in segregated housing patterns.<sup>184</sup> The legislative history of the original Act demonstrates that it was intended to end segregation and pave the way for an integrated society.<sup>185</sup> In a much-cited piece of legislative history from the enactment of the original FHA, Senator Walter Mondale claimed that the Act was designed to enable American society to establish “truly integrated and balanced living patterns.”<sup>186</sup> The FHAA intended to extend these protections to disabled individuals.<sup>187</sup> The legislative history of the FHAA affirms Congress’ intention that the Amendments be “a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.”<sup>188</sup> Numerous U.S. Senators reiterated this goal

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181. *Chisom v. Roemer*, 501 U.S. 380, 403–04 (1991) (holding that the Voting Rights Act should be interpreted in a manner that provides “the broadest possible scope” in combating racial discrimination).

182. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1011 (7th Cir. 1980) (citing *Trafficante v. Metro. Life Ins.*, 409 U.S. 205, 209, 212 (1972)); *see also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (referring to Congress’ “broad remedial intent” in enacting the Statute).

183. *See supra* notes 126–42 and accompanying text.

184. 24 C.F.R. § 100.70(a) (2011) (“It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to restrict or attempt to restrict the choices of a person by word or conduct in connection with seeking, negotiating for, buying or renting a dwelling so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood, or development.”).

185. *Trafficante*, 409 U.S. at 211; *see also supra* note 180 and accompanying text.

186. *Trafficante*, 409 U.S. at 211.

187. 42 U.S.C. § 3604(f) (2006).

188. HOUSE REPORT, *supra* note 101, at 2179 (“Prohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life.”). *See also* 42 U.S.C. § 3604(f).

during the floor debates.<sup>189</sup> For example, Senator Tom Harkin, a major force behind the amendment, stated:

What we have been trying to do with the handicapped community in this country over the last dozen years or more is to try to get a more enlightened attitude towards the handicapped that they should be fully integrated into our society to the maximum extent possible; not segregated off to someplace else.<sup>190</sup>

In fact, while Members of Congress repeatedly spoke of *extending* the FHA's broad protections to disabled individuals, not a single one mentioned limiting these protections.<sup>191</sup> For instance, during the House floor debates one Congressman stated that "[i]n my view, the Fair Housing Amendments Act is particularly historic because, for the first time, it *extends* the protection of the Fair Housing Act to people with disabilities."<sup>192</sup> Given this explicit purpose to further integration, it seems unlikely Congress intended that the rights of protected groups under the Supreme Court's interpretations of the FHA would be denied to disabled individuals. However, because the record is replete with com-

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189. 134 CONG. REC. S10467 (daily ed. Aug. 1, 1988) (statement of Sen. Dole) ("Disabled Americans want to be part of the mainstream; and I can think of no more fundamental first step toward mainstream living than fairness in housing."); 134 CONG. REC. S10556 (daily ed. Aug. 2, 1988) (statement of Sen. Cranston) ("Ensuring nondiscrimination in housing means ensuring an essential element of independence and integration into the community for disabled individuals."); *id.* at S10552 (statement of Sen. Weicker) ("[T]he attitudes, stereotypes, and misconceptions of the rest of society about people with disabilities are not going to change until those around of us without disabilities have the opportunity to be around people with them — as class-mates, as colleagues, and as neighbors. With the passage of the Fair Housing Amendments Act of 1988, we move closer to that goal by ensuring that discrimination against people with disabilities in housing will no longer be tolerated.")

190. 134 CONG. REC. S10539 (daily ed. Aug. 2, 1988).

191. *See* 134 CONG. REC. H4603 (daily ed. June 22, 1988) (statement of Rep. Rodino) (stating that the Amendment "would extend the protections of the Fair Housing Act to disabled individuals and families with children"); *id.* at H4608 (statement of Rep. Sensenbrenner) ("I am also delighted that [the proposed Amendment] extends [the FHA's] protections to handicapped persons."). *See also* 134 CONG. REC. H4900 (statement of Rep. Coelho) (explaining that the bill "expands protections to two classes of Americans that experience housing discrimination daily — families with children and people with disabilities"); 134 CONG. REC. S10461 (daily ed. Aug. 1, 1988) (statement of Sen. Hatch) ("The bill correctly extends fair housing protections to two new classes of citizens, the handicapped and families with children . . .").

192. 134 CONG. REC. H4605 (statement of Rep. Fish) (emphasis added).

ments like this, it can be argued these statements are not instructive. Yet members of Congress noted that protections granted to familial status were limited or not analogous to the existing protected classes, while no similar statements were made regarding disabled individuals as a protected class.<sup>193</sup> Additionally, Congress was aware of the Supreme Court precedents interpreting the FHA and explicitly intended these to apply in the FHAA.<sup>194</sup> Members of Congress reaffirmed that disabled individuals would have the same legal recourse as the existing protected classes.<sup>195</sup>

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193. See *id.* (statement of Rep. Fish) ("Before leaving the subject of familial status, I want to stress that our bill makes it clear that the rights of this newly protected class would not be absolute."). See also 134 CONG. REC. S10555 (daily ed. Aug. 2, 1988) (statement of Sen. Helms) ("[I]t does not seem that discrimination against families with children has much in common with prejudice based on race, religion, national origin, sex, or handicaps."). It appears that no similar statements were made regarding disability as a protected class. On the contrary, at least one member of congress analogized disability discrimination to race discrimination. See 134 CONG. REC. S10491 (statement of Sen. Simon) ("I strongly support the inclusion of individuals with handicaps as a newly protected class . . . . The reality is that millions of Americans are being excluded from full participation in the life of this Nation by an inaccessible, unavailable, and inappropriate housing stock. Part of the housing problem is a result of simple prejudice — the same kind of prejudice we made illegal on the basis of race in 1968.").

194. See HOUSE REPORT, *supra* note 101, at 2174, 2184 (1988) ("In *Gladstone Realtors v. Village of Bellwood*, the Supreme Court affirmed that standing requirements for judicial and administrative review are identical under title VIII. In *Havens Realty Corp. v. Coleman*, the Court held that 'testers' have standing to sue under title VIII, because Section 804(d) prohibits the representation 'to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.' The bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases." (internal citations omitted)). See also 134 CONG. REC. H4607 (statement of Rep. Gonzalez) ("I understand that this amends section 804 of the Fair Housing Act of 1968 in order to include the two new protected classes of handicapped and familial status. I further understand that other than these changes to section 804, no other amendment to that section is proposed, so that there has been preserved the status quo with regard to the case law, the interpretation and the enforcement of the language that makes it unlawful to 'otherwise make unavailable or deny a dwelling to any person' who is in a protected class?"; *id.* (statement of Rep. Edwards) (replying to Rep. Gonzalez that his statement is correct); *id.* (statement of Rep. Sensenbrenner) (agreeing with Rep. Edwards that "the interpretation of [Rep. Gonzalez] is correct . . .").

195. See 134 CONG. REC. S10465 (daily ed. Aug. 1, 1988) (statement of Sen. Harkin) ("Individuals with disabilities have the right to be protected from discrimination in housing and have the *same* recourse through the *same* legal avenues that are now available to the other minorities to protest discriminatory actions.") (emphasis added). See also *id.* at S10492 (statement of Sen. Simon) ("By including individuals with handicaps as a protected class, the bill provides the same general prohibitions against activities related to the sale or rental of a dwelling as are currently in place for the existing protected classes.").

Thus, the FHA's prohibition on discrimination includes policies that operate to segregate communities on the basis of disability and to deny disabled individuals their right to integrated living in the community.<sup>196</sup> In support of this argument are: (1) the express language and structure of the FHA; (2) the unique nature of disability as a protected class; (3) the Act's definition of discrimination; (4) the Eighth Circuit's decision in *Familystyle*; and (5) the FHA's broad remedial purpose. The FHA prohibits not only the actual denial of housing, but also decisions that operate to deny people with disabilities equal access to the community at large. The FHA therefore supports a Paterson claim alleging that mentally disabled individuals are discriminated against and denied the benefits of integrated living by policies operating to restrict them to segregated group home facilities rather than supportive housing alternatives.

It remains to be addressed whether an FHA claim would be an effective litigation strategy, and what, if any, advantages it would bring when compared with the ADA claim brought in *Disability Advocates*. The next three sections address this issue with respect to standing, available defenses, and remedies.<sup>197</sup>

## V. ADVANTAGES OF AN FHA-BASED PATERSON CLAIM

Part V presents the advantages of bringing an FHA-based Paterson claim, as compared with the ADA, in terms of standing, defenses, and remedies. Part V.A compares the groups entitled to standing under the ADA with the FHA. Part V.B outlines the relief authorized under both statutes. Part V.C briefly discusses the main ADA defenses raised by the defendants in *Disability Advocates* and potential defenses in an FHA Paterson claim.

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196. Although this legal analysis is strong, it is based on long-standing precedent. If pressed, the current Roberts Supreme Court may not uphold an interpretation of the FHA as the Warren and Burger Courts understood it. See Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 283 (2011) ("During the 1980s, the Supreme Court took a deeply conservative turn on issues of civil rights.").

197. While these are three primary categories from which to assess the relative strengths and weaknesses of bringing a Paterson claim, they are by no means exhaustive. Other categories, such as differences in the burden of proof, specific criteria for establishing discrimination, and immunities, are beyond the scope of this Note.

## A. STANDING

The FHA offers more liberal standing than the ADA, such that the strategy of bringing an FHA-based Paterson claim would expand a plaintiff's options for bringing a discrimination claim. This section first sets out the ADA requirements for standing, then explores the options for standing in a Paterson case under the FHA.

### 1. *Standing Under the ADA*

The Second Circuit outlined the requirements for ADA standing in *Henrietta D. v. Bloomberg*<sup>198</sup> as follows:

[T]he plaintiffs must demonstrate that (1) they are “qualified individuals” with a disability; (2) that the defendants are subject to the ADA; and (3) that plaintiffs were denied the opportunity to participate in or benefit from defendants’ services, programs, or activities, or were otherwise discriminated against by defendants by reason of plaintiffs’ disabilities.<sup>199</sup>

Under the first requirement, only “qualified individuals with a disability” have standing to sue.<sup>200</sup> However, under the doctrine of associational standing, an organization can bring a claim on behalf of its constituents who are qualified individuals and who have suffered an injury cognizable under the ADA.<sup>201</sup> The Supreme Court has outlined the doctrine of associational standing as follows:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have

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198. 331 F.3d 261 (2d Cir. 2003).

199. *Id.* at 272.

200. “Qualified individual with a disability” is defined by the ADA as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2) (2006).

201. *See* *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977).



standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual of individual members in the lawsuit.<sup>202</sup>

In *Disability Advocates*, an example of associational standing, the requirement that the plaintiff be a qualified individual with a disability was met because the organization, Disability Advocates, Inc., was acting on behalf of its constituents, the residents of adult homes in New York.<sup>203</sup> Under the doctrine of associational standing, the organization's members must meet all of the criteria to have standing in their own right.<sup>204</sup> This means that the members must be qualified individuals with a disability.<sup>205</sup> *Olmstead* further qualified this by requiring that, in cases where the discrimination takes the form of failure to provide alternative housing, the association must represent members who were qualified and desired to move to the alternative housing.<sup>206</sup>

The associational standing test essentially folds back into the broader test for standing under the ADA. The remaining requirements — that the organization seeks to protect interests consistent with its purpose, and that the claim does not require the participation of the individual members — usually pose no great barrier for an organization like Disability Advocates, which was created specifically to support individuals with disabilities.<sup>207</sup> Disability Advocates was established to advocate on behalf of disabled individuals and therefore it may sue in this capacity.<sup>208</sup>

The second requirement for standing, that the defendants be subject to the ADA, also imposes restraints.<sup>209</sup> Title II of the ADA covers only public entities: housing funded or operated by a state, city, or public housing authority.<sup>210</sup> Because of this, the ADA does

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202. *Id.* at 343.

203. *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 309 (E.D.N.Y. 2009).

204. *See supra* notes 201–02 and accompanying text.

205. *Henrietta D.*, 331 F.3d at 272.

206. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 602 (1999).

207. *Disability Advocates*, 598 F. Supp. 2d at 292.

208. *Id.*

209. *See Henrietta D.*, 331 F.3d at 272.

210. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 208–10 (1998). *See also* 42 U.S.C. § 12131(1) (2006) (defining “public entity” as “(A) any State or local government; (B) any

not cover individuals in privately operated facilities like group homes, unless the plaintiff can show that these facilities are part of a broader, governmentally designed, managed, and financed system.<sup>211</sup> Even if group homes are part of a state system, the plaintiff must show that the state itself discriminated in planning, overseeing, and funding the group homes in violation of the ADA.<sup>212</sup> A regulation pursuant to the ADA promulgated by the U.S. Department of Justice, the federal agency tasked with promulgating regulations for the statute, clarifies that while state administration and licensing programs may not discriminate on the basis of disability, the activities of the private entities themselves are beyond the scope of the Act.<sup>213</sup> In short, the ADA targets only state action.<sup>214</sup>

In *Disability Advocates*, the public entity requirement posed a hurdle because the group homes themselves were private.<sup>215</sup> Plaintiffs overcame this by arguing that the private homes were licensed and overseen by the government.<sup>216</sup> The plaintiffs were careful to clarify that the State of New York was being sued on the basis of its “policies of relying on adult homes, rather than the more integrated setting of supported housing, to provide residential and treatment services to thousands of individuals with

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department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation . . .”).

211. Burnim & Mathis, *supra* note 4, at 388–89.

212. *Id.* at 389.

213. 28 C.F.R. § 35.130(b)(6) (2011) (“A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.”).

214. 42 U.S.C. § 12131(1).

215. *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 293 (E.D.N.Y. 2009).

216. *Id.* at 314–16. *See also* *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004) (finding that the State violated the ADA’s integration mandate even though it used private entities to deliver services to disabled individuals.); *Conn. Office of Prot. & Advocacy for Pers. with Disabilities v. State of Connecticut*, No. 3:06CV00179, 2010 US. Dist. LEXIS 31601, at \*15 (D. Conn. Mar. 31, 2010) (following *Disability Advocates* by reaffirming the standards for action by a public entity and allowing standing, noting “*Olmstead* made clear that the actions of the state that led to a denial of integrated settings could serve as a basis for an ADA claim.” Thus a state’s conduct in *administering* a housing program was subject to the ADA, not the activities of the individual private housing entities themselves).

mental illness.”<sup>217</sup> The State defended itself by arguing that the discriminatory conduct lay with the private group homes themselves, and thus was beyond the reach of the ADA.<sup>218</sup> The court, in its opinion, clarified that only the state’s administrative policy of licensing and funding adult homes in lieu of supportive housing was at issue, and not the behavior of the private group home administrators themselves.<sup>219</sup> The court was clear that the suit did not reach the private conduct within an individual group home.<sup>220</sup>

The third requirement for ADA standing is that plaintiffs were discriminated against on the basis of their disability.<sup>221</sup> In *Disability Advocates*, the plaintiffs satisfied this requirement because they were subject to unjustifiable segregation on the basis of their disabilities.<sup>222</sup> Under associational standing, it is sufficient that at least one member of the association has suffered a direct injury as a result of the discrimination.<sup>223</sup> Notably, only someone who was both disabled and discriminated against on the basis of that disability has suffered an injury sufficient to give rise to ADA standing.<sup>224</sup>

## 2. *Standing Under the FHA*

Establishing standing under the FHA is easier than under the ADA. First, unlike the ADA, the FHA can sustain a legal action against any person who discriminates;<sup>225</sup> it is not limited to state actors.<sup>226</sup> A private actor may therefore be sued directly for dis-

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217. *Disability Advocates*, 598 F. Supp. 2d at 313.

218. *Id.* (“Defendants contend that DAI has failed to identify any State ‘service, program, or activity’ that is subject to the ADA or subjects DAI’s constituents to discrimination, because the State merely licenses and inspects the privately owned adult homes. Defendants further contend that DAI’s complaint lies with the adult homes themselves, with the manner in which they are operated and the nature and quality of the services residents receive, and that government agencies cannot be held liable for discriminatory conduct on the part of their licensees.” (internal citations omitted)).

219. *Id.* at 313.

220. *Id.* at 318.

221. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

222. *Disability Advocates*, 598 F. Supp. 2d at 309.

223. *Id.*

224. *Henrietta*, 331 F.3d 261, 272.

225. *Kanter*, *supra* note 2, at 935.

226. *Herron v. Blackwell*, 908 F.2d 864 (11th Cir. 1990), offers an example of a FHA case against a private individual. The defendant, Blackwell, was a private homeowner, who sold his home but later attempted to rescind a sales agreement when he discovered

criminating against a protected class in violation of the FHA.<sup>227</sup> In *Disability Advocates*, the quality of the specific services provided by the group homes themselves was outside the scope of the enforcement provisions of the ADA.<sup>228</sup> In contrast, under the FHA, individual group homes and their employees could be sued directly, if found to have contributed to the unjustified isolation and segregation of mentally disabled residents.<sup>229</sup> A Paterson claim, supported by the FHA, could be brought against not only states and government agencies, but also against the private group homes themselves, who have undoubtedly contributed to the situation.<sup>230</sup> Because the FHA allows suits against private entities, it provides a much wider spectrum of potential defendants, and thus avenues to target discriminatory housing practices.

Second, the FHA has fewer standing requirements than the ADA. In fact, FHA standing corresponds to the constitutional minimum under Article III.<sup>231</sup> The constitutional minimum for standing in federal court was expressed by the Supreme Court in *Lujan v. Defenders of Wildlife*<sup>232</sup> as follows:

First, the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal con-

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the new owners were an African-American couple. *Id.* at 865–67. The couple recovered against Blackwell in an FHA discrimination claim. *Id.* at 871–72.

227. Kanter, *supra* note 2, at 935.

228. *Disability Advocates*, 598 F. Supp. 2d at 329.

229. A hypothetical example will further illustrate the breadth of this distinction. Suppose a complex of group homes managed by a single private corporation segregates disabled residents by rooming them exclusively in only one of its buildings. Assume in this case that the discriminatory activity cannot be plainly attributed to any government regulations or programs. Here, the disabled residents have no recourse under the ADA. Nonetheless, they possess standing to bring an action against the managers and owners of the private corporation for violation of the FHA.

230. See *Disability Advocates*, 598 F. Supp. 2d at 299–301. In this case, private entities were directly running and managing the group homes. It was their employees that had primary contact with the residents. For instance, the plaintiffs alleged that the private employees running the group homes had failed to inform residents of available alternative housing options when requested. This evidence was held to constitute illegal discrimination under the ADA only to the extent the plaintiffs were able to aggregate these instances and trace them back to a pattern of control and regulation by New York State.

231. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

232. 504 U.S. 555 (1992).

nection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>233</sup>

The Supreme Court in *Havens v. Coleman* affirmed the broadest possible allowance for standing under the FHA.<sup>234</sup> The essential requirement is “injury in fact” as a result of a violation of the Act.<sup>235</sup> The injury must be “fairly traceable” to the defendant’s violation of the FHA, and the discrimination must be based on disability.<sup>236</sup>

Under the FHA, mentally disabled residents of adult homes seeking to bring a Paterson claim would have no trouble meeting the requirements of direct standing (as opposed to associational standing): they could argue that segregating them in group homes solely on the basis of their disability constitutes an injury in fact because it deprives them of the benefits of integrated living.<sup>237</sup> The FHA also provides for associational standing.<sup>238</sup> Associational standing is useful when an association seeks to bring an action on behalf of its members, but the association itself lacks an injury traceable to the discrimination.<sup>239</sup> The standard for associational standing under the FHA is essentially the same as under the ADA.<sup>240</sup> Both follow the test laid out in *Hunt vs. Washington*.<sup>241</sup>

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233. *Id.* at 560–61 (internal citations and quotation marks omitted).

234. *Havens*, 455 U.S. at 372 (recognizing that, “the sole requirement for standing to sue . . . is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant’s actions he has suffered a distinct and palpable injury”) (internal quotation marks omitted).

235. *Id.* at 372–73.

236. *Id.* at 376.

237. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

238. *Havens*, 455 U.S. at 372–73.

239. *Id.*

240. *See supra* Part V.A.1.

241. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977). One important distinction is the first prong, requiring that the “members would otherwise have standing to sue in their own right.” *Id.* at 343. Since the FHA’s requirements for direct standing are broader than those of the ADA, this requirement poses less of a hurdle. For example, an individual need not be a member of the protected class, and need only show injury as a result of the discrimination. *See Havens*, 455 U.S. at 373. Basically, the FHA’s more

Furthermore, under the FHA, a plaintiff may have standing even though he or she is not a member of the protected class.<sup>242</sup> That is, the plaintiff need not be disabled to have direct standing.<sup>243</sup> In contrast, under the ADA only disabled individuals may have direct standing.<sup>244</sup> For example, a non-disabled individual may have standing under the FHA if she faces housing discrimination because her roommate is disabled, but she would not have standing under the ADA. This conclusion was made plain in *Trafficante*, where the Supreme Court held that an individual who was not a member of a protected class had standing to sue under the FHA.<sup>245</sup> One plaintiff in *Trafficante* was a white tenant residing in a building in which the owner discriminated on the basis of race by denying black applicants.<sup>246</sup> The Supreme Court acknowledged that the tenant had suffered a sufficiently concrete injury as a result of the owner's action,<sup>247</sup> the injury being deprivation of the social and commercial benefits of an integrated living environment.<sup>248</sup> The Court affirmed that those injured by discrimination were not only the immediate victims, but "the whole community."<sup>249</sup> Further, the Court stated, "We can give vitality to [the Act] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute."<sup>250</sup> This means any individual residing in an apartment building or complex where discrimination in violation

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liberal requirements for direct standing carry over into associational standing under the first prong of the *Hunt* test. Therefore, associational standing under the FHA is significantly broader than under the ADA.

242. *Trafficante*, 409 U.S. at 211.

243. *Id.*

244. *See* *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003). The ADA explicitly applies only to individuals with disabilities. 42 U.S.C. §§ 12101–12102 (2006).

245. *Trafficante*, 409 U.S. at 211.

246. *Id.*

247. *See supra* notes 232–33 and accompanying text.

248. *Trafficante*, 409 U.S. at 211.

249. *Id.*

250. *Id.* at 212. The Court's holding with respect to the requirements for standing under the FHA provisions addressing racial discrimination can be extended to the context of disability discrimination using the arguments outlined in Part IV.A of this Note.

of the FHA takes place has standing to sue,<sup>251</sup> including any non-disabled residents.<sup>252</sup>

In *Gladstone, Realtors v. Village of Bellwood*,<sup>253</sup> the Supreme Court revisited the issue of who has standing to bring a claim under the FHA and expanded the holding in *Trafficante*.<sup>254</sup> The Court held that a municipality and its residents have standing to sue on the basis of a violation of the FHA.<sup>255</sup> Plaintiffs alleged that the Village of Bellwood and citizens of Bellwood had suffered a social and economic injury as a result of being denied the benefits of integrated living.<sup>256</sup> By holding that this is injury met the standard for proving “injury in fact,” the court acknowledged that people could have standing if they were injured as an indirect result of discrimination in violation of the FHA directed at *someone else*.<sup>257</sup>

In *Gladstone*, the Court held that both economic injury and the loss of integrated living can qualify for purposes of FHA standing.<sup>258</sup> The Court found that the economic injury to the municipality from the illegal discrimination was sufficient to constitute an injury in fact.<sup>259</sup> The Court stated that “[a] significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services.”<sup>260</sup> The Court then extended this analysis to allow individual homeowners in the community to sue on the basis that their property value had diminished as a result of the discriminatory practices.<sup>261</sup> The Court also recognized that the loss of integration in a neighborhood resulting from illegal discrimination could give rise to

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251. See *Trafficante*, 409 U.S. at 211.

252. *Id.* Although this case addresses discrimination on the basis of race, it demonstrates that a resident of a building who is not a member of a protected class may have standing under the FHA.

253. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979).

254. *Id.*

255. *Id.* at 101–09.

256. *Id.* at 95.

257. *Id.* at 103. In these situations, it can be difficult for a plaintiff to show an injury in fact that is traceable to the defendant’s conduct, even in cases where the discrimination was plainly evident. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Under the ADA, however, this type of claim would be impossible.

258. *Gladstone*, 441 U.S. at 110–11.

259. *Id.* at 111.

260. *Id.* at 110–11.

261. *Id.* at 115.

standing under the FHA.<sup>262</sup> The Court stated that “[i]f, as alleged, petitioners’ sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of the conduct.”<sup>263</sup> Therefore, the loss of an integrated neighborhood and the social benefits of integration provided adequate standing to both the city and its residents, even though it was a non-economic injury.<sup>264</sup>

Analyzing the advantages of bringing a Paterson claim under the FHA instead of the ADA creates interesting comparisons. At the municipal level, a town may have standing to bring an action alleging that the managers of group homes had discriminated resulting in segregation within a single city.<sup>265</sup> This reasoning can also support claims on behalf of the residents of a town alleging that either the state or group homes have discriminated and injured them by depriving them of their right to integrated living. Therefore under the FHA, community standing can be met regardless of whether the discrimination occurred at the level of: (1) a single private group home; (2) a private corporation that runs a number of group homes; (3) a municipality; or (4) a state.<sup>266</sup> Whether standing is met will depend on whether there is an in-

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262. *Id.* at 110–11.

263. *Id.* at 111.

264. *See id.* at 111–12. *See also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (affirming *Gladstone’s* holding that residents of a community have standing to sue for deprivation of the benefits of integrated living but qualifying the holding by acknowledging that it may only be possible to prove injury in fact in a “relatively compact neighborhood.”) *Id.* at 377.

265. *See* *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009). Although these arguments are persuasive in theory, there is admittedly little chance a municipality would bring such an action.

266. The FHA may provide advantages in addressing discrimination that produces effects at the statewide level. In states where hundreds of disabled individuals are relegated to a few select areas of housing, entire cities or municipalities theoretically have standing to sue for the loss of the benefits of integrated living under the FHA. *See* *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972). If a single municipality brings the action on its own, it will be difficult to show any actual injury traceable to the State’s conduct. *See Havens*, 455 U.S. 363, 377 (discussing the difficulties faced by diffuse communities in meeting the evidentiary requirements for standing). However, if a substantial number of the state’s municipalities allege statewide discrimination, then the burden is much lower. As a practical matter, inducing many cities and towns to act in conjunction toward a common goal sounds far fetched. Yet, there are statewide administrations and organizations that may have the ability to coordinate such activities. *See* Conn. Office of Prot. & Advocacy for Pers. with Disabilities *v. State of Connecticut*, No. 3:06CV00179, 2010 U.S. Dist. LEXIS 31601 (D. Conn. Mar. 31, 2010).



jury in fact flowing from the discriminatory conduct.<sup>267</sup> Wherever it can be shown that the neighborhood's composition has been altered due to discrimination on the basis of disability, the community and its residents will have standing to sue.<sup>268</sup> However, it will be difficult to sufficiently demonstrate the injury in a large city where the effects flowing onto the individual residents from discriminatory conduct may be too diffuse and speculative.<sup>269</sup>

Additionally, the Supreme Court has interpreted the FHA to allow testers standing to sue. *Havens v. Coleman* defined testers as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices."<sup>270</sup> The Court held that, in certain circumstances, testers have standing to sue in their own right.<sup>271</sup> Although testers were not used to gather evidence in *Disability Advocates*, the use of testing has proven highly effective for gathering evidence of discrimination against the disabled.<sup>272</sup> For example, if a landlord is suspected of discrimi-

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267. See *Havens*, 455 U.S. at 377.

268. *Id.* at 377–78.

269. *Id.*

270. *Id.* at 373. But see Fred Freiberg, *A Test of Our Fairness*, 41 URB. LAW. 239, 240 (2009). Although the Supreme Court limited the definition of "testers" to the specific facts of that case, testing is in practice understood as a broader concept. Freiberg, the Field Services Director for the Fair Housing Justice Center, defines testing as "an investigative tool used to gather evidence. A testing investigation typically has three characteristics. First, at least one person participates in the investigation. Second, the investigation is covert. And, third, the investigation is conducted to obtain a comparison. Testing is conducted to compare how different types of people are treated by a housing provider and/or to compare the practices of a housing provider against the requirements of fair housing laws." *Id.*

271. *Havens*, 455 U.S. at 373–74 ("A tester who has been the object of a misrepresentation made unlawful under [the provision] has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages.") See also 42 U.S.C. § 3604(d) (2006). This provision makes it unlawful "[t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."

272. BARRIERS, *supra* note 17, at 53 ("The study found paired testing to be a feasible and effective tool for detecting and measuring discrimination by rental housing providers against persons with disabilities. It can be used to capture both differential treatment discrimination and refusal to make reasonable accommodation or permit reasonable modification, and the paired research testing methodology can be adopted for a wide variety of disabilities and housing circumstances."). This report found that disabled individuals are capable testers, although some accommodation in the testing procedure may be necessary, such as assistance with travel to the sites or evaluations. These in turn might affect the costs of testing.

minating on the basis of disability, an organization could use disabled and non-disabled individuals as “testers” to gather evidence of disparate treatment.<sup>273</sup> If the allegations turned out to be true, the testers would have standing to sue under the FHA even though they were not actually seeking to rent an apartment.<sup>274</sup> To the extent that testing is a valuable investigative tool, it is important to recognize that it forms part of the broader basis for standing allowed under the FHA.

Furthermore, the Supreme Court has recognized that an organization may have standing to sue in its own right under the FHA based on an injury to *itself*.<sup>275</sup> This is distinct from associational standing, where the organization sues on behalf of the injury done to its members.<sup>276</sup> In *Havens*, the Court found a “concrete and demonstrable injury to the organization’s activities — with the consequent drain on the organization’s resources,” constitutes an injury in fact sufficient to allow standing.<sup>277</sup> This doctrine allows an organization such as Disability Advocates to bring a claim in its own right, for the harm to its mission and diversion of resources it suffered as a result of combating the discriminatory conduct.<sup>278</sup> Hence the standing afforded to organizations under the FHA goes beyond the limited associational standing allowed under the ADA. The organization can claim injury and request relief in its own right for the aspects of the discriminatory conduct that affected it.<sup>279</sup>

By allowing direct standing for non-disabled residents, municipalities, advocacy organizations, and testers, the FHA provides substantially more avenues for bringing a Paterson claim.

## B. DEFENSES IN A PATERSON CASE

This section describes the main defense raised in an ADA disability discrimination claim compared with potential FHA de-

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273. *Havens*, 455 U.S. at 373–74.

274. *Id.*

275. *Id.* at 379

276. *Supra* notes 238–41 and accompanying text.

277. *Havens*, 455 U.S. at 379.

278. *Id.*

279. *See* *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (“The organization must show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.”).

fense strategies. In *Olmstead*, the Supreme Court acknowledged that “[t]he State’s responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless.”<sup>280</sup> Generally, a public entity facing a violation of the ADA’s integration mandate will rely on a fundamental alteration defense.<sup>281</sup> The defense derives from an ADA regulation promulgated by the Department of Justice, which states that “[a] public entity shall make *reasonable* modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity.”<sup>282</sup> The *Olmstead* Court framed the fundamental alteration defense as follows:

Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.<sup>283</sup>

The Court suggested that this standard should be flexible: “To maintain a range of facilities and to administer services with an even hand, the State must have . . . leeway . . . .”<sup>284</sup> Justice Kennedy, in his concurring opinion, emphasized that it was essential for a state to retain broad discretion in the manner in which it chooses to adopt and manage housing and treatment programs for the mentally disabled.<sup>285</sup> In assessing a state’s fundamental alteration defense, a court may consider the cost of the proposed relief, the state’s available economic resources, and the state’s

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280. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 (1999).

281. See 28 C.F.R. § 35.130(b)(7) (2011).

282. *Id.* (emphasis added).

283. *Olmstead*, 527 U.S. at 604.

284. *Id.* at 605.

285. *Id.* at 615 (Kennedy, J., concurring) (“The State is entitled to wide discretion in adopting its own systems of cost analysis.”). See also *id.* at 613 (“a State may not be forced to create a community-treatment program where none exists.”).

responsibility to provide for other mentally disabled individuals, perhaps with severe needs requiring institutionalized care.<sup>286</sup>

The Court in *Olmstead* also mentioned that a state could successfully use the fundamental alteration defense by submitting a thorough plan for moving qualified disabled individuals to alternative community housing; this is known as an *Olmstead* plan.<sup>287</sup> However, circuit courts have divided over whether a state is required to provide a thorough plan or whether a state's assertion of a fiscal problem alone is sufficient to meet this requirement.<sup>288</sup> In *Disability Advocates*, the State of New York raised the fundamental alteration defense in its motion for summary judgment,<sup>289</sup> arguing that the burden of providing alternative supportive housing was too high.<sup>290</sup> The district court concluded that an *Olmstead* plan was not required to plead the fundamental alteration defense.<sup>291</sup>

Although the fundamental alteration defense is a significant obstacle facing plaintiffs challenging housing discrimination

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286. *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 493 (3d Cir. 2004).

287. *Olmstead*, 527 U.S. at 605–06 (“If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met.”).

288. *See Frederick L.*, 364 F.3d at 493–94 (concluding that an *Olmstead* plan is required to plead the fundamental alteration defense, not merely allegations of general cost concerns). *See also Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 381 (3d Cir. 2005) (“[T]he only sensible reading of the integration mandate consistent with the Court’s *Olmstead* opinion allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA . . .”). *But see Arc v. Braddock*, 427 F.3d 615, 620 (9th Cir. 2005) (concluding an *Olmstead* plan is not required to raise the fundamental alteration defense and noting that “our approach has been consistent with the Supreme Court’s instructions: So long as states are genuinely and effectively in the process of deinstitutionalizing disabled persons ‘with an even hand,’ we will not interfere.”).

289. *Disability Advocates Inc. v. Paterson*, 598 F. Supp. 2d 289, 356 (E.D.N.Y. 2009).

290. *Id.* The court reserved its determination on the fundamental alteration defense for trial, stating “[a]t trial, if DAI establishes that the adult home residents at issue are not in the most integrated settings appropriate to their needs, the court will hear evidence on the fundamental alteration defense. This evidence will include components of Defendants’ *Olmstead* plan that relate to identifying and moving adult home residents who are not in the most integrated setting appropriate to their needs, as well as the fiscal impact of the requested relief and its potential impact on others with mental disabilities. The court will consider all of this evidence together in determining whether the requested relief would be a ‘reasonable modification’ or ‘fundamental alteration’ of Defendants’ programs and services.” *Id.*

291. *Id.* at 339.

against disabled persons, the defense reflects a legislative acknowledgment of the reality that states face federal mandates and budget shortfalls. Acknowledging this reality, courts have found that states have engaged in discrimination against the disabled, but declined to provide relief on the grounds that it would constitute a fundamental alteration.<sup>292</sup>

In contrast, the FHA poses no such barrier. While an exhaustive analysis of any potential defenses under the Fair Housing Act is beyond the scope of this Note, currently there is no equivalent to the fundamental alteration defense under the FHA.<sup>293</sup> The lack of a fundamental alteration defense is a key advantage of the FHA approach. Adding an FHA claim in Paterson litigation can increase the chances of surviving the motion for summary judgment stage.

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292. See, e.g., *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003).

293. See 42 U.S.C. § 3604(f)(3) (2006). Admittedly, the FHA establishes a requirement that the alterations made to provide equality to people with disabilities must be “reasonable.” This requirement comes in the definition of discrimination offered in subsection (f)(3), that discrimination includes a refusal to allow “reasonable modifications of existing premises” or to “make reasonable accommodations in rules, policies, practices, or services” in order to allow a disabled resident equal opportunity to live in the dwelling. *Id.* This is a specific requirement mainly relating to the goal of removing architectural barriers for disabled individuals. See *Kanter*, *supra* note 2, at 951. The cases that raise the issue of reasonable accommodations to rules or policies involve situations such as whether a landlord must allow a disabled resident to have a pet where there is a no pet policy. See *Panjwani*, *supra* note 16, at 102. Therefore, a defendant who has been proven to have discriminated in a Paterson case probably would not raise the defense that the proposed relief was unreasonable. Further, the regulations promulgated under the FHA explicitly declare that a housing provider is not required to offer services, such as medical services, that fall outside the scope of services that the housing provider offers generally. See 24 C.F.R. § 100.202(a) (2011). Since State governments and group homes are in the business of providing these services regularly, it could be argued the reasonable accommodations provision is not meant to apply to these situations. This Note leaves open the possibility of other defenses under the FHA based on reasonableness or financial considerations, especially where the defendant is a government entity.

### C. RELIEF IN A PATERSON CASE

The ADA grants several types of relief for aggrieved parties who succeed on their discrimination claims. Title II of the ADA incorporates by reference the enforcement scheme of section 505 of the Rehabilitation Act, which adopts the remedies made available under Title VI of the Civil Rights Act of 1964.<sup>294</sup> Equitable relief, actual damages, and attorneys' fees may be recovered.<sup>295</sup> In contrast, the FHA allows the court to award equitable relief, actual damages, attorneys' fees *and* punitive damages.<sup>296</sup> In other words, the FHA makes available the same types of relief as the ADA, but also allows for the recovery of punitive damages. Therefore, in Paterson litigation, adding an FHA claim would augment the possibilities for recovery.

## VI. CONCLUSION

The FHA supports what this Note has dubbed a Patterson claim — a claim that mentally disabled residents of group homes have been unlawfully segregated and discriminated against in violation of their right to integrated community living. The Supreme Court precedents plainly uphold a right to integrated living as embedded within the FHA's prohibition on discrimination, at least with respect to race.<sup>297</sup> The main barrier lies in extending this right from the context of race to disability, even though both are protected classes under the Act.<sup>298</sup>

There are three main advantages to bringing a Paterson claim under the FHA. First, standing is relatively easier to establish under the FHA. The disabled residents themselves, organizations representing residents, municipalities, or even the individual community members at large, potentially have direct stand-

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294. 42 U.S.C. § 12133 (2006). *See also* 29 U.S.C. § 794 (2006).

295. 29 U.S.C. § 794(a)(1).

296. 42 U.S.C. § 3613(c)(1). In a private civil action, "if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and . . . as the court deems appropriate, any permanent or temporary injunction, temporary restraining order or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)." *Id.*

297. *Trafficante*, 409 U.S. 205; *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979); *Havens*, 455 U.S. 363.

298. *See supra* Part IV.B.

ing under the FHA. An association potentially has standing to sue and recover in its own right, instead of solely on behalf of its disabled members. Furthermore, litigation under the FHA can target public and private discrimination. Critically, the FHA allows lawsuits against private entities, such as the individual group homes or specific managers and owners. The ADA, by contrast, is much more restrictive in limiting a Paterson claim to address actions by only public entities, requiring the plaintiff to prove the housing is significantly funded or managed by the government. This presents difficulties as to whether the discriminatory conduct is attributable to an overseeing public entity when the evidence shows the actual violations occurred within the private group homes themselves. Thus, an FHA claim will advance the goal of Paterson litigation more broadly by compelling private housing providers or entities with only a tenuous connection to state action to afford and inform disabled individuals of an opportunity to move to supportive housing.

Second, the defenses under the FHA pose less of a barrier compared with the ADA. The absence of a fundamental alteration defense available under a FHA Paterson claim provides better chances of successful litigation. Third, the availability of punitive damages as well as actual damages, injunctive relief, and attorneys' fees provides plaintiffs with multiple avenues for recovery. Specifically, the FHA allows any type of equitable relief and punitive damages, including recovery for emotional distress.

In these three areas, adding a FHA count to a Paterson discrimination claim increases the potential for success in advancing the underlying policy goal. This analysis is highly relevant to future litigation strategies, especially given the widespread use of private group homes for mentally disabled adults in other states and the need to continue advocating non-discriminatory alternatives.<sup>299</sup> While this Note is by no means exhaustive, the results demonstrate that adding a FHA claim in Paterson litigation can lead to beneficial results.

The importance of increasing access to integrated supportive housing options cannot be understated. Describing the results of the *Disability Advocates* litigation, Jennifer Mathis of the Bazelon Center for Mental Health Law, stated that “[t]his order will

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299. See Kanter, *supra* note 2, at 929–30.

give current adult home residents and anyone at risk of becoming a resident in the future the opportunity to live with the freedoms that the rest of us take for granted every day.”<sup>300</sup>

The principle that mentally disabled individuals should have the civil right to live and receive treatment in the least restrictive setting is a noble ideal and supportive housing has the potential to bring this ideal closer to reality. Nevertheless, this Note ends with a word of caution. The deinstitutionalization movement was based on the same ideal.<sup>301</sup> In the words of Joseph Califano, the former Secretary of Health, Education, and Welfare, “[w]e got into much of the current mess by acting on the best of intentions without foreseeing the worst unintended effects.”<sup>302</sup> Without forgetting the lessons of the past, the recent litigation has the potential to result in more options and a better quality of life for mentally disabled individuals currently residing in group homes.

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300. BAZELON, *supra* note 93.

301. TORREY, *supra* note 1, at 10. (“Deinstitutionalization was based on the principle that severe mental illness should be treated in the least restrictive setting.”) For a critical analysis of the civil rights conceptual basis for deinstitutionalization, *see id.* at 142. (“The road began in the civil rights era of the 1960s, when the mentally ill were identified by some lawyers as ‘a group to be ‘liberated’ along with blacks, Hispanics, and Third World peoples.”) As a result of the reform some mentally disabled individuals were “discharged from psychiatric hospitals and allowed to live in roach-infested rooms, jails, public shelters, or cardboard boxes on the street and we call the latter the ‘least restrictive setting.’” *Id.* at 149.

302. *Id.* at 91 (quoting Joseph A. Califano, *The Last Time We Reinvented Health Care*, WASH. POST., Apr. 1, 1993, at A23).