No. 23-134

In the
Supreme Court of the United States

SUELLEN KLOSSNER,
Petitioner,
v.

IADU TABLE MOUND MHP, LLC AND
IMPACT MHC MANAGEMENT, LLC,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ABBEY C. FURLONG
Counsel of Record
DAVID C. WATERMAN
LANE & WATERMAN LLP
220 N. Main St., Ste. 600
Davenport, IA 52801-1987
(563) 324-3246
afurlong@l-wlaw.com
dcwaterman@l-wlaw.com

BRIDGET R. PENICK
JODIE C. MCDOUGAL
FREDRIKSON & BYRON, P.A.
111 E. Grand Ave., Ste. 301
Des Moines, IA 50309
(515) 242-8900
bpenick@fredlaw.com
jmcdougal@fredlaw.com

Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Respondents disagree with Petitioner's question presented because it is stated too broadly and misconstrues the facts. Ignoring her attempts to force Respondents to participate in the *voluntary* Section 8 housing choice voucher program, Petitioner suggests this is a simple case of "relaxing" alternative sources of income. Not so. Rather, this case involves a fundamental alteration of a policy not to accept a specific type of alternative source of income—a Section 8 voucher—which imposes upon the recipient substantial burdens. App. 15a (Stras, J., concurring) ("The burdens here are even greater than usual.").

Also, whether Petitioner is "too disabled to work" is far from settled. The District Court did not find that her disability *caused* her inability to afford her rent. Rather than requiring Petitioner to prove this fact, the Court improperly shifted the burden to Respondents to disprove it. *See id.* at 29a, 39a (noting the "weak" evidence on the issue of her ability to pay her rent and "no evidence" on her income before her disability or after from part-time work or why she is currently unable to work part-time). The Court of Appeals only held she was "unable to work full-time." *Id.* at 4a.

The accurate question presented is far narrower: did the Court of Appeals correctly hold that a landlord's duty, under the Fair Housing Amendments Act of 1988 (FHAA), does not extend to "accommodating" a "disabled" tenant's lack of income by accepting a Section 8 voucher that the landlord otherwise would not accept from a non-disabled low-income tenant? The answer is "yes."

RULE 29.6 STATEMENT

Respondent Impact Management, LLC ("Impact") and Respondent IADU Table Mound, MHP, LLC ("Table Mound") do not have any parent corporation and no publicly-held corporations hold any of their stock. Respondent Impact and Respondent Table Mound do not have any direct subsidiaries, and there are no other entities that have a direct or indirect pecuniary interest in the outcome of this case.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE WRIT 14

I. The circuits are not split; it is 2-0 15

II. Even if there is a circuit split, this case is not the proper vehicle to resolve it 25

III. The decision below is right 28

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Arnold v. Elmington Prop. Mgmt., LLC,
2023 WL 4242757 (N.D. Ala. 2023)....................... 28

Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.,
528 F.3d 556 (8th Cir. 2008).................................... 5

Bell v. Tower Mgmt. Serv., L.P.,
2008 WL 2783343 (D.N.J. 2008)............................ 28

Bentley v. Peace and Quiet Realty 2 LLC,
367 F.Supp.2d 341 (E.D.N.Y. 2005) 28

Bryant Woods Inn, Inc. v. Howard Cnty.,
124 F.3d 597 (4th Cir. 1997).................................. 30

CNY Fair Hous., Inc. v. Welltower Inc.,
588 F.Supp.3d 282 (N.D.N.Y. 2022)...................... 28

Daniel v. Avesta Hous. Mgmt. Corp.,
2013 WL 4541152 (D. Maine 2013)....................... 24

Doe v. WCP I, LLC,
2009 WL 1564909 (Cal. Ct. App. 2009)................. 28

Evans v. UDR, Inc.,
644 F. Supp. 2d 675 (E.D.N.C. 2009) 24

Fair Hous. Rights Ctr. In Se. Pa. v. Morgan Props. Mgmt. Co., LLC,
2018 WL 4489653 (E.D. Pa. 2018)......................... 28

Fair Housing of the Dakotas, Inc. v. Goldmark Property Mgmt., Inc.,
778 F.Supp.2d 1028 (D.N.D. 2011).................... 1, 29

Freeland v. Sisao LLC,
2008 WL 906746 (E.D.N.Y.) 28

FW/PBS, Inc. v. City of Dallas,
493 U.S. 215 (1990) 5

Giebeler v. M & B Assocs.,
343 F.3d 1143 (9th Cir. 2003)
.... 3, 9, 13, 14, 16-19, 23, 24, 27, 28, 33

Hayden Lake Recreational Water & Sewer Dist. v. Haydenview Cottage, LLC,
835 F. Supp. 2d 965 (D. Idaho 2011) 24

Hemisphere Bldg. Co. v. Village of Richton Park,
171 F.3d 437 (7th Cir. 1999) 4, 12, 22-24

Hevner v. Village East Towers, Inc.,
2010 WL 11680173 (S.D.N.Y. 2010) 28

Lanier v. Assoc. of Apartment Owners of Villas of Kamali'i, 2007 WL 842069 (D. Haw. 2007) 28

Mei Ling v. City of Los Angeles,
2012 WL 12918729 (C.D. Cal. 2012) 18

Mercado v. Realty Place, Inc.,
2015 WL 5626510 (S.D. Ohio 2015) 28

Murphy v. Fullbright,
2012 WL 4754730 (S.D. Cal. 2012) 24

Riccardo v. Cassidy,
2012 WL 651853 (N.D.N.Y. 2012) 28

Salute v. Stratford Greens Garden Apartments,
136 F.3d 293 (2d Cir. 1998)
.... 3, 9, 11, 14, 16, 17, 21-24, 27, 31, 34

Schanz v. Vill. Apts., 998 F.Supp. 784 (E.D. Mich. 1998) 1, 32

Schaw v. Habitat for Humanity of Citrus Cty., Inc., 938 F.3d 1259 (11th Cir. 2019) 2, 3, 14, 19, 20, 23

Schueller v. Pennypack Woods Home Ownership Ass'n, 2021 WL 7285246 (E.D. Pa. 2021) 28

Smith v. City of Jackson, 544 U.S. 228 (2005) 30

Spieth v. Bucks Cty. Hous. Auth., 594 F. Supp. 2d 584 (E.D. Pa. 2009) 24

Sutton v. Freedom Square Ltd., 2008 WL 4601372 (E.D. Mich. 2008) 28

US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) 3, 9, 12-14, 17-19, 31, 32

Yee v. City of Escondido, 503 U.S. 519 (1992) 5

Statutes

42 U.S.C. § 3604 .... 1, 29

42 U.S.C. § 3604(f)(3)(B) 1, 29

42 U.S.C. § 12112(b)(5)(A) 30

Rules

Fed. R. App. P. 10(a) 5

STATEMENT

The FHAA requires a landlord to make "reasonable accommodations" in its housing "rules, policies, practices, or services" where such accommodations "may be necessary to afford [handicapped] person[s] *equal* opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B) (emphasis added).[1]

To expand the duty of a "reasonable accommodation" in the narrow context at issue here, and to force landlords to accept a Section 8 housing choice voucher as an "alternative source of income," will result in Petitioner enjoying not *equal*—but *greater*—opportunities than her non-disabled, low-income peers. That result is not what the law requires. Petitioner's contentions amount to nothing more than an attempt "to transform [her] 'financial status' into a 'handicap' in order to secure relief under the FHAA," *Schanz v. Vill. Apts.*, 998 F.Supp. 784, 792 (E.D. Mich. 1998), and permit income redistribution in the guise of disability protection.

---

[1] Congress passed the Fair Housing Amendments Act ("FHAA") in 1988, extending the protections against housing discrimination under the Fair Housing Act ("FHA") to include disabled persons. 42 U.S.C. § 3604. While Respondents agree that the term "disability" is used in common parlance today, Pet. Cert. at 2 n.1, this Court must remain wary of Petitioner's attempts to confuse and engraft definitions of terms from the Americans with Disabilities Act ("ADA") into the FHA, *see, e.g.*, *id.* at 19–22. As discussed further in Section III below, the two Acts' purposes are distinct, and the ADA's reasoning does not automatically apply to an FHA matter. *See Fair Housing of the Dakotas, Inc. v. Goldmark Property Mgmt., Inc.*, 778 F.Supp.2d 1028, 1035 (D.N.D. 2011).

Contrary to Petitioner's argument, there is not "a longstanding circuit split" over the application of the FHAA "in one common situation." Pet. Cert. at 2. Petitioner attempts to create a conflict among the circuits by setting forth three bullet points that misconstrue and conflate the factual circumstances arising in two different sets of cases, which span over a 25-year period. *Id.* at 2–3. The different outcomes in these cases are attributable to distinct facts, not a legal disagreement. When properly framed within the context of whether the FHAA requires a landlord to accept a Section 8 housing choice voucher as a reasonable accommodation, there is no circuit split at all; the score is 2-0 in Respondents' favor.

The first set of cases upon which Petitioner relies (authored by the Ninth and Eleventh Circuits) do not involve the Section 8 program and its attendant burdens. Nor do they stand for the propositions Petitioner claims. She overreaches in discussing *Schaw v. Habitat for Humanity of Citrus Cty., Inc.*, 938 F.3d 1259 (11th Cir. 2019). There, the Eleventh Circuit reversed and remanded for the district court to determine, among other issues, whether the plaintiff's financial condition was *a result of* his disability (quadriplegia) because—as here—there was a dearth of evidence on that issue. *Id.* at 1274–75. Significantly, as Judge Strass noted below, the Eleventh Circuit in *Schaw* "explained, in a passage that is relevant here, that the forced acceptance of housing vouchers is an example of an *unreasonable* accommodation." App. 17a (emphasis in original) (citing *Schaw*, 938 F.3d at 1267).

Unlike *Schaw* (and this case), only the Ninth Circuit in *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1155 (9th Cir. 2003), which the Eleventh Circuit described as an "easier case," *Schaw*, 938 F.3d at 1271, determined the plaintiff was unemployed *because of* his disability. The Ninth Circuit purportedly relied on language in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), to hold that the plaintiff's request for a waiver of the landlord's no-cosigners policy was a "reasonable accommodation" because—distinct from Petitioner's request here—it did not "alter the essential obligations" of the landlord-tenant relationship or create "substantial financial or administrative risk or burden." *Giebeler*, 343 F.3d at 1157–58. The cosigner had "significant assets," lived "less than a mile" away, *id.* at 1158, and "demanded no special, burdensome rights as a condition of her tenancy," *id.* at 1158 n.12.

Only the second set of cases Petitioner cites (authored by the Eighth and Second Circuits) address whether the FHAA can function to override a landlord's decision not to accept Section 8 tenants. These two circuits reached the same conclusion—it does not. *See* App. 13a–14a (holding that the duty of reasonable accommodation under the FHAA does not extend to alleviating a disabled tenant's impoverished economic circumstances by forcing a landlord to accept a Section 8 voucher); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir. 1998) (same). These cases—in the Section 8 voucher context—address issues rarely faced by the courts. The Seventh Circuit has not conclusively joined those circuits in the context of Section 8 vouchers but has addressed the issue in considering a challenge to a

zoning ordinance. *See Hemisphere Bldg. Co. v. Village of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999) (holding that the FHAA, in the context of a zoning ordinance that raised the cost of housing, is limited to "rules, policies, practices, or services … that hurt handicapped people *by reason of their handicap*, rather than that hurt them solely by virtue of what they have in common with other people, such as a limited amount of money to spend on housing") (emphasis in original).

The nuances underlying this case make clear that it is not a proper vehicle for review by this Court. This case involves application of a specific type of "alternative source" of rent (the Section 8 voucher). It also involves application of this narrow subset of alternative source of income to an even narrower subset of tenants: those who own a manufactured home and rent, not the dwelling itself, but only the lot upon which the home sits, impacting how the Section 8 voucher program applies. Further, this is far from the "clean" case Petitioner would like to make it out to be—either factually or legally. The facts remain disputed and unclear. Here, there has been no factual finding that Petitioner "is too disabled to earn an income," *see* App. 4a, 29a, 39a, with the District Court below explicitly undercutting Petitioner's position, finding she "worked some after she was declared disabled in 1993," *id.* at 29a.

Petitioner's claims, that this case is about the "relaxation of a policy of refusing to accept rent from an alternative source" and that she will "pay her full rent by using [a Section 8] voucher," Pet. Cert. at 4, are dubious. Undermining these claims is the fact that

forcing Respondents to participate in the *voluntary* and burdensome Section 8 program will fundamentally alter their established policy in exchange for unguaranteed funds dependent, in part, on a financially insecure tenant maintaining a dwelling to the Section 8 program's specifications. Because this dispute involves the Section 8 program, there are added layers of complexity as to *whether* a landlord can be forced to participate in the Section 8 program and *when* that obligation arises. The writ should be denied.

1. Petitioner, Suellen Klossner, resides in a manufactured home community known as Table Mound Mobile Home Park in Dubuque, Iowa. The park is owned by IADU Table Mound MHP, LLC ("Table Mound"), and managed by Impact MHC Management, LLC ("Impact") (jointly, "Respondents"). App. 4a. Since 2009, Petitioner has owned her manufactured home or "mobile home,"[2] and rents the

[2] Petitioner's selective quotes from *Yee v. City of Escondido*, 503 U.S. 519 (1992), Pet. Cert. 5 n.2, underscore disputed facts in the record as to whether she could have moved her home to a mobile home park that voluntary accepts Section 8 vouchers, App. 30a. Her reference to outside-the-record facts, such as Mobile Home University's website, violates the well-established rule that material outside the record cannot be considered, *see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990) (refusing to rely on evidence first introduced before this Court and not in the record of the proceedings below); *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556, 559–60 (8th Cir. 2008); *see also* Fed. R. App. P. 10(a), and that reference conflicts with her assertion that "the record is as complete as it could be," Pet. Cert. 19.

lot underneath it, but has long relied on income from government programs to pay her rent. App. 4a.

In 1993, Petitioner was declared disabled. *Id.* 29a. She claims her disabilities prevent her from working and therefore affording the rent for her lot. Pet. Cert. 4. Although she cannot work full-time due to her disabilities, App. 4a, no evidence in the record links her inability to work and earn *any* income to her disabilities. In fact, the record is devoid of any evidence about her income before or after she became disabled, or why she is now supposedly unable to work part-time. *Id.* at 29a, 39a. Further belying her position is that, even after becoming disabled, she was hired for jobs and worked, indicating she is capable of generating *some* measure of income. *Id.* Significantly, even without a voucher, a part-time job paying as little as $83.25 per week could cover Petitioner's financial needs. This is because the Section 8 voucher for which she qualified would have limited her rent obligation to 30% of her income and covered approximately $333.00. *Id.* at 29a.

In mid-2017, Respondents acquired the manufactured home park and made numerous improvements. *Id.* at 28a. Petitioner implies that Respondents unfairly or unreasonably increased her lot rent and associated expenses. Pet. Cert. 5–6; App. 28a n.1. The charges, however, were consistent with the market rate in the area, and no evidence suggests they were unreasonable. App. 28a n.1. Because of the increased percentages of lot rent and utility expenses to income, Pet. Cert. 5–6, Petitioner alleged she could no longer afford basic repairs, such as repairing "a plumbing problem" in late 2019, App. 29a.

In November 2019, the City of Dubuque approved a measure to allow the local housing authority to provide Section 8 vouchers to residents of mobile-home parks. *Id.* at 4a, 29a. In January 2020, Petitioner received and sought to use a voucher. *Id.* Respondents declined to accept it. *Id.* at 4a, 29a–30a.

Respondents explained that federal law does not require landlords to accept Section 8 vouchers. *Id.* at 5a. They further explained that they will only accept such vouchers in limited circumstances: (1) where the law requires acceptance (neither the City of Dubuque nor the State of Iowa have adopted so-called source-of-income laws requiring acceptance), and (2) where a previous owner of a newly acquired manufactured home park accepted vouchers, thereby grandfathering in those existing tenants (a total of approximately 40 tenants out of more than 20,000 under Impact's management are Section 8 voucher participants, or 0.2% of all tenants). *Id.* at 5a, 32a.

Respondents also outlined the administrative burdens of accepting Section 8 vouchers, including (1) the obligation to sign a housing assistance payment contract with restrictions on rent amounts and lease terminations; (2) the requirement to meet certain housing quality standards; and (3) the inefficiencies of recordkeeping, tracking multiple rent payments, imposing late fees, raising rents, enforcing rules, and nonpayment concerns when multiple payers are involved. *Id.* at 5a, 15a (Stras, J., concurring), 32a–33a.

Even though Respondents did not accept the Section 8 voucher, they offered to provide Petitioner

with a referral to parks in the area that do accept Section 8 vouchers and to assist in locating a moving company, as well as asked if there were other ways they could assist her. *Id.* at 30a. Petitioner never responded. Through November 2020, despite being unemployed she paid her lot rent and utility payments without voucher assistance. *Id.* at 29a–30a.

Six months after Respondents denied Petitioner's request, she sued, claiming, *inter alia*, that Respondents failed to reasonably accommodate her by not accepting her Section 8 voucher, in violation of the FHAA. *Id.* at 5a. More than two months later, Petitioner moved for an injunction—to force Respondents to accept her voucher—and she sought damages. *Id.* She also brought state-law claims, which have since been dismissed. *Id.*

2. Following a two-day bench trial, the District Court concluded that Petitioner had proved, by a preponderance of the evidence, that Respondents violated the FHAA by not accepting her Section 8 voucher, which was "necessary to ameliorate the effect of her disability," *id.* 37a, 40a, and "reasonable," *id.* at 40a–46a. Thus, the court enjoined Respondents "by ordering them to accept [Petitioner's] housing choice voucher." *Id.* at 47a.

In reaching its "necessity" finding, the District Court improperly shifted the burden to Respondents to disprove whether the accommodation is necessary. Despite reaching its "necessity" finding "with some hesitancy" based on Petitioner's "weak" evidence supporting her inability to pay rent, the Court noted "there was no evidence to the contrary." *Id.* at 39a. The

court also noted that Petitioner "apparently worked some after she was declared disabled in 1993," *id.* at 29a, and that she "continued to pay her rent through November 2020," *id.* at 30a. The court further recognized that Petitioner "presented no evidence at trial about her income before she became disabled," her income "after she became disabled" from pursuing "part-time employment," or "why she is currently unable to work part-time." *Id.* at 29a, 39a. That means, as the court put it, "[I]t is theoretically possible that [Petitioner] could not have afforded the current rent even if she was fully employed in her prior profession." *Id.* at 39a.

Elsewhere in its decision, the District Court noted that the "reasoning of" *Salute*, 136 F.3d at 301—"'that the law addresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps'—is facially appealing, *especially when it involves the voluntary housing voucher program*." App. 39a n.4 (emphasis added). The court tried to minimize the significance of *Salute*, noting that *Salute* was "decided before [*Barnett*, 535 U.S. at 391,]" and that "[*Salute*'s] broad holding appears to this Court to be inconsistent with *Barnett*'s holding." App. 39a n.4.

In doing so, the District Court repeated the same flawed analysis of the Ninth Circuit in *Giebeler*, 343 F.3d 1143, overreading *Barnett* to assert the same two propositions that were purportedly declared in that ADA case: "In *Barnett*, the Supreme Court held that accommodations (1) may require providing preferential treatment to disabled people over those similarly situated but not disabled and (2) are not

limited only to lowering barriers created by the disability itself." App. 38a.

After concluding that Respondent failed to disprove the "necessity" element of Petitioner's claim, the District Court turned to analyze whether the requested accommodation is "reasonable" under the FHAA. In holding that it is reasonable, the court disagreed with Respondents' arguments that the accommodation would constitute an "undue hardship" by imposing an "undue burden" or resulting in a "fundamental alteration" of their rental program. *Id.* at 40a–46a. This is at odds with other portions of its decision, recognizing that Congress made the Section 8 program voluntary in "recognition that participation in the program carries burdens that landlords may find too significant to overcome the benefits of participation." *Id.* at 41a. The District Court even acknowledged that Respondents "presented proof that accepting vouchers for [Petitioner] *could impose significant burdens* on them." *Id.* at 42a (emphasis added).

The District Court held that the Petitioner did not consider any alternatives to accepting the Section 8 voucher and its costs and benefits. *Id.* at 43a–44a. Indeed, the court found she "presented virtually no evidence that she ever seriously attempted to sell her home or find alternative housing" and that "[h]er attempts to sell her home were not conducted in good faith or with an effort to sell; [she] even admitted she had no intention of selling her home." *Id.* at 44a. Despite this finding, the court relied on Respondents' limited participation in the Section 8 program—only where it is mandated by law, or a Section 8 tenant was

grandfathered in (0.2% of Respondents' tenants)—to conclude Respondents failed to prove the accommodation is unreasonable, that is, it would constitute "an undue hardship," meaning it would impose an "undue burden" or result in a "fundamental alteration" to the rental policy. *Id.* at 35a, 40a, 46a.

Respondents appealed. Several parties filed amicus briefs in support of Petitioner's position, including the United States.[3]

3. The Court of Appeals reversed and vacated the injunction, holding that the FHAA "requires a landlord to make reasonable accommodations that directly ameliorate the handicap of a tenant" and that "the obligation does not extend to alleviating a tenant's lack of money to pay rent." App. 4a. In so holding, the Court of Appeals considered the cases Petitioner claims present a conflict and, instead of noting a conflict, found that the cases could all be applied here based on their factual differences and in support of the holding. *Id.* at 12a–14a.

In concluding there is no duty to accommodate a tenant's economic circumstances by accepting a Section 8 voucher and that Petitioner's claim was foreclosed, the Court of Appeals relied on the sound reasoning of two cases. *See id.* at 7a–9a. It relied on *Salute*, 136 F.3d at 293, which held that the FHAA did not require a landlord to accept government housing certificates as a reasonable accommodation for

[3] This Court need not entertain another uninvited amicus brief from the United States, a nonparty, as its position is clearly stated in the briefing below.

handicapped tenants. App. 7a–8a. It also relied on *Hemisphere Building Co. v. Village of Richton Park*, 171 F.3d 437 (7th Cir. 1999), which held that the FHAA does not require consideration of handicapped people's financial situation in the context of a zoning ordinance. App. 8a–9a.

Next, the Court of Appeals considered the FHAA's predecessor statute, the Rehabilitation Act of 1973, which, unlike the FHAA, addressed the term "reasonable accommodation." *Id.* at 9a–12a. The two statutes use the same language and have similar purposes. *Id.* at 10a. "Consistent with the regulation promulgated under the Rehabilitation Act," the case law that was decided under that statute "called for accommodations that provided what one court later described as the 'direct amelioration of a disability's effect.'" *Id.* at 11a. As the court further explained, "Nothing in the law suggested that the duty of 'reasonable accommodation' extended to the dissimilar action of alleviating downstream economic effects of a handicap." *Id.* In 1988, when Congress adopted the FHAA, "it acted against a background understanding that the concept of a 'reasonable accommodation' was so limited." *Id.*

In disagreeing with the reasoning of the District Court, the Court of Appeals concluded that the United States Supreme Court's more recent ruling in *Barnett*, 535 U.S. at 391, "addressed a different question and does not supersede the holdings in *Hemisphere* and *Salute*." App. 12a. Rather, as the Court of Appeals explained, "*Barnett* concerned a different statute, the [ADA], and its prohibition on discrimination in employment," *id.*, and "involved a potential

accommodation that would have directly ameliorated an employee's inability to work in cargo-handling by placing him in a mailroom job," *id.* at 14a.

In contrast to the issue in *Barnett*, the issue here is whether the duty of reasonable accommodation not only requires preferential treatment for disabled tenants in some circumstances, but whether it "goes further and extends to measures that would alleviate a disabled tenant's impoverished economic circumstances." *Id.* at 13a–14a. *Barnett* does not address that issue. *Id.* at 14a. The Court of Appeals below went on to state that the Ninth Circuit in *Giebeler* "overstated the meaning of *Barnett* by presuming that it dictates the ambitious interpretation of the FHAA that was rejected in *Hemisphere* and *Salute*, despite what *Giebeler* termed the 'facial appeal' of those decisions." *Id.*

Judge Stras concurred in the judgment. *Id.* at 14a–17a. Rather than deciding whether a housing voucher is an "accommodation" under the FHAA, he took what he described as a "simpler route": to "just conclude that the request is unreasonable." *Id.* at 14a. He recognized that participating in the Section 8 program carries with it significant regulatory burdens. *Id.* at 15a. And that here the burdens "*are even greater than usual*" because "[t]he tenant purchases the trailer and then parks it in a space owned by the landlord." *Id.* (emphasis added). This split in ownership creates "real consequences" for complying with the Section 8 requirements. *Id.* While the tenant has the burden to fulfill certain Section 8 requirements, it is the landlord, who would shoulder and suffer the financial risk of not getting paid if the tenant fails to comply

with the requirements that must be met to receive these benefits. *Id.* at 15a–16a. Eviction is also a less viable option under the housing-voucher regulations. *Id.* at 16a.

REASONS FOR DENYING THE WRIT

This Court should deny certiorari. Petitioner attempts to manufacture a conflict among the circuits using cases that are legally and factually distinguishable and are not truly in conflict. Only the Second Circuit in *Salute* and the Eighth Circuit in this case addressed the Section 8 housing choice voucher program at issue here. Both circuits held that the FHAA does not extend to forcing a landlord to accept a Section 8 voucher. Contrary to Petitioner's assertion, this issue rarely arises and presents no urgency for the U.S. Supreme Court to resolve. Section 8 has been in effect since 1974 (or 49 years) and the FHAA since 1968 (or 55 years), and these are the only two cases that have addressed this issue in this context. The Eleventh Circuit in *Schaw*, as here, also was presented with no evidence as to whether the plaintiff's disability *actually caused* his financial status. *Giebeler* overstated *Barnett* by attempting to glean two non-existent propositions from it and to expand the FHAA's application.

Moreover, this case is a poor vehicle for resolving the question presented because material facts and legal issues remain in dispute. And the Appellate Court's decision is correct. To stretch the FHAA beyond its intended bounds, as Petitioner requests, would effectively convert the Section 8 program from

a *voluntary* one into a *compulsory* program for every landlord doing business in *any* jurisdiction.

I. The circuits are not split; it is 2-0.

Petitioner has failed to demonstrate a genuine conflict among the circuits regarding the question that actually controls the outcome of this case. In attempting to present her Petition in the most appealing way to increase the chances it will be accepted by this Court, Petitioner frames only the broad issue and ignores how narrowly it would apply to her own circumstances. Her argument ignores the muddled facts of this case. Not once does Petitioner recognize that even if this Court resolves the circuits' purported split "as to whether an 'accommodation' under the Fair Housing Act can include the relaxation of a landlord's policy of refusing to accept rent from a source other than the tenant herself, where the tenant's disability prevents her from earning an income," the specific facts of this case mean the outcome most likely would not change (only the reasoning). Pet. Cert. 12. This is because in this case, the question of reasonable accommodation under the FHAA arises in the specific context of the Section 8 voucher program applied in the specific context of the owner of a manufactured home.

The true issue controlling the ultimate outcome of this case based on this unique and narrow set of facts, therefore, is one that only two circuit courts—the Second and Eighth Circuits—have addressed: whether a reasonable accommodation under the FHAA includes forced participation in the *voluntary* Section 8 housing choice voucher program. The

answer in both circuits is a resounding "no." Accordingly, even if *arguendo* this Court were to grant Petitioner's writ *and* agree with her, the outcome would not change because of the application of the Section 8 voucher program. Instead of addressing this fatal discrepancy head-on, Petitioner instead mistakenly argues that there is a circuit split with the Ninth and Eleventh Circuits on one side, and the Second, Seventh, and Eighth Circuits on the other side.

In *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1144–45 (9th Cir. 2003), the plaintiff became disabled after contracting AIDS and was no longer able to meet the income requirements of the apartment where he sought to live because he could not work as a result of his disability. The landlord denied his request that his mother cosign the lease because of a policy against allowing cosigners. *Id.* The Ninth Circuit, based on the facts of that case, decided that the request was a reasonable accommodation under the FHAA. *Id.* at 1159.

The Ninth Circuit found that the accommodation was "necessary" because there was an "obvious" causal link between the landlord's failure to accommodate and the plaintiff's disability. *Id.* at 1555. That is, the plaintiff was "*unemployed because of his disability* and therefore had insufficient income to qualify for the apartment." *Id.* (emphasis added). The court also found that the accommodation was "reasonable." This is because—unlike the facts in *Salute* and this case—by allowing the requested accommodation, the landlord "would not assume any substantial financial or administrative risk or burden." *Id.* at 1158. In

Giebeler, the plaintiff's mother had "significant assets," her home was "located less than a mile" from the plaintiff's apartment, *id.*, and she "demanded no special, burdensome rights as a condition of her tenancy," *id.* at 1158 n.12; *see also id.* (recognizing, in contrast, the *Salute* Court "was concerned that 'participation in a federal program will or may entail financial audits, maintenance requirements, increased risk of litigation, and so on.'"). Additionally, the court noted that in the past, the landlord had also "on occasion waived the minimum income requirement and allowed cosigners and other alternative arrangements." *Id.* at 1158.

In deciding that the plaintiff's request was a reasonable accommodation under the FHAA, even though the accommodation resulted in a preference for disabled tenants over similarly situated nondisabled tenants, the Ninth Circuit purported to rely on *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). *Giebeler*, 343 F.3d at 1149–50. According to *Giebeler*, *Barnett* supports two propositions: an accommodation under the FHAA (1) "may indeed result in a preference for disabled individuals over otherwise similarly situated nondisabled individuals," and (2) "may adjust for the practical impact of a disability, not only for the immediate manifestations of the physical or mental impairment giving rise to the disability." *Id.*

But closer analysis of *Barnett*, which involved the ADA—not the FHAA—dictates a different understanding: *Barnett* does not support the two propositions upon which Petitioner relies so heavily. In *Barnett*, the plaintiff injured his back while working in a cargo-handling position; because of that

injury, he was transferred to a less physically demanding position in the mailroom. 535 U.S. at 394. The defendant had a seniority-based policy allowing senior employees to bid for the plaintiff's new job. *Id.* The plaintiff requested that the defendant accommodate his disability-imposed limitations by making an exception to its policy to allow him to remain in the mailroom. *Id.* The defendant declined. *Id.* In his lawsuit, the plaintiff alleged that the defendant violated the ADA by failing to reasonably accommodate his disability. *Id.* at 394–95.

As to the first proposition above, *Barnett* merely stated that when a disabled person receives a reasonable accommodation under the ADA, then by definition the person will have inherently received some preference over another. *See id.* at 397. The Court explicitly supported the position that the ADA requires only that the disabled be treated equally—not preferentially—in comparison with the nondisabled: "[P]references will sometimes prove necessary to achieve the [ADA's] *basic equal opportunity goal*." *Id.* (emphasis added). To be clear, the *implicit* preference for a disabled person is allowed only to the extent that that person is treated as an equal to the nondisabled. *See Mei Ling v. City of Los Angeles*, 2012 WL 12918729, at *9 n.3 (C.D. Cal. 2012) (noting that "[s]imply obtaining preferential treatment … is not a legitimate end result in and of itself.").

As to the second proposition above, both *Giebeler* and the District Court below seemed to suggest that *Barnett* supports the aforesaid proposition where the disabled individual suffers economic hardships

related to the disability. *See Giebeler*, 343 F.3d 1143 at 1150; App. 38a. That interpretation is unavailing. *Barnett* affirmed that reasonable accommodations must alleviate the direct physical or mental effects of a disability by framing the issue of the proposed accommodation, stating, the plaintiff "has requested assignment to a mailroom position as a 'reasonable accommodation.'" *Barnett*, 535 U.S. at 402–03. The transfer of the plaintiff to the mailroom—not the alteration of the seniority-based policy—would alleviate the physical effects of the disability. *Id.*

Although the Ninth Circuit misinterpreted *Barnett* for the above reasons, the Ninth Circuit expressly stated that "mandating lower rents for disabled individuals would *fail the kind of reasonableness inquiry"* that the law requires. *Giebeler*, 343 F.3d at 1154 (emphasis added). That proposition—from the only circuit court decision Petitioner relied on that actually addresses whether an economic impact *caused by* a disability must be accommodated under the FHAA—comes close to effectively defeating Petitioner's requested writ relief.

Almost two decades later, the Eleventh Circuit described *Giebeler* as an "easier case" than the one it confronted in *Schaw v. Habitat for Humanity of Citrus Cty., Inc.*, 938 F.3d 1259, 1271 (11th Cir. 2019), which Petitioner also overreads. Pet. Cert. 13–14. In *Schaw*, the plaintiff—like Petitioner here—was *not* found to be too disabled to earn an income. And contrary to Petitioner's contention, the Eleventh Circuit did not reach "the same holding" as *Giebeler*. To be sure, it was unclear in *Schaw* whether there was "a direct causal link between the impairment and the inability

to meet the minimum-income requirement." *Schaw*, 938 F.3d at 1271. Petitioner incorrectly asserts that *Schaw* explicitly decided that the plaintiff was "too disabled to earn an income" due to the plaintiff's handicap of quadriplegia. *Compare* Pet. Cert. 13, *with Schaw*, 938 F.3d at 1271–72.

Importantly, the Eleventh Circuit reversed and remanded the summary judgment ruling as to the plaintiff's failure-to-accommodate claim to determine, among other issues, whether the plaintiff's "*financial state is a result of his disability* such that the requested accommodation is 'necessary to afford [him an] equal opportunity to use or enjoy a dwelling.'" *Schaw*, 938 F.3d at 1275 (emphasis added). *Schaw* further explained that, on remand, when analyzing whether the plaintiff's disability actually caused his inability to pay, the district court should consider, e.g., the plaintiff's "pre-accident salary, or whether he lived independently or paid rent anywhere before the accident." *Id.* at 1271. With the unclear record as to whether the plaintiff would have been able to meet the defendant's income requirement with wages earned before becoming paralyzed, the Court lacked evidence of "the clear causal connection present in *Giebeler*." *Id.* "We just don't know," said the Eleventh Circuit. *Id.*

Bolstering Respondents' position that this Court's review is unwarranted, consider the Second Circuit's decision that addressed whether the rejection of tenants with Section 8 housing choice vouchers violates the FHAA. The Second Circuit reached the same result as the Eighth Circuit in this case.

Other than this case, only *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir. 1998), specifically addressed whether a waiver of an established policy against accepting new Section 8 tenants is a reasonable accommodation required by the FHAA, holding that "[e]conomic discrimination—such as the refusal to accept Section 8 tenants—is *not cognizable as a failure to make reasonable accommodations, in violation of § 3604(f)(3)(B).*" In *Salute*, two plaintiffs with disabilities, who qualified to receive Section 8 housing assistance, sued after the landlord refused to accept new Section 8 tenants. *Id.* at 295–96. Only four times over 15 years, had the landlord agreed to accept Section 8 payments on behalf of tenants who were already renters. *Id.* at 296. Unlike here, each time, the tenant became a Section 8 certificate holder during the tenancy, and the landlord agreed to accept the Section 8 subsidies rather than evict. *Id.* At the time of the opinion's writing, two of the Section 8 tenants still resided at the landlord's apartments. *Id.*

The Second Circuit affirmed the district court's ruling that an accommodation for the financial circumstances of a disabled person is not a "reasonable accommodation" under the FHAA. *Id.* at 301–02. As the Second Circuit reasoned, "We think that the voluntariness provision of Section 8 reflects a congressional intent that the burdens of Section 8 participation are substantial enough that participation should not be forced on landlords, either as an accommodation to handicap or otherwise." *Id.* at 300.

The *Salute* Court also held that forcing a landlord to accept a Section 8 voucher was not an "accommodation" under the FHAA. *Id.* at 302. The plaintiffs in *Salute* were—like Petitioner here—not requesting an accommodation that alleviated their handicaps but requested an accommodation to remedy "their economic status, on the ground that this economic status results from their being handicapped." *Id.* at 301. "We think it is fundamental," said the Court, "that the law addresses the accommodation of handicaps, *not the alleviation of economic disadvantages that may be correlated with having handicaps*." *Id.* (emphasis added).

Petitioner relies heavily on Judge Calabresi's dissenting opinion in *Salute*. *See* Pet. Cert. at 14–15, 20–21. In particular, she block quotes an analogy standing for the proposition that where a person is "poor *because* they are disabled (blind people who need a seeing-eye dog *because* they are blind)," a landlord must reasonably accommodate that person. Pet. Cert. at 15–16 (quoting *Salute*, 136 F.3d at 310). That analogy only serves to further weaken Petitioner's claim as the record is absent evidence that she is financially compromised *because of* her disability. *See* App. 4a, 29a, 39a.

One year after *Salute*, the Seventh Circuit in *Hemisphere Bldg. Co. v. Village of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999), adopted a similar view as the majority opinion in *Salute* and the Eighth Circuit below, holding that the FHAA does not require "consideration of handicapped people's financial situation." As Petitioner admits, *Hemisphere* did not involve "a request to pay rent from a source other than

the tenant's funds." Pet. Cert. at 16. *Hemisphere*'s holding is limited to its facts. It involved a zoning ordinance that raised housing costs that impacted everyone (not the handicapped by reason of their handicap), which did not need to be waived for the handicapped. *Hemisphere*, 171 F.3d at 440.

Unlike the facts in this case and *Salute*, the facts in *Schaw*, *Giebeler*, and *Hemisphere* share one thing in common: *they did not address the Section 8 housing choice voucher program*. Neither the Eighth Circuit nor Respondents note the existence of a circuit split as described by Petitioner. *See generally* App. 2a–17a; Resp. 8th Cir. Br. Nor do the courts. The Courts have, however, recognized their important factual distinctions. The Ninth Circuit in *Giebeler* acknowledged that "the requested accommodation in this case differs from the one requested in *Salute* in two ways that could be significant in a reasonableness analysis." *Giebeler*, 343 F.3d at 1159 n.12 (noting that, unlike *Giebeler*, in *Salute*, the requested accommodation was a waiver of an established policy against accepting Section 8 vouchers as payment for rent, and unlike the tenants in *Salute*, *Giebeler* involved a proposed lessee who more than met the economic qualifications required to rent and demanded no special, burdensome rights as a condition of her tenancy). The Eleventh Circuit in *Schaw* described *Giebeler*'s facts, proclaiming: "*Giebeler* is an easier case." *Schaw*, 938 F.3d at 1271. In *Hemisphere*, Judge Posner rejected the argument—"that if handicaps cause poverty, financial concessions to the handicapped are accommodations"—propounded by Judge Calabresi's dissenting opinion in

Salute because of the radical results that would follow. *Hemisphere*, 171 F.3d at 441. A disagreement between two individual (esteemed) jurists does not alone create a circuit conflict.

The specific issue presented in *Salute*—involving the waiver of a policy against accepting Section 8 vouchers—and addressed in this case should be allowed to percolate through the lower courts and sister circuits. Petitioner contends that the issue presented here "arises so often, several of the district courts have discussed the split." Pet. Cert. at 17. But three of the five cases Petitioner cites do not address whether a Section 8 voucher is a reasonable accommodation under the FHAA,[4] three of the five cases support Respondents' position on the merits,[5] and the one remaining case is distinguishable.[6] No petition for cert was filed in any of the five cases cited by Petitioner.

---

[4] *See Daniel v. Avesta Hous. Mgmt. Corp.*, 2013 WL 4541152 (D. Maine 2013); *Hayden Lake Recreational Water & Sewer Dist. v. Haydenview Cottage, LLC*, 835 F. Supp. 2d 965 (D. Idaho 2011); *Evans v. UDR, Inc.*, 644 F. Supp. 2d 675 (E.D.N.C. 2009)

[5] *See Daniel*, 2013 WL 4541152, at *1 (granted summary judgment for landlord where tenant alleged FHAA violation); *Evans*, 644 F. Supp. 2d at 684–85 (same); *Spieth v. Bucks Cty. Hous. Auth.*, 594 F. Supp. 2d 584, 593–94 (E.D. Pa. 2009) (granted motion to dismiss for landlord where tenant failed to state a claim under FHAA, claiming general financial hardship).

[6] *Murphy v. Fullbright*, 2012 WL 4754730, at *3 (S.D. Cal. 2012) (guided by *Giebeler*, finding landlord's motion to strike not appropriate to resolve dispute, "even if the economic accommodation may prove to be unreasonable under the FHA").

Other district and federal circuit courts need to further define and clarify the problem presented here and address competing views before determining whether this Court's intervention is necessary. As it stands, Petitioner's request is nothing more than a solution in search of a problem.

II. Even if there is a circuit split, this case is not the proper vehicle to resolve it.

This case is a poor vehicle for reviewing the question presented. The murky record in this matter means significant material facts remain in dispute and are unclear. Petitioner failed to establish that she is unable to work *because of* her disability. There was no factual finding that Petitioner "is too disabled to earn an income." To the contrary, there was evidence that Petitioner worked "after she was declared disabled in 1993," App. 29a, and "continued to pay her rent through November 2020," *id.* at 30a. At trial, she presented no evidence about "her income before she became disabled or her income from part-time employment after she became disabled." *Id.* at 29a. Nor did she present evidence as to "why she is currently unable to work part-time." *Id.* at 39a. Even if Petitioner is allowed to use a Section 8 voucher, it remains disputed whether Petitioner will be able to pay the full amount of her rent because the Section 8 payments are never guaranteed. *See Id.* at 15a–16a (Stras, J., concurring).

Moreover, given the layers of complexity that are attached to the Section 8 program, extraneous legal issues abound, adding further clutter to the record. Respondents participate in the Section 8 program in

two limited circumstances: where (1) the law requires acceptance of Section 8 vouchers, or (2) a previous owner of a newly acquired manufactured home community accepted Section 8 tenants. Even if this Court took up Petitioner's framing of the issue and hypothetically ruled in her favor, unresolved questions would remain not only as to *whether* a landlord can be forced to participate in the Section 8 housing choice voucher program as a reasonable accommodation of a disabled individual's financial condition, but also as to *when* and under what circumstances that obligation arises. Further highlighting that there is nothing "clean" about the issue presented here, when it comes to forcing landlords to participate or expand their participation in the Section 8 program, four possible outcomes exist.[7]

Petitioner wants the Supreme Court to use her case to create the law of the land. She specifically wants this Court to declare that a disabled individual's economic circumstances must be accommodated even where the requested accommodation may still be unreasonable. It may not be deemed a reasonable one because there are inherent burdens specific to the

[7] These four possible outcomes include: (1) all landlords must participate in the Section 8 program as an accommodation; (2) landlords who already participate in the Section 8 program *anywhere* must accept the Section 8 voucher as an accommodation; (3) landlords who already participate in the Section 8 program in a *specific jurisdiction* where the case arose must accept the Section 8 voucher as an accommodation; or (4) landlords do not have to accept the Section 8 voucher as a reasonable accommodation regardless of the extent of previous and current participation in the Section 8 program.

Section 8 voucher program, and it would require significant alterations to the very nature of the tenancy itself. *See* App. 14a–17a (Stras, J., concurring). A better case to decide this issue would be one with straightforward facts like *Giebeler*, 343 F.3d at 1144, where the sole issue on appeal was whether a disabled tenant's financial circumstances could form the basis for a reasonable accommodation under the FHAA. In contrast, here, this Court would first need to decide (1) whether the economic impact of the disability must be accommodated under the FHAA and would then have to decide (2) whether acceptance of a Section 8 voucher is a "reasonable" accommodation even under that framework.

Even if this Court agrees with Petitioner that her financial circumstances must be considered, Respondents will still prevail under the reasonable accommodation analysis. *See* App. 14a–17a (Stras, J., concurring); *see also Salute*, 136 F.3d at 300 ("[I]t would be unreasonable to require" a landlord "to shoulder the burdens of Section 8."). This result exemplifies the legal confusion engendered by the murky facts of this case, and why it is not suited for certiorari review.

In spite of the above, Petitioner maintains that the instant issue "is important because it arises so often" and refers this Court to 13 district court cases. Pet. Cert. at 18–19. A closer look at Petitioner's string cite of cases demonstrates this is not the case. Of those 13 cases, eight cases do not address whether a Section 8 voucher is a reasonable accommodation under the

FHAA.[8] The remaining five cases are distinguishable and support Respondents' position on the merits.[9] No petition for cert was filed in any of the 13 cases cited by Petitioner.

III. The decision below is right.

According to Petitioner, certiorari is warranted because the Eighth Circuit's "decision below is contrary to the text of the Fair Housing Act." Pet. Cert. 19. Specifically, Petitioner argues that the "statute

---

[8] *See CNY Fair Hous., Inc. v. Welltower Inc.*, 588 F.Supp.3d 282 (N.D.N.Y. 2022); *Schueller v. Pennypack Woods Home Ownership Ass'n*, 2021 WL 7285246 (E.D. Pa. 2021); *Fair Hous. Rights Ctr. In Se. Pa. v. Morgan Props. Mgmt. Co., LLC,* 2018 WL 4489653 (E.D. Pa. 2018); *Mercado v. Realty Place, Inc.*, 2015 WL 5626510 (S.D. Ohio 2015); *Riccardo v. Cassidy*, 2012 WL 651853 (N.D.N.Y. 2012); *Hevner v. Village East Towers, Inc.*, 2010 WL 11680173 (S.D.N.Y. 2010); *Lanier v. Assoc. of Apartment Owners of Villas of Kamali'i*, 2007 WL 842069 (D. Haw. 2007); *Bentley v. Peace and Quiet Realty 2 LLC*, 367 F.Supp.2d 341 (E.D.N.Y. 2005).

[9] *See Arnold v. Elmington Prop. Mgmt., LLC*, 2023 WL 4242757, at *4 (N.D. Ala. 2023) (landlord provided "*no evidence* that granting [tenant's] accommodation would burden it *at all*") (emphasis in original); *Doe v. WCP I, LLC*, 2009 WL 1564909, at *6–*7 (Cal. Ct. App. 2009) (affirming lower court's dismissal of tenant's failure-to-accommodate claim due to lack of evidence and authority); *Sutton v. Freedom Square Ltd.*, 2008 WL 4601372, at *4–*5 (E.D. Mich. 2008) (distinguishing *Giebeler*, granting landlord's summary judgment motion as to plaintiff's failure-to-accommodate claim); *Freeland v. Sisao LLC*, 2008 WL 906746, at *1, *5 (E.D.N.Y.) (denying landlord's motion to dismiss tenant's failure-to-accommodate claim where tenant's disability prevented her from working and earning an income); *Bell v. Tower Mgmt. Serv., L.P.*, 2008 WL 2783343, at *1, *8 (D.N.J. 2008) (granting landlord's motion to dismiss tenant's failure-to-accommodate claim where tenant failed to plead a causal nexus between her disabilities and requested accommodation).

does not distinguish between accommodations intended to alleviate a disability's *physical* effects and accommodations intended to alleviate a disability's *economic* effects." *Id.* at 19–20. The FHAA does not include a "source-of-income" class or Section 8 tenants in its list of protected classes, *see* 42 U.S.C. § 3604, and Petitioner has failed to show—and there has been no finding by a court below—that her inability to afford her lot rent without a Section 8 voucher is *because of* her disability, *see* App. 4a, 29a, 39a. Nevertheless, Petitioner argues that the Respondents' policy of rejecting Section 8 tenants, "fits squarely within [the FHA's] statutory text, where the tenant's disability prevents her from earning an income." Pet. Cert. 20. Petitioner's conclusory arguments miss the mark.

Petitioner's reliance on the ADA as the appropriate comparison statute with the FHAA—instead of the Rehabilitation Act of 1973, which Judge Colloton addressed at length in his majority opinion below, App. 9a–11a—carries little force. The difficulty of engrafting the ADA's definition of terms into the FHA, as other courts have recognized, is due in part to "the distinct purposes the two statutes serve." *Fair Housing of Dakotas, Inc.*, 778 F.Supp.2d at 1035. The FHA prohibits discrimination against handicapped persons in providing housing. *Id.*; 42 U.S.C. § 3604(f)(3)(B). Although the ADA and FHA both "prohibit discrimination on the basis of disability, it is not unexpected that different rules might govern in public places versus private dwellings." *Fair Housing of Dakotas, Inc.*, 778 F.Supp.2d at 1035. Nor is it unexpected that the ADA defines "discriminate" to include "not making reasonable accommodations to

the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," as it applies in a work-related context. 42 U.S.C. § 12112(b)(5)(A).

The legislative history of the FHA's predecessor statute, the Rehabilitation Act of 1973, which uses the same language, serves a similar purpose, and was enacted shortly before Congress adopted the FHAA in 1988, providing clearer guidance on the application of the term "reasonable accommodation" here. *See* App. 10 (quoting *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) for the proposition that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."). In accordance with the regulation promulgated under the Rehabilitation Act of 1973, the intent of the legislature as to that Act and the FHAA was to limit application of the concept "reasonable accommodation" to, what one court described as, the "direct amelioration of a disability's effect." *Id.* at 11a (quoting *Bryant Woods Inn, Inc. v. Howard Cnty.*, 124 F.3d 597, 604 (4th Cir. 1997)). The concept does not apply, as Petitioner would have it, to the alleviation of "downstream economic effects of a handicap." *Id.*

Even if Petitioner's position—that a disabled tenant can require use of a voucher *because of* her disability—is correct, the other side of the argument is that a disabled tenant can qualify for the use of a Section 8 voucher for reasons *unrelated* to her disability (non-disabled low-income individuals

qualify for Section 8 vouchers). That factual murkiness is compounded because here there has been *no finding* that Petitioner's inability to afford her lot rent without a Section 8 voucher is *because of* her disability, *id.* at 4a, 29a, 39a, and the district court noted the "weak" evidence on her ability to pay before improperly shifting her burden to Respondents to rebut, *id.* at 39a.

Further weakening Petitioner's position, she herself acknowledges that "it is conceivable that participation in a voucher program might impose too great a financial or administrative burden on a landlord" in which case the request would "not be reasonable." Pet. Cert. at 23 n.4. This acknowledgment alone provides all the reasons this Court need not grant the petition for writ of certiorari here. To the extent this Court's intervention on this issue is required, it would be infinitely more useful to weigh in on a case presenting a truly clean set of facts rather than through an opinion based on a case with such a nuanced and turbid factual background that it would inevitably be distinguished more often than followed.

Trying to undermine the Second Circuit's proposition in *Salute*—that "[t]he FHAA does not elevate the rights of the handicapped poor over the rights of the non-handicapped poor"—Petitioner again overreads *Barnett*. *Id.* at 23. She cites this language from *Barnett*: "By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially." *Id.* But that was not the holding or even a secondary point of *Barnett*. Rather, as

discussed above, this Court mentioned that point in passing as an obvious corollary to requiring an accommodation for a disability at all.

To be clear, the FHAA requires elevating the rights of disabled persons *only to the extent* doing so would allow the disabled individual to enjoy "the *same* … opportunities that those without disabilities automatically enjoy." *Barnett*, 535 U.S. at 397 (emphasis in original); *see Schanz*, 998 F.Supp. at 792 n.15 ("[T]he FHAA does not entitle a handicapped person to a preference, but merely an equal opportunity."). In the context of Section 8 vouchers, however, the disabled tenant enjoys *greater* opportunities than non-disabled comparators. It is not disputed here that the Section 8 program provides *more favorable lease terms* and protections than the opportunities afforded to a non-disabled person without Section 8 vouchers. Thus, Section 8 vouchers are not "reasonable accommodations" under the FHAA, and this case is not suited to the much broader principal Petitioner is attempting to have this Court rule on as the law of the land.

By incorrectly claiming that Petitioner is "too disabled to work" and that the waiver of Respondents' no-voucher policy would only require Respondents "to receive two rent checks each month rather than one," Pet. Cert. at 24, Petitioner ignores the fact that no court has found she is "too disabled to work" and disregards all the burdens of the Section 8 program, including the requirement that a private landlord enter into a secondary lease agreement directly with the government through the required Housing Assistance Payments Contract. Respondents had no

issue accepting no-strings-attached payments from a non-Section 8 source before. *See* App. 29a. The parties would not be here if Petitioner had merely requested that they continue to accept rental assistance checks from charitable organizations, where no additional obligations are tied to accepting this form of payment. Such facts are closer to the facts in *Giebeler* because acceptance of no-strings-attached payments would not "alter the essential obligations" of the tenancy relationship or create "substantial financial or administrative risk or burden" as is the case here. *Giebeler*, 343 F.3d at 1157–58.

Finally, to try to tug at this Court's heartstrings, Petitioner suddenly is not only "likely to lose her home" but must also now "be institutionalized." Pet. Cert. at 24. She further alleges that countless disabled users of Section 8 vouchers will lose their homes. *Id.* Not so. Petitioner's suggestions are unsupported. No authority, empirical evidence, or statistics in the underlying proceedings identifies the number of Section 8 vouchers only accepted as a reasonable accommodation for a disability. Nothing in the record suggests that disabled, Section 8 tenants will somehow lose their vouchers or be deprived of their ability to live independently. The Eighth Circuit's decision below will have no impact on landlords who have voluntarily chosen to participate and take on the burdens of the Section 8 program. Recognizing these "substantial" burdens, Congress intended Section 8 to be a *voluntary* program involving *voluntary* participation by landlords. In contrast, Petitioner's requested relief may very well lead to the perverse result of *discouraging* property management

companies from ever accepting Section 8 housing choice vouchers (including those for tenants who were allowed to utilize them previously) unless required to do so by law for fear of being required to accept such vouchers as an accommodation in every jurisdiction in which they operate. Stretching the FHAA beyond its intended bounds, as Petitioner requests, would effectively convert the Section 8 program from a *voluntary* one into a *compulsory* program for every landlord doing business in *any* jurisdiction. Such an absurd and perverse result would lead to "evictions of persons that Congress is solicitous to protect." *Salute*, 136 F.3d at 298.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

ABBEY C. FURLONG
Counsel of Record
DAVID C. WATERMAN
LANE & WATERMAN LLP
220 N. Main St., Ste. 600
Davenport, IA 52801-1987
(563) 324-3246
afurlong@l-wlaw.com
dcwaterman@l-wlaw.com

BRIDGET R. PENICK
JODIE C. MCDOUGAL
FREDRIKSON & BYRON, P.A.
111 E. Grand Ave., Ste. 301
Des Moines, IA 50309
(515) 242-8900
bpenick@fredlaw.com
jmcdougal@fredlaw.com

Counsel for Respondents