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 U.S. Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition argues: (1) that the circuits are not split; (2) that this case would be a poor vehicle for resolving the split; and (3) that the decision below is correct. Respondents are mistaken in all three respects.

I. The circuits are split.

The question presented is whether an "accommodation" under the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(b), 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 is too disabled to work. Two circuits say yes. *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1148-55 (9th Cir. 2003); *Schaw v. Habitat for Humanity of Citrus Cty., Inc.*, 938 F.3d 1259, 1269-72 (11th Cir. 2019). Three circuits, including the Eighth Circuit in the decision below, say no. *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 301-02 (2d Cir. 1998); *Hemisphere Bldg. Co. v. Village of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999); Pet. App. 7a-14a.

These courts recognize that they are divided. *See Giebeler*, 343 F.3d at 1154 ("We reject the reasoning of *Salute* and *Hemisphere*."); *Schaw*, 938 F.3d at 1270 (discussing the holding of *Salute* and retorting "Not in this Circuit."); Pet. App. 14a (rejecting the holding of *Giebeler*).

The split is based on conflicting understandings of the "accommodation" required by the Fair Housing Act.

The Second, Seventh, and Eighth Circuits hold that the FHA requires landlords to accommodate only the physical effects of a disability, not a disabil-

ity's economic effects. *Salute*, 136 F.3d at 301 ("We think it is fundamental that the law addresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps."); *Hemisphere*, 171 F.3d at 440 (confining "the duty of reasonable accommodation in 'rules, policies, practices, or services' to rules, policies, etc. 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"); Pet. App. 9a (after discussing these portions of *Salute* and *Hemisphere*, explaining: "We conclude that the reasoning of these decisions is sound, and that it forecloses Klossner's claim here.").

By contrast, the Ninth and Eleventh Circuits hold that the FHA requires landlords to accommodate the economic effects of a tenant's disability as well as the disability's physical effects. *Giebeler*, 343 F.3d at 1150 ("[A]ccommodations 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."); *Schaw*, 938 F.3d at 1270 (holding that the "accommodation" required by the FHA "is one that alleviates not handicaps *per se*, but rather the *effects* of those handicaps") (internal quotation marks omitted).

Below, respondents acknowledged that the circuits are split. They argued to the Eighth Circuit that "the district court mistakenly relied upon the reasoning of the Ninth Circuit in *Giebeler*." Resp. 8th Cir. Br. 46. They urged the Eighth Circuit to follow the Second Circuit's decision in *Salute* instead. They noted that "[o]ne scholar has persuasively argued

why the court's decision in *Salute* was correct, whereas the court's ruling in *Giebeler* was improper." *Id.* at 46 n.4 (citation and internal quotation marks omitted).

Respondents have now changed their minds. BIO 15-25. But their new argument requires them to rewrite the question presented. Respondents' new version of the question is whether landlords must accept Section 8 housing vouchers from disabled tenants. BIO i. That's not the question we presented in our certiorari petition. A respondent can always make a circuit split disappear by changing the question presented!

Respondents' rewritten question makes little sense in any event. There are many ways a tenant who is too disabled to work might get assistance in paying her rent. She might use the Section 8 program. She might secure funds from one of the other government programs that help poor people obtain housing. *See* Brief of Amicus Curiae National Housing Law Project at 10 n.23. She might include another person as a co-signer on the lease. She might simply count on financial support from a relative or friend.

The question presented in this case is the same for all these alternative sources of funds. Where a tenant is too disabled to work, can the FHA require the landlord to relax a policy of not accepting rent from one of these alternative sources? The answer to the question turns on whether "accommodation" means accommodation merely of a disability's physical effects or whether it also includes the accommodation of a disability's economic effects. If the answer

is "yes" (or "no") for one of these alternative sources, it will be the same for all the others.

Under the view taken by the Second, Seventh, and Eighth Circuits, the FHA could not require a landlord to accept rent from *any* source other than the disabled tenant herself, because that would not be an "accommodation" under the statute. By contrast, under the view taken by the Ninth and Eleventh Circuits, the FHA *could* require a landlord to accept rent from a source—any source—other than the disabled tenant herself, where accepting rent from the alternative source would be reasonable, because that *would* be an "accommodation" under the statute.

II. This case is an excellent vehicle.

Respondents also err in contending that this case is a poor vehicle. BIO 25-28.

Contrary to respondents' view, the facts of the case are not "murky," and they can no longer be "in dispute." BIO 25. The District Court conducted a bench trial and made explicit findings of fact. The District Court found that Suellen Klossner is too disabled to work and earn an income.

Here are some of the facts found by the District Court:

- "Plaintiff is a person with a 'handicap' as defined by Title 42, United States Code, Section 3602(h)." Pet. App. 29a.
- "Defendants have been aware of plaintiff's disabilities." *Id.*
- "Plaintiff asked defendants to accept the housing choice voucher." *Id.*
- "Defendants declined to accept the voucher." *Id.* at 29a-30a.

- "Plaintiff continued to pay her rent through November 2020 without the voucher assistance and *despite being unemployed due to her disability*." *Id.* at 30a (emphasis added).

In its conclusions of law, the District Court repeated these factual findings:

- "Here, *plaintiff's disabilities prevent her from working*." *Id.* at 35a (emphasis added).
- "As a result, she is on a fixed income limited to government aid that is insufficient to pay the market rent from her own resources." *Id.*
- "*Plaintiff has proved that her disability has prevented her from working*." *Id.* at 37a (emphasis added).
- "Thus, an accommodation that would allow her to supplement her rent payments through another funding source is necessary to ameliorate the effect of her disability: her inability to work to earn enough money to pay her rent." *Id.* at 37a-38a.

The facts of this case are as clear as they could possibly be.

Respondents nevertheless devote much of their brief in opposition to relitigating the facts. They continue to claim, erroneously, that "Petitioner failed to establish that she is unable to work *because of* her disability." BIO 25. *See also id.* at i ("The District Court did not find that her disability *caused* her inability to afford her rent."); *id.* at 6 ("[N]o evidence in the record links her inability to work and earn *any* income to her disabilities."); *id.* at 29 ("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."); *id.* at 31 ("[T]here 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 32 ("[N]o court has found that she is 'too disabled to work.'").

In fact, the District Court *did* find that Suellen Klossner is too disabled to work and that her disability is the reason she needs assistance to pay her rent.

In the District Court, respondents had every opportunity to conduct discovery, yet they presented no evidence rebutting the fact that Klossner is too disabled to work. Pet App. 39a. Respondents note that she tried to work, BIO 6, but that was many years ago, long before she requested an accommodation for her disability. Pet. App. 29a. The record is clear that at all relevant times she has been unemployed and unable to work. The District Court correctly concluded that "plaintiff presented enough evidence—and there was no evidence to the contrary—for the Court to find by a preponderance of the evidence … that but for plaintiff's disability she could work and earn enough money to pay her rent." *Id* at 39a.

Respondents err further in suggesting that the Section 8 program involves "extraneous legal issues" that will add "clutter to the record." *Id.* at 25. There are no extraneous legal issues. The question presented is the only issue left in this case.

Respondents err again when they accuse us of arguing that landlords must make an accommodation even if the accommodation would be unreasonable. *Id.* at 26. The statute requires only "reasonable accommodations." 42 U.S.C. § 3604(f)(3)(B). Whether a

proposed accommodation is reasonable is a fact-intensive question that depends on all the circumstances of a particular case. Here, the District Court engaged in a lengthy analysis of the facts and found that Suellen Klossner's proposed accommodation *is* reasonable, because respondents would still be paid the full amount of rent, and because receiving two checks each month rather than one would not be an undue hardship. Pet. App. 40a-46a.

At this stage, moreover, the question presented is *not* whether accepting Klossner's voucher is reasonable. The question is whether accepting the voucher is an "accommodation" under the Fair Housing Act. The Eighth Circuit decided it is not an accommodation, so the court never addressed respondents' claim that the District Court erred in finding it reasonable. (Only Judge Stras addressed this claim, in his opinion concurring in the judgment. *Id.* at 14a-17a.) If this Court grants certiorari and reverses, respondents will be free to raise this issue again in the Court of Appeals. We of course disagree with respondents' prediction that they will prevail on this point. BIO 27. In our view, the Court of Appeals would be very unlikely to disturb the District Court's reasoned, fact-specific, and correct conclusion that the accommodation is reasonable. But at this stage it makes no difference who is right in this debate. This Court often grants certiorari to decide questions in precisely this posture, where a decision in favor of the petitioner may result in further litigation in the lower courts.

III. The decision below is wrong.

Respondents' argument on the merits, *id.* at 28-34, conspicuously avoids discussing the text of the statute. The Fair Housing Act provides that discrimination against the disabled "includes … a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). The statute does not distinguish between accommodations meant to alleviate a disability's *physical* effects and accommodations meant to alleviate a disability's *economic* effects. It just says "accommodations." Where a tenant is too disabled to work, an accommodation in a no-voucher rule would "afford such person equal opportunity to use and enjoy a dwelling," because it would allow the disabled tenant to pay rent just as readily as a non-disabled tenant who has the capacity to earn an income by working.

Respondents appear to misunderstand the lesson to be drawn by comparing the FHA and the Americans With Disabilities Act. BIO 29-30. The ADA also requires reasonable accommodations, but only "reasonable accommodations *to the known physical or mental limitations* of an otherwise qualified individual." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). The italicized phrase is absent from the FHA. The natural inference is that in the FHA, Congress did not intend "accommodations" to mean only accommodations to the physical effects of a disability. Rather, Congress simply meant "accommodations."

Respondents erroneously suggest that this straightforward interpretation of the statute would

allow a disabled tenant to use a housing voucher "for reasons *unrelated* to her disability." BIO 30. Not at all. If a disabled tenant's lack of funds is not caused by her disability, the FHA would not require the landlord to make an accommodation in a no-voucher policy, because the accommodation would not be "necessary to afford [the disabled] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Judge Calabresi put it best: "The plaintiffs could be poor people who happen to be disabled …, or they could be people who are poor *because* they are disabled …. It is only in the latter case—where the would-be tenant needs the Section 8 subsidy as a direct result of a disability—that the housing complex must reasonably accommodate that person." *Salute*, 136 F.3d at 310 (Calabresi, J., dissenting).

Respondents also err in contending that a straightforward interpretation of the statute would give disabled tenants greater rights than non-disabled tenants. BIO 32. One might just as well say that disabled drivers have greater rights than non-disabled drivers because they get better parking spaces. The whole point of requiring "reasonable accommodations" is to afford disabled people opportunities equal to those enjoyed by the non-disabled, where such opportunities can be provided without too much difficulty.

Finally, respondents offer a parade of extraordinarily unlikely horribles. *Id.* at 33-34. Landlords will not be forced to accept housing vouchers from the vast majority of their tenants. They would only have to accept vouchers in the tiny fraction of cases where (1) a tenant is disabled under the FHA, (2) the ten-

ant's disability prevents the tenant from working and earning an income, (3) the tenant's lack of income requires the tenant to use a voucher to help pay the rent, and (4) requiring the landlord to accept a voucher would be reasonable in light of all the circumstances. Nor will landlords be discouraged from participating in the Section 8 program. The Fair Housing Act applies equally to all landlords, whether or not they participate in the program. Interpreting "accommodations" literally, to mean "accommodations," will not make the Section 8 program any less attractive to landlords.

Once all this smoke is cleared away, this case can be summed up in two sentences. The view taken by the Ninth and Eleventh Circuits (and by Judge Calabresi in the Second) is true to the text of the Fair Housing Act. By contrast, the Second, Seventh, and Eighth Circuits read into the FHA a limitation that appears nowhere in the statute.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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