No. 22-40637

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WOMEN'S ELEVATED SOBER LIVING L.L.C.; CONSTANCE SWANSTON,

Plaintiffs-Appellees/Cross-Appellants

SHANNON JONES,

Plaintiff-Appellee

v.

CITY OF PLANO, TEXAS,

Defendant-Appellant/Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which concerns the proper application of the reasonable-accommodation provision of the Fair Housing Act (FHA). See 42 U.S.C. 3604(f)(3)(B). The Department of Justice (DOJ) and the Department of Housing and Urban Development (HUD) share

enforcement authority under the FHA. 42 U.S.C. 3610, 3612, 3614. HUD has commenced administrative proceedings against housing providers who fail to provide reasonable accommodations that meet the needs of residents with disabilities. See, *e.g.*, *Astralis Condo. Ass'n* v. *HUD*, 620 F.3d 62 (1st Cir. 2010); *Jankowski Lee & Assocs.* v. *Cisneros*, 91 F.3d 891 (7th Cir. 1996), as amended (Aug. 26, 1996). The United States has filed amicus briefs in appeals involving the FHA's reasonable-accommodation provision. See, *e.g.*, U.S. Amicus Br., *Klossner* v. *IADU Table Mound MHP, LLC, et al.*, No. 21-3503 (8th Cir. Mar. 7, 2022); U.S. Amicus Br., *Valencia* v. *City of Springfield*, 883 F.3d 959 (7th Cir. 2018) (No. 17-2773); U.S. Amicus Br., *Edwards* v. *Gene Salter Props. & Salter Constr. Inc.*, 739 F. App'x 357 (8th Cir. 2018) (No. 17-3769), cert. denied, 139 S. Ct. 1271 (2019).

The United States also has filed amicus briefs in cases involving sober living homes that have challenged city zoning ordinances under the FHA. See, *e.g.*, U.S. Amicus Br., *SOCAL Recovery, LLC* v. *City of Costa Mesa*, 56 F.4th 802 (9th Cir. 2023) (Nos. 20-55820, 20-55870); U.S. Amicus Br., *Pacific Shores Props., LLC* v. *City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013) (Nos. 11-55460, 11-55461), cert. denied, 574 U.S. 974 (2014).

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

The United States will address the following question:

Whether the district court clearly erred in deciding that a variance from a city's zoning ordinance, which permits a maximum of eight residents in a "Household Care Facility," to allow 15 residents with disabilities to live together in a sober living home, is necessary to afford those residents an equal opportunity to use and enjoy a dwelling under the FHA.

STATEMENT OF THE CASE

Plaintiffs-appellees include Constance Swanston, Shannon Jones, and Women's Elevated Sober Living LLC (WESL), which operates a sober living home at 7312 Stoney Point Drive (the Home). ROA.348, 350 (Second Am. Compl.).[1] The City of Plano, Texas (the City) is the defendant-appellant. ROA.348-349. Plaintiffs sought a variance from the City's zoning ordinance—permitting a maximum of eight residents in a "Household Care Facility"—to allow 15 residents to live together in the Home to accommodate the needs of its residents with disabilities. ROA.350-351. The City denied plaintiffs' request and offered no alternative accommodation. ROA.351. Plaintiffs filed this suit to challenge that denial. See ROA.348-372. After conducting a two-day bench trial, the district

[1] "ROA.__" refers to the page numbers of documents in the record on appeal in this case. "Br.__" indicates the page number of the City's opening brief.

court, as relevant here, ruled in favor of plaintiffs' reasonable accommodation claim. See ROA.1742-1759, 1763. The City now challenges that ruling on appeal. Br. 14-30.

1. Statutory Background

Congress enacted the FHA to provide "for fair housing throughout the United States." 42 U.S.C. 3601. To that end, the FHA 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 of * * * a person residing in or intending to reside in that dwelling." 42 U.S.C. 3604(f)(1)(B).[2] As relevant here, discrimination 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). "[P]recedent recogniz[es] the FHA's 'broad and inclusive' compass" and thus requires courts to afford its provisions "a 'generous

[2] Although the FHA uses the term "handicap," this brief uses the term "disability." The two terms have the same legal meaning, see, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998), and may be used "interchangeably," *Austin* v. *Town of Farmington*, 826 F.3d 622, 624 n.2 (2d Cir.), cert. denied, 137 S. Ct. 398 (2016).

construction.'" *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (quoting *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972)).

2. Factual History[3]

Plaintiff Swanston and her husband, James Kearins, are individuals recovering from substance use disorders (SUDs). ROA.1722. Their shared experiences led them to give back to the community and help others stay sober by opening and operating sober living homes, including the Home, which they opened in November 2018. ROA.1722-1723. Swanston owns the Home and is the primary operator of WESL. ROA.1722. Plaintiff Jones is a caretaker and lives in the Home. ROA.1722.

The Home is 5890 square feet and located in one of the City's SF-7 (single-family residential) zoning districts. ROA.1723. It has seven bedrooms, one for Jones and six for WESL residents, with each resident required to have at least one roommate. ROA.2304, 2352, 2413. The Home has had 15 residents for an extended period of time. ROA.2942-2943; see also ROA.2422-2423. Within the Home, WESL offers numerous services, including weekly meetings of Alcoholics Anonymous and Narcotics Anonymous. ROA.1723. WESL requires its residents to sign an oath and, while living in the Home, abide by its rules, such as remaining

[3] The facts are taken primarily from the district court's principal post-trial opinion and order making findings of fact and conclusions of law. See ROA.1721-1764.

sober, consenting to daily drug and alcohol testing, and helping out with chores. ROA.1723. Lastly, WESL provides help with facilitating transportation, work and employment opportunities (*e.g.*, résumé drafting, interviewing skills), and offering off-site counseling and access to drug- and alcohol-education groups. ROA.1723.

After citizens complained about WESL's operations, the City opened an investigation into the Home and discovered it was housing 15 unrelated residents. ROA.1064-1065, 1723-1724. The City informed WESL that Ordinance No. 2009-6-9 (the Ordinance) permitted a maximum of eight residents in a "Household Care Facility" in an SF-7 zone, and the number of residents in the Home exceeded that number. ROA.1724. Under the City's zoning code, a "Household Care Facility," is "[a] dwelling unit that provides residence and care to not more than eight persons, regardless of legal relationship, who are . . . disabled . . . , living together with no more than two caregivers as a single household." ROA.1724; see also ROA.2813-2815 (Ordinance); ROA.810 (permitted uses in residential districts).

WESL soon thereafter filed a reasonable-accommodation request with the City's Board of Adjustment (the Board). ROA.1724. That request sought a variance from the Ordinance to allow 15 residents with disabilities to live together in the Home. ROA.1724. The Board took up the request at a public meeting in May 2019, where the City's code-compliance officer recommended approval of the request, Swanston and her attorney presented the request, and nearly 100 members

of the public attended, with about a third speaking to urge denial of the request. ROA.1724-1725. After closing the hearing, the Board deliberated and ultimately rejected WESL's requested accommodation. ROA.1724-1726.

3. Procedural History

In June 2019, plaintiffs filed suit against the City in the Eastern District of Texas. ROA.19-40 (Compl.); see also ROA.348-371 (Second Am. Compl.). Plaintiffs alleged, in relevant part, that the City violated the FHA by denying their request for a reasonable accommodation that would allow up to 15 individuals to live together in the Home. ROA.367-368, 1721, 1724. They alleged a similar claim under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12132. ROA.369. In August 2021, after a two-day bench trial, the district court ruled in favor of plaintiffs on their reasonable-accommodation claim. ROA.1721, 1731-1732, 1742-1759, 1763.

First, the district court determined that WESL's residents, who are individuals with SUDs, have a disability. ROA.1732-1734. Specifically, the court found that the "inability" of the Home's residents "to live independently constitutes a substantial limitation on their ability to 'care for themselves.'" ROA.1733 (citation omitted).

Second, the court discussed "necessity" under the FHA and defined it as "indispensable, requisite, essential, needful; that cannot be done without."

ROA.1743 (quoting *Harmony Haus Westlake, L.L.C.* v. *Parkstone Prop. Owners Ass'n*, 851 F. App'x 461, 465 (5th Cir. 2021) (per curiam) (*Harmony Haus*) (quoting *Vorchheimer* v. *Philadelphian Owners Ass'n*, 903 F.3d 100, 105 (3d Cir. 2018))). As to the question of "necessary to achieve what end," the court explained that "[t]he statute provides the answer: 'to afford such person equal opportunity to use and enjoy a dwelling.'" ROA.1743 (quoting 42 U.S.C. 3604(f)(3)(B)). The court elaborated, "[t]he plain language of § 3604(f)(3)(B) is best understood as referring to an equal opportunity for a [person with a disability] to live in the housing of their choice." ROA.1744 (emphasis omitted).

Third, the district court focused on two types of necessity, economic and therapeutic. ROA.1742 (citing *Harmony Haus*, 851 F. App'x at 465). As to economic necessity, the court held that plaintiffs had not proved that WESL had to have 15 residents to be financially viable. ROA.1742, 1745-1747. The court held, on the other hand, that plaintiffs' "therapeutic concerns are a different story." ROA.1747. Both sides' experts agreed that approaches to treating individuals with SUDs differ but that "sober living homes may be critical to some in recovery." ROA.1750-1751. The court emphasized "the foundational premise endorsed by both sides: a critical mass of residents must exist to achieve the therapeutic benefits a sober living home provides." ROA.1749-1750. What that means "in the context of sober living," the court explained, is that "therapeutic necessity, as

would be involved with any course of treatment, is irreducible to formulae or algorithms, and requires individualized considerations." ROA.1751. Thus, the court reasoned that necessity "must be meticulously considered on a case-by-case basis and in light of the evidence presented." ROA.1751.

Turning to the evidence, the district court found plaintiffs' expert Dr. John Majer particularly persuasive in testifying to the needs of WESL residents and justifying the Home's need for, at a minimum, 15 residents. ROA.1751-1752; see also ROA.2482-2487, 2493, 2502-2503. The court also heard, though did not cite, Dr. Majer's testimony that 21 residents would be ideal for establishing an effective therapeutic environment for WESL residents. ROA.2482-2483. At the same time, the court rejected the City's argument and the testimony of its expert Dr. Kevin Gilliland that plaintiffs' requested accommodation was not necessary to establish an effective therapeutic milieu in the Home. See ROA.1748-1750, 1752. As discussed below, given Dr. Gilliland's lack of experience with sober homes and his failure to visit the Home or interview its residents, the court afforded his testimony "little weight." See ROA.1748-1752; pp. 24-25, *infra*.

The district court emphasized that Dr. Gilliland's testimony and the City's argument on necessity omitted an essential consideration—"necessary as compared to what?" ROA.1752. The court explained that "necessity must be considered in the light of '*proposed* alternatives.'" ROA.1752 (quoting *Harmony Haus*, 851 F.

App'x at 465). It elaborated that necessity "is a *relative* inquiry," meaning that perhaps a "number between eight and fifteen would have sufficed to form the requisite critical mass for therapeutic necessity at WESL," but all the court could compare was "the requested accommodation and an 'alternative *on offer* [that] satisfies the goal of equal housing opportunity for [a] tenant." ROA.1754 (alterations in original) (quoting *Vorchheimer*, 903 F.3d at 108). Because the City denied the request "outright," offering no alternative to the eight residents permitted by the Ordinance, the court considered the evidence presented for "two options: fifteen or eight." ROA.1755. The court was persuaded by Dr. Majer's testimony that "eight residents in the Home will lead to isolation." ROA.1754. "All in all," the court concluded, "after scrupulous and detailed consideration of the immediate facts and applicable law," plaintiffs' requested accommodation of 15 residents is "therapeutically necessary." ROA.1754. The court also determined that plaintiffs' proposed accommodation was reasonable. See ROA.1756-1759.

Accordingly, the district court issued a permanent injunction prohibiting the City from restricting the occupancy of the Home to less than 15 residents, enforcing any other restrictions on the Home's use that would violate the FHA or ADA, and retaliating against plaintiffs. See ROA.1763. The court later decided that plaintiffs were entitled only to nominal damages, rejecting their arguments for

other compensatory and punitive damages. ROA.2105-2114. The court also awarded attorneys' fees. ROA.2228-2242.

The City timely appealed. ROA.2252. Plaintiffs cross-appealed. ROA.2254.

SUMMARY OF ARGUMENT

This Court should examine necessity under the FHA in relation to equal opportunity and in light of the record and proposed alternatives. In the context of sober living homes, courts may grant requested accommodations that "may be necessary" to afford residents recovering from SUDs an "equal opportunity" to live in the housing of their choice. See 42 U.S.C. 3604(f)(3)(B). Experts and courts have recognized that a critical mass of residents must exist for sober living homes to provide meaningful therapeutic benefits. Ultimately, whether a requested accommodation to allow a minimum number of residents in a sober living home is necessary and affords equal housing opportunity in a particular case requires courts to conduct a fact-intensive inquiry.

1. Here, the district court correctly found (and certainly did not clearly err in finding) that plaintiffs' requested accommodation of 15 residents in the Home—as opposed to the Ordinance's maximum of eight residents—is necessary. Plaintiffs' expert Dr. Majer conducted a two-day visit to WESL, toured the Home, interviewed the residents, and reviewed the Home's rules and regulations. He

testified that a minimum of 15 residents is therapeutically necessary (though 21 residents would be ideal) to improve the odds that WESL residents would succeed in recovering from their SUDs. The record also supports the court's finding that the only alternative on offer, eight residents as permitted by Ordinance, is insufficient to meet the needs of and provide equal opportunity to WESL residents.

2. None of the City's arguments to the contrary justifies a different outcome. First, this Court's unpublished opinion in *Harmony Haus Westlake, L.L.C.* v. *Parkstone Property Owners Ass'n*, 851 F. App'x 461 (5th Cir. 2021) (per curiam)—another sober living home case evaluating the critical mass of residents necessary for a failure-to-accommodate claim—turned on the particular evidence presented and is thus distinguishable. Nor, as the City argues, did the district court inappropriately place an evidentiary burden on the City to propose an adequate alternative. The court properly found, based on the evidence presented at trial, that 15 residents is therapeutically necessary in the Home; thus, plaintiffs met their burden. And the City neither provided sufficient evidence to undermine that showing nor offered evidence to support any other alternative for the district court to consider.

ARGUMENT

A. The District Court Properly Decided—And Certainly Did Not Clearly Err In Finding—That An Accommodation Is Therapeutically Necessary To Afford WESL Residents An Equal Opportunity To Use And Enjoy The Dwelling Of Their Choice

To prevail on a failure-to-accommodate claim under the FHA, plaintiffs must make a four-part showing: (1) the residents of the Home have a disability under the statute; (2) plaintiffs requested an accommodation and the City denied it; (3) the accommodation was reasonable; and (4) the accommodation was necessary to afford WESL residents an equal opportunity to use and enjoy the Home. ROA.1731-1732; see *Vorchheimer* v. *Philadelphian Owners Ass'n*, 903 F.3d 100, 105 (3d Cir. 2018) (quoting 42 U.S.C. 3604(f)(2), (f)(2)(A), (f)(3), and (f)(3)(B)); see also *Providence Behav. Health* v. *Grant Road Pub. Util. Dist.*, 902 F.3d 448, 459 (5th Cir. 2018); *Harmony Haus Westlake, L.L.C.* v. *Parkstone Prop. Owners Ass'n*, 851 F. App'x 461, 463 (5th Cir. 2021) (per curiam).[4]

On appeal, the City does not dispute the first three elements; thus, we address only the fourth element—specifically, whether plaintiffs demonstrated that

[4] Plaintiffs also asserted a reasonable-modification claim under the ADA. ROA.369. Noting that the parties did not differentiate between the similar FHA and ADA claims, the district court analyzed them together and concluded that plaintiffs succeeded on their reasonable accommodation claim under both statutes. ROA.1728 & n.6, 1742-1759, 1763. We address plaintiffs' reasonable accommodation claim under FHA standards.

their requested accommodation was necessary under the FHA. We focus here on plaintiffs' showing on therapeutic, not economic, necessity.[5]

1. The District Court's Finding Of Necessity Is Subject To Clear-Error Review

"The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo." *Luwisch* v. *American Marine Corp.*, 956 F.3d 320, 326 (5th Cir. 2020) (per curiam) (citation omitted).

Clear-error review should apply to a district court's finding that a requested accommodation may be necessary under the FHA. Findings of necessity involving disability discrimination are generally reviewed for clear error. See *A. L. by and through D.L.* v. *Walt Disney Parks & Resorts U.S., Inc.*, 50 F.4th 1097, 1108-1110 (11th Cir. 2022) (applying clear-error review to a district court's finding of necessity under the Americans with Disabilities Act); *Ashland Sch. Dist.* v. *Parents of Student R.J.*, 588 F.3d 1004, 1009-1011 (9th Cir. 2009) (applying clear-error review to a district court's finding of necessity under the Individuals with Disabilities Education Act). Moreover, courts have appropriately found that a

[5] Although the parties and the district court have framed the showing of necessity here in terms of therapeutic and economic necessity, plaintiffs need not attach one of these labels to their justifications for an accommodation under the FHA.

district court's related determination that an accommodation is reasonable under the FHA and other civil rights statutes constitutes a factual finding subject to clear-error review.[6] That consensus makes eminent sense, as the reasonable-accommodation analysis, as a whole, is "highly fact-specific." *De Boise* v. *Taser Int'l, Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) (quoting *Bahl* v. *County of Ramsey*, 695 F.3d 778, 785 (8th Cir. 2012)), cert. denied, 575 U.S. 1025 (2015). And it also underscores that the analogous necessity inquiry is properly viewed as a factual one.

Accordingly, this Court should review for clear error the district court's finding that plaintiffs' requested accommodation of 15 residents in the Home is necessary under the FHA.

2. The "Necessity" Of A Reasonable Accommodation Under The FHA Is Examined In Relation To Equal Opportunity And In Light Of The Proposed Alternatives

a. The FHA provides that an accommodation "may be necessary" to afford persons with disabilities "equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B). "[T]he object of the statute's necessity requirement is a

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[6] See, *e.g.*, *Hovsons, Inc.* v. *Township of Brick*, 89 F.3d 1096, 1101 (3d Cir. 1996) (FHA); *Jankowski Lee & Assocs.* v. *Cisneros*, 91 F.3d 891, 896 (7th Cir. 1996), as amended (Aug. 26, 1996) (same); see also *McGary* v. *City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004) (ADA); *Garcia-Ayala* v. *Lederle Parenterals, Inc.*, 212 F.3d 638, 645, 649 (1st Cir. 2000) (same); *Doherty* v. *Southern Coll. of Optometry*, 862 F.2d 570, 575 (6th Cir. 1988) (Section 504 of the Rehabilitation Act of 1973), cert. denied, 493 U.S. 810 (1989).

level playing field in housing for the disabled." *Cinnamon Hills Youth Crisis Ctr., Inc.* v. *Saint George City*, 685 F.3d 917, 923 (10th Cir. 2012) (Gorsuch, J.). To be "necessary," a requested accommodation must alleviate or mitigate the barrier preventing the person with a disability from accessing, using, or enjoying a property in the same way as persons without disabilities. See *Schwarz* v. *City of Treasure Island*, 544 F.3d 1201, 1226 (11th Cir. 2008) (recognizing that a person's "need" for an accommodation must be traceable to or "created by" her disability). To state it differently, "necessary requires a 'showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability.'" *Oconomowoc Residential Programs* v. *City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002) (quoting *Dadian* v. *Village of Wilmette*, 269 F.3d 831, 838 (7th Cir. 2001)).

Ultimately, the FHA "links the term 'necessary' to the goal of equal opportunity." *Smith & Lee Assocs., Inc.* v. *City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996). The necessity element requires that there be "some causal relationship" between the disability and the requested accommodation. *Sailboat Bend Sober Living, LLC* v. *City of Fort Lauderdale*, 46 F.4th 1268, 1280 (11th Cir. 2022) (citation omitted). "In other words, the plaintiffs must show that without the required accommodation they will be denied the equal opportunity to live in a residential neighborhood," *Oconomowoc Residential Programs*, 300 F.3d at 784,

or obtain "the housing of [their] choice," *Wisconsin Cmty. Servs., Inc.* v. *City of Milwaukee*, 465 F.3d 737, 749 (7th Cir. 2006) (en banc); see also *Hollis* v. *Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 541 (6th Cir. 2014) ("The necessity element is * * * a causation inquiry that examines whether the requested accommodation or modification would redress injuries that otherwise would prevent a disabled resident from receiving the same enjoyment from the property as a non-disabled person would receive.").

An example from HUD's regulations illustrates this principle: Where a blind resident relies on the assistance of a service dog, application of a no-pets policy must be waived because the resident's blindness "creates an inability to walk around safely" that would deprive her of an equal opportunity to enjoy her home absent the accommodation. *Schaw* v. *Habitat for Human. of Citrus Cnty., Inc.*, 938 F.3d 1259, 1270 (11th Cir. 2019) (citing 24 C.F.R. 100.204(b)). Thus, an accommodation is "necessary" where a rule, policy, practice, or service at issue interposes a barrier to equal housing opportunity. *Cinnamon Hills Youth Crisis Ctr., Inc.*, 685 F.3d at 923.

b. The City's principal argument is that the district court relied on an incorrect definition of necessity, namely, that to be necessary, an accommodation must be beneficial or preferable, not essential. Br. 14-23. The City relies on a definition of the term "necessary" that several courts, including this Court in a non-

precedential decision, have cited: "Necessary means indispensable, requisite, essential, needful; that cannot be done without." Br. 15 (quoting *Harmony Haus*, 851 F. App'x at 465, and additional cases). But the City mischaracterizes the district court's legal analysis; the court cited and relied on that definition. See ROA.1743. And, as discussed below, the record supports the district court's finding that plaintiffs' requested accommodation is essential, not just preferable. See pp. 22-24 & n.7, *infra*.

Instead, the question here is how to apply that literal definition in determining whether a particular application—*i.e.*, plaintiffs' request to allow 15 residents in the Home—is necessary under the FHA. As then-Judge Gorsuch explained, after citing the very definition the City urges here, "the FHA's necessity requirement doesn't appear in a statutory vacuum, but is expressly linked to the goal of 'afford[ing] . . . equal opportunity to use and enjoy a dwelling.'" *Cinnamon Hills Youth Crisis Ctr., Inc.*, 685 F.3d at 923 (alteration in original) (quoting 42 U.S.C. 3604(f)(3)(B)). Thus, here, as the district court aptly put it, the City's application of necessity "is reductive to the point of error." ROA.1749.

"[G]roup living arrangements can be essential for disabled persons who cannot live without the services such arrangements provide, and not similarly essential for the non-disabled." *Oconomowoc Residential Programs*, 300 F.3d at 787. For sober living homes, an accommodation may be necessary if it assists

residents recovering from SUDs. See, *e.g.*, *Schwarz*, 544 F.3d at 1226-1227 (explaining that the question is whether stays in halfway houses "contribute in a meaningful way" to addressing residents' "needs" in recovering from substance use disorders). For groups of persons with disabilities "'who seek to live together . . . for mutual support', such as in a sober-living home, 'some minimum size may be essential to the success of the venture.'" *Harmony Haus*, 851 F. App'x at 465 (quoting *Brandt* v. *Village of Chebanse*, 82 F.3d 172, 174 (7th Cir. 1996)); see also *Bryant Woods Inn, Inc.* v. *Howard Cnty.*, 124 F.3d 597, 605 (4th Cir. 1997) (same). Whether a requested accommodation and any proffered alternative "afford equal housing opportunity" will often require a "fact-intensive inquiry." *Vorchheimer*, 903 F.3d at 109.

With that backdrop in mind, and given the many approaches that can address the needs of individuals with SUDs, there is no "one size fits all" accommodation. See ROA.2480 (Dr. Majer's testimony explaining that you cannot "meet the needs of a community like Plano with just one kind of sober living home located in one size house in one kind of neighborhood"). For this reason, sober living homes differ in services, programs, and size, based on the needs of the community. See ROA.2480.

Moreover, nothing in the FHA's text requires that plaintiffs request the *perfect* accommodation—here, a magical precise number of residents that would

establish the exact degree of therapeutic milieu necessary in a sober living home, and no more. Such an inquiry would be exceedingly difficult to undertake, if it were possible at all. This Court's opinion in *Harmony Haus* comports with this commonsense understanding by explaining that, to determine the necessary critical mass in a sober living home, plaintiffs must show only that a certain number of residents is necessary to make the sober-living home "*therapeutically meaningful*." 851 F. App'x at 465 (emphasis added) (quoting *Bryant Woods Inn, Inc.*, 124 F.3d at 605).

c. In addition, necessity must "be considered in the light of 'proposed alternatives.'" *Harmony Haus*, 851 F. App'x at 465 (quoting *Vorchheimer*, 903 F.3d at 105); see ROA.1752, 1754. As the Third Circuit explained in *Vorchheimer*, "[f]or a housing accommodation to be 'necessary' under the Act, it must be required for that person to achieve equal housing opportunity, taking into account the alternatives on offer." 903 F.3d at 103. "Consideration of the alternatives has long been built into the common law's analyses of necessity." *Id.* at 108 (offering examples from criminal, tort, and property law). A joint statement by DOJ and HUD illustrates this understanding in explaining that, even when a requested accommodation is reasonable, a defendant may offer an "alternative accommodation that would be equally effective in meeting the individual's disability-related needs." Joint Statement of the Dep't of Hous. & Urban Dev. and

the Dep't of Just., *Reasonable Accommodations Under the Fair Housing Act* 8 (2004), available at https://www.perma.cc/FB9C-TZ2N.

Courts vary in how they assess the legal impact of proposed alternatives. The Eleventh Circuit, for example, held that summary judgment based on the defendant's offer of an "alternative accommodation" was premature before determining the reasonableness of the plaintiff's requested accommodation. See *Schaw*, 938 F.3d at 1269. The Third Circuit, however, held that a requested accommodation was not "necessary" where the defendant had offered several equally effective alternatives. See *Vorchheimer*, 903 F.3d at 112. And some district courts have determined that where a defendant has already provided a reasonable accommodation, albeit not the one the plaintiff prefers, the defendant cannot be said to have "denied" a reasonable accommodation. See *Temple* v. *Hudson View Owners Corp.*, 222 F. Supp. 3d 318, 324 (S.D.N.Y. 2016); *Resnick* v. *392 Cent. Park W. Condo.*, No. 07 Civ. 1988, 2007 WL 2375750, at *2 (S.D.N.Y. Aug. 14, 2007).

All of these cases demonstrate, however, that any alternative accommodation offered by a defendant is inadequate unless it actually affords persons with disabilities "equal housing opportunity." *Vorchheimer*, 903 F.3d at 109. As *Vorchheimer* clarified, this "may require more than just [offering] those accommodations that are absolutely necessary for the disabled individual's

treatment or basic ability to function." *Ibid.* (citation and internal quotation marks omitted). "An accommodation that does not provide *equal* opportunity, or that provides equal opportunity to *use* but not to *enjoy*, will not satisfy that requirement." *Ibid.*

As discussed below, the City offered no alternative to plaintiffs' accommodation request. Nor did it offer sufficient evidence to support any other alternative that would provide equal opportunity to WESL residents.

3. The District Court Did Not Clearly Err In Finding That Plaintiffs' Requested Accommodation Is Necessary Under The FHA

The district court properly found (and certainly did not clearly err in finding) that plaintiffs' requested accommodation of 15 residents is therapeutically necessary. See ROA.1747-1756. Plaintiffs presented fact witnesses who testified at trial that this particular Home needed 15 residents to be therapeutically meaningful. See, *e.g.*, ROA.2308-2310 (Swanston); ROA.2422-2424 (Jones); ROA.2557 (former resident Taylor Harvey).

Plaintiffs' expert Dr. Majer focused on this point in testifying that data shows that having more residents in a recovery home produces greater therapeutic benefits. ROA.2466-2467. Specifically, Dr. Majer attested that having a minimum of 15 residents in this particular Home is necessary to improve the odds that WESL residents "will have a longer term of or even a permanent term of sobriety after they leave" the Home. ROA.2482, 2502-2503. Indeed, he opined

that the ideal number of residents in this Home is 21, establishing the appropriate range to meet the needs of WESL residents as 15 to 21. ROA.2483. In other words, although a number greater than 15 would be *preferable* to meet the needs of WESL residents, a minimum of 15 is necessary or *essential*.[7]

Dr. Majer's testimony was well-founded. To form his opinion, he conducted a two-day visit to WESL, toured the Home, familiarized himself with the intake process and rules, and interviewed 10 to 12 residents, as well as Swanston and Jones. ROA.2467-2468. Having extensively studied other sober living homes, Dr. Majer also based his opinion on the differences between those homes and WESL: the presence of a caretaker, size of the Home, needs of the particular women living in the Home, and the Home's non-democratic nature. ROA.2485-2487. The district court properly relied on this evidence to find that a critical mass of 15 WESL residents in the Home is therapeutically necessary. ROA.1747-1756.

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[7] One reason Dr. Majer gave for this range is that "it's most likely going to result in each resident having a roommate, and that's crucial, especially those who are new to the recovery home." ROA.2483. He explained that "[h]aving access to a roommate, especially during the sleeping hours, is vital" and creates a "buddy system," which "help[s] individuals be accountable for things they need to do" and allows "individual residents to extend a lending hand to their fellow peer." ROA.2483; see also ROA.2297. Dr. Majer also elaborated that having "at a minimum 15 residents" would account for unscheduled departures from the Home and increase the likelihood that more "senior level resident[s]" remain in the Home to maintain the necessary therapeutic atmosphere. ROA.2483-2485.

The record also supports the district court's finding that eight residents in the Home would be insufficient. Dr. Majer testified that having eight residents "will lead to isolation, which counteracts the therapeutic effects of the group setting and potentially endangers the residents' chances of remaining sober." ROA.1754; see ROA.2486-2487; see, *e.g.*, *Oxford House, Inc.* v. *Browning*, 266 F. Supp. 3d 896, 901 (M.D. La. 2017) (emphasizing that "sharing bedrooms" and "having the ability to congregate and socialize in communal living spaces" help residents of sober living homes "avoid feelings of isolation and loneliness—which have been shown to contribute to relapse"). Dr. Majer elaborated that "[d]ue to the size of [the Home], it will make it very easy for the residents to go off on their own * * * [a]nd that's very dangerous for people who are trying to become clean and sober on a day-to-day basis and develop a capacity to reintegrate." ROA.2486. Dr. Gilliland, the City's expert, agreed that isolating is a danger for individuals with SUDs. ROA.2752. Thus, the "alternative on offer" of eight residents here stands in sharp contrast to the eminently workable alternatives discussed in *Vorchheimer*, 903 F.3d at 108, 112-113 (discussing "four * * * proffered alternatives" that met the plaintiffs "needs").

Separately, the district court properly afforded Dr. Gilliland's testimony—that eight residents would meet the critical mass for therapeutic necessity—little weight. First, as the court explained, Dr. Gilliland's professional background and

expertise was "ill-fitting" for this case because he has not published on sober living homes and lacks field-work experience. ROA.1748; see ROA.2717-2718. Second, the court determined that Dr. Gilliland's testimony was "based on an incomplete definition of 'necessary,'" equating the term "with 'indispensable,' 'essential,' and something that 'cannot be done without,'" while failing to consider the "context" and proposed alternatives. ROA.1748-1749, 1752-1753 (quoting *Cinnamon Hills Youth Crisis Ctr., Inc.*, 685 F.3d at 923, and *Vorchheimer*, 903 F.3d at 105); see ROA.2737. Moreover, neither Dr. Gilliland (nor any of the City's other witnesses) offered evidence that a number between 8 and 15 could meet the needs of WESL residents. Lastly, Dr. Gilliland, unlike Dr. Majer, never visited WESL or interviewed its residents. ROA.1609-1610, 1752.

In short, the district court properly concluded that Dr. Gilliland's testimony, although admissible, failed to speak to the "fact-specific, case-by-case" aspects of determining necessity. ROA.1748-1749 (citing *Staron* v. *McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995)); cf. *Mac Sales, Inc.* v. *E.I. du Pont de Nemours & Co.*, 24 F.3d 747, 752 (5th Cir. 1994) (explaining that "a district court may exclude expert testimony that lacks an adequate foundation"). The court properly found—and certainly did not clearly err in finding—that 15 residents in the Home is therapeutically necessary.

B. None Of The City's Arguments Justifies A Different Outcome

The City argues on appeal that plaintiffs' requested accommodation is not necessary to afford WESL residents an equal opportunity to use and enjoy a dwelling because (1) this Court in *Harmony Haus*, 851 F. App'x at 465-466, rejected a similar accommodation as not necessary; and (2) the district court incorrectly placed the burden on the City to propose an adequate alternative. Neither argument is persuasive.

1. The City relies primarily on this Court's unpublished decision in *Harmony Haus* to argue that this Court should reverse the district court's finding on necessity. Br. 14-29. In that case, this Court considered whether the defendant homeowner association violated the FHA by denying the plaintiff sober living home's request to operate with 12 residents, as opposed to six. 851 F. App'x at 465-466. The plaintiff argued that 12 residents were necessary "to ensure that its phasing system functions, whereby more established residents mentor newer ones and where each resident has a roommate to help ensure accountability and avoid feelings of isolation." *Id.* at 466. The Court nevertheless held that the plaintiff failed to show "that a *phasing system* using 12 residents is necessary to accommodate its handicapped residents." *Ibid.* (emphasis added). As the Court explained: "Showing that an accommodation is necessary for a sober-living home operator's chosen model is not sufficient." *Ibid.* Evaluating the evidence in the

record, the Court in *Harmony Haus* found that the plaintiff did not meet its "burden to show that it needs 12 residents to prevent isolation" and thus establish that its requested number of residents was therapeutically necessary. *Ibid.*

Here, by contrast, plaintiffs offered ample evidence to establish that they required 15 residents in the Home to achieve the necessary critical mass, not just that having 15 residents would promote their preferred model for operating a sober living home. The district court found the record in this case compelling in establishing therapeutic necessity. ROA.1747-1756; see also ROA.1755 n.15 (distinguishing *Harmony Haus*). As discussed above, plaintiffs' fact witnesses and their expert—who has conducted two-and-a-half decades of field work with sober living homes—testified specifically to the therapeutic needs of WESL residents in this Home. See pp. 9-10, 22-24 & n.7, *supra*. Thus, based on the case-specific facts and individualized considerations in the trial record, the district court properly found that 15 residents is therapeutically necessary in this Home. ROA.1751, 1754, 1756.

The City also cited *Bryant Woods Inn, Inc.*, 124 F.3d at 605, in which the Fourth Circuit rejected a requested expansion of a group home from 8 to 15 residents. Br. 23. But there, too, the court emphasized, among other grounds, that the plaintiff had "presented no evidence" that "expansion from 8 to 15 residents

would be therapeutically meaningful." 124 F.3d at 605. The same cannot be said here.

2. Additionally, the City contends that the district court inappropriately placed the evidentiary burden on it to propose an adequate alternative accommodation to meet the needs of WESL residents. Br. 26-29. This argument is premised on the City's mistaken assertion that the court failed to hold plaintiffs to their burden to show that their requested accommodation is necessary. Br. 19-29. But as explained above, the record supports the court's finding that having 15 residents in the Home is therapeutically necessary; thus, plaintiffs met their burden. The record also supports the court's factual finding that the "alternative on offer"—the Ordinance's eight-resident limit—is inadequate to meet WESL residents' needs. ROA.1754 (quoting *Vorchheimer*, 903 F.3d at 108 (emphasis omitted)); see also pp. 9, 24-25, *supra*.

The City nevertheless attempts to undermine the finding that 15 is necessary by suggesting the possibility that some hypothetical number between 8 and 15 residents could conceivably provide a therapeutic benefit. Br. 21-22. That argument holds no water. The City never "proposed alternatives" such as 12 or 13 residents in the Home or presented evidence supporting such alternatives. See *Harmony Haus*, 851 F. App'x at 465 (quoting *Vorchheimer*, 903 F.3d at 105). The district court correctly emphasized that fact. ROA.1755. Accordingly, after

plaintiffs met their burden of establishing that having 15 residents in the Home is necessary, and the court found that the City's only proposed alternative—the Ordinance's cap of eight residents—is inadequate, the court was right to find that "considering the evidence presented at trial, fifteen wins out over eight." ROA.1755.

In any event, the record supports a finding that a number between 8 and 15 would have failed to afford WESL residents equal housing opportunity. During trial, the City asked Dr. Majer during cross-examination about several hypothetical scenarios, including whether having 12 residents in the Home—allowing each resident to have a roommate—would meet the residents' therapeutic needs. See ROA.2494. The City did not offer affirmative evidence demonstrating that 12 residents would meet those needs; it proposed the number only in response to Dr. Majer's testimony that each resident needed a roommate. See ROA.2494. But Dr. Majer rejected the City's contention, explaining that "there will be some therapeutic benefit [with 12 residents]," but a greater number will "increase the likelihood that [WESL residents are] going to engage and actually stay clean and sober" and thus succeed in recovery. ROA.2495. As he attested, a minimum of 15 is necessary to "improve the odds that the women will have a longer term of or even a permanent term of sobriety after they leave." ROA.2502-2503.

In sum, far from committing clear error, the district court properly found that plaintiffs met their burden to demonstrate that their requested accommodation of 15 residents in the Home is necessary. And the City neither provided sufficient evidence to undermine that showing nor offered an adequate alternative for the district court to consider in lieu of the requested accommodation. See *Vorchheimer*, 903 F.3d at 105, 107-109.

CONCLUSION

The United States respectfully urges this Court to affirm the district court's holding that plaintiffs' requested accommodation is necessary under the FHA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6499 words according to the word processing program used to prepare the brief.

This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

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