
RENOVATING FEDERAL HOUSING LAW TO HELP PROTECT TENANTS WITH DISABILITIES

CAMPBELL SODE*

ABSTRACT

Many individuals with disabilities contact landlords to inquire about rental housing only to learn that the landlord's dwelling units are inaccessible. And federal anti-discrimination laws applicable to private rentals are often unhelpful. First, Title III of the Americans with Disabilities Act ("ADA") applies to only the public areas of rental housing complexes and does not extend to dwelling units. Second, the Fair Housing Act ("FHA") requires persons with disabilities, who have a median household income far below the national average, to pay for any structural modifications needed to facilitate their use of housing even though such retrofitting costs several thousand dollars on average. Third, it is often unclear whether landlords or their properties receive federal financial assistance that subjects them to the Vocational Rehabilitation Act of 1973 ("Rehab Act"), so individuals with disabilities may find it difficult to enforce landlords' obligation to implement and pay for reasonable modifications under this statute. People with disabilities thus lack equal access to rental housing and cannot fully participate in American society. But the ADA, FHA, and Rehab Act were all enacted with the goal of integrating those with disabilities into public life.

Congress can address this persistent housing inequality by renovating the ADA, FHA, and Rehab Act to eliminate their coverage gaps. These incremental changes to federal law make sense as a policy matter because they will shift the cost of accessible rental dwellings from individuals with disabilities—who tend to have low incomes—to wealthy corporate property

* University of Virginia School of Law J.D. 2018; Rutgers University B.A. 2015. I thank the *Southern California Law Review Postscript* staff, especially Kaitlyn Sever, Victoria Stark, Jessica Block, Thitipong Mongkolrattanothai, and Christopher LoCascio, for their invaluable contributions to this Article and their exemplary editorial assistance.

managers that can better absorb such expenses. And freeing people with disabilities from the economic constraints of their disability will help them live independently and in turn facilitate their development of a personal identity and full integration into their communities. This increased visibility of individuals with disabilities in everyday life will enhance the diversity of the American social fabric, which is an important step in reducing anti-disability attitudes and prejudices that too often impact interactions between people with disabilities and their nondisabled peers.

INTRODUCTION

Sixty-one million American adults, comprising twenty-six percent of adults in the United States, live with a disability.¹ People with disabilities face significant educational barriers. They finish high school at lower rates than their nondisabled peers, and fifteen percent of individuals with disabilities aged twenty-five and over have a bachelor's degree or higher, whereas thirty-three percent of nondisabled persons in that age bracket have the same education level.² This disparity partially explains why “[i]n nearly every occupation, workers with a disability are less likely to work full-time” and earn sixty-six cents per dollar made by nondisabled individuals.³ And the forty-three thousand dollar annual median income for households with persons with disabilities is twenty-five thousand dollars less than the annual median income of other households.⁴

Given these challenging socioeconomic circumstances, “[r]enter households are more likely than owner households to have a member with a disability,” and they “are ‘priced out’ of housing at rates higher than that of the general population.”⁵ Seven million renters with disabilities are “cost-burdened, meaning they pay more than 30 percent of their income on rent,”

1. *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/ncbddd/disabilityandhealth/documents/disabilities_impacts_all_of_us.pdf [http://perma.cc/YL5L-69BD].

2. *Disability and Socioeconomic Status*, AM. PSYCH. ASS'N, <http://www.apa.org/pi/ses/resources/publications/disability> [http://perma.cc/CQN5-2SUU].

3. Jennifer Cheeseman Day & Danielle Taylor, *In Most Occupations, Workers With or Without Disabilities Earn About the Same*, U.S. CENSUS BUREAU (Mar. 21, 2019), <http://www.census.gov/library/stories/2019/03/do-people-with-disabilities-earn-equal-pay.html> [http://perma.cc/L4D2-PNC2].

4. *Median Household Income of People With and Without Disabilities With Earnings, Age 21 to 64, 2016*, ADA PARC [hereinafter *Median Household Income*], http://www.centerondisability.org/ada_parce/utills/indicators.php?id=32 [http://perma.cc/VF5K-YY3L].

5. Jaboia Lake, Valerie Novack & Mia Ives-Rublee, *Recognizing and Addressing Housing Insecurity for Disabled Renters*, CTR. FOR AM. PROGRESS (May 27, 2021), <http://www.americanprogress.org/article/recognizing-addressing-housing-insecurity-disabled-renters> [http://perma.cc/WG2T-5QGK].

and at high risk of eviction.⁶ Yet individuals with disabilities “continue to face housing discrimination, creating barriers to both obtaining and maintaining housing.”⁷ In 2016, fifty-five percent of the 28,181 fair housing complaints documented by National Fair Housing Alliance member organizations were related to disabilities.⁸ This financial pressure and disability discrimination is compounded by the lack of affordable housing accessible to people with disabilities. America has a substantial “national affordable housing shortage of more than 7 million units,” and “[l]ess than 5 percent of housing nationwide is accessible for people with moderate mobility difficulties, and less than 1 percent is accessible for wheelchair users.”⁹ These unfavorable circumstances sparked calls for better “enforcement of fair housing policies.”¹⁰

Although increased enforcement of fair housing policies for people with disabilities represents a step in the right direction, this is a weak foundation for meaningful change because the federal laws that give force to these fair housing policies are structurally flawed. These statutes must be renovated to substantially improve the difficult circumstances faced by prospective and existing renters with disabilities. This Article analyzes three federal laws applicable to fair rental housing for persons with disabilities and recommends statutory amendments to fill the gaps in these laws. First, Title III of the Americans with Disabilities Act (“ADA”) inadequately protects individuals with disabilities because it does not apply to individual dwelling units. Second, the Fair Housing Act (“FHA”) does not remedy this problem with the ADA because it distinguishes reasonable accommodations and reasonable modifications in a manner that allows landlords to disclaim responsibility for making their units accessible to people with disabilities. Third, the Vocational Rehabilitation Act of 1973 (“Rehab Act”) only extends to landlords that receive federal funding, and its effectiveness is hampered by the lack of a disclosure requirement. This Article then examines several policy considerations that support changing these federal statutes to better support individuals with disabilities, who should be able to live independently to the same extent as their nondisabled peers.

6. *Id.*

7. *Id.*

8. See NAT’L FAIR HOUS. FOR ALL, THE CASE FOR FAIR HOUSING: 2017 FAIR HOUSING TRENDS REPORT 7 (2017), <http://nationalfairhousing.org/wp-content/uploads/2017/04/TRENDS-REPORT-4-19-17-FINAL-2.pdf> [<http://perma.cc/5RF8-D6Y4>] (detailing the percent of fair housing complaints attributable to various types of discrimination).

9. Lake et al., *supra* note 5.

10. See *id.*

I. CHANGES TO FEDERAL LAW

Three federal statutes—ADA Title III, the FHA, and the Rehab Act—apply when people with disabilities seek privately-owned rental housing.¹¹ But these laws are insufficiently protective in the rental housing context; their coverage gaps are discussed in turn below. This statutory exposition is accompanied by proposed amendments that will help protect prospective and existing tenants with disabilities.

A. ADA TITLE III

Title III of the ADA requires landlords to make public areas of their properties, like commercial establishments and leasing offices, disability-accessible, but individual dwelling units are not subject to the ADA.¹² Under this legal framework, ADA Title III protects prospective and existing tenants with disabilities who need modifications to publicly accessible parts of rental properties. Landlords must make such accommodations if they are not an undue burden and do not “fundamentally alter the nature of the goods, services, facilities, [or] privileges” subject to the modifications requested by persons with disabilities.¹³ The term “undue burden” refers to significant difficulty or expense, and undue burdens are identified using the following five factors: (1) the nature and cost of the accommodation; (2) the general financial and human resources of the rental property that needs to be modified to satisfy the needs of persons with disabilities; (3) the administrative, fiscal, and geographic relationship between the rental property and its parent corporate entities; (4) those parent corporate entities’ size and financial and human resources; and (5) the type of operations that are undertaken by parent corporate entities.¹⁴ Fundamental alteration is also a fact-sensitive inquiry.¹⁵ But Title III of the ADA offers no recourse to people with disabilities who require modifications to their individual dwelling units.¹⁶

11. See Gregory Proctor, *Three Misconceptions Regarding ADA and Fair Housing Accessibility Laws*, REALPAGE (May 12, 2021), <http://www.realpage.com/blog/3-misconceptions-regarding-ada-and-fair-housing-accessibility-laws> [http://perma.cc/38U2-329F].

12. *Regents of the Mercersburg Coll. v. Republic Franklin Ins. Co.*, 458 F.3d 159, 165 n.8 (3d Cir. 2006) (discussing commercial establishments within rental complexes); *Kalani v. Castle Vill. LLC*, 14 F. Supp. 3d 1359, 1370–71 (E.D. Cal. 2014) (noting that any public leasing offices in rental complexes are subject to the ADA).

13. 28 C.F.R. § 36.303(a) (2017).

14. *Id.* § 36.104 (2016) (defining “undue burden” for ADA Title III purposes).

15. *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1000–02 (9th Cir. 2000); see also *Giebler v. M&B Assocs.*, 343 F.3d 1143, 1156–57 (9th Cir. 2003).

16. *Mercersburg Coll.*, 458 F.3d at 165 n.8.

1. Proposed Amendments to the ADA

Congress can strengthen ADA Title III through a statutory amendment extending its reach to individual rental dwellings. This upgrade to the law would align rental homes with comparable forms of so-called “transient lodging” like boarding houses, dormitories, hotels, inns, motels, and resorts, which are subject to the ADA and must be fully accessible to people with disabilities.¹⁷ And it makes sense to apply Title III of the ADA to individual rental dwellings such that rental landlords have the same accessibility obligations as owners of transient housing.

The ADA contains strict accessibility standards for “new construction,” which pertain to all “public accommodations designed or constructed after January 26, 1992, and to the portion of a facility altered after that date.”¹⁸ The ADA also requires public facilities not subject to its new construction standards to remove barriers to equal access by persons with disabilities.¹⁹ Under this mandate, structural barriers in existing facilities must be removed when “readily achievable,” meaning “easily accomplished and able to be carried out without much difficulty or expense” on the part of the facility owner or manager.²⁰ “Compliance with the ADA’s barrier removal provision may require, for example, the installation of a concrete ramp, a widened exterior door, or the modification of an existing public restroom.”²¹ Where barrier removal is unfeasible, accessibility must be achieved through other means.²² Extending the ADA’s new construction standards and barrier removal requirement to rental dwellings would help alleviate the shortage of disability-accessible housing.

The ADA’s barrier removal requirement is crucial because, on average, it costs four²³ to six thousand dollars,²⁴ or approximately ten to fifteen percent of the median annual income for households with individuals with disabilities,²⁵ to modify a residence for accessibility.²⁶ It can be far more expensive to retrofit a home for accessibility to mobility-impaired persons like users of canes, walkers, and wheelchairs. Related projects comprise

17. *Id.* at 166–67.

18. *Id.* at 168 (citing, *inter alia*, 42 U.S.C. § 12183(a) and 28 C.F.R. pt. 36 app. A–B (2022)).

19. *Id.* at 169 n.13 (citing 42 U.S.C. § 12182(b)(2)(A)(iv)).

20. *Id.* (citing 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12181(9)).

21. *Id.* (citing 28 C.F.R. § 36.304(b)).

22. *Id.* (citing 28 C.F.R. § 36.305(a)).

23. *Disability Accommodation Cost Guides*, HOMEADVISOR, <http://www.homeadvisor.com/cost/disability-accommodation> [<http://perma.cc/ZR9Z-ZZ7K>].

24. *How Much Does It Cost Disability Remodeling in Your Area?*, FIXR, <http://www.fixr.com/costs/disability-remodeling> [<http://perma.cc/EE3Q-DS9T>].

25. *See Median Household Income*, *supra* note 4.

26. *See Disability Accommodation Cost Guides*, *supra* note 23.

building ramps to exterior doors, widening doorways and halls, reconfiguring bathrooms to allow enough room for a mobility-impaired individual to turn around, and installing handrails, grab bars, chair or stair lifts, and elevators, all of which can cost at least sixty thousand dollars.²⁷ Some people with mobility limitations may also require several thousand dollars of additional bathroom modifications encompassing installation of non-slip floors and accessible cabinets, vanities, sinks, faucets, showers, tubs, and toilets.²⁸ Other mobility-related renovations may include lowering some kitchen appliances, cabinets, and countertops to accommodate wheelchair users and individuals who cannot stand for long periods of time, which may cost tens of thousands of dollars.²⁹

While these costs may appear high at first glance, they are trivial with regard to rental homes developed, managed, or owned by large companies.³⁰ These sophisticated entities have the financial and human resources needed to implement reasonable accommodations requested by persons with disabilities. In particular, Charleston, South Carolina-based Greystar Real Estate Partners, one of the biggest residential rental property development and management firms in the United States, has developed twenty-four billion dollars of real estate, manages fifty-eight billion dollars in assets, and employs twenty thousand people.³¹ The Lincoln Property Company of Dallas, Texas, is one of Greystar's competitors in the residential rental property development and management market; it has developed fourteen billion dollars of real estate, manages eighty-two billion dollars in assets, and employs eight thousand people.³² This data suggests that large property developers and managers like Greystar, the Lincoln Property Company, and their peers can absorb the average cost of disability-related home modifications requested by their tenants.

But large property developers and managers are only part of the puzzle because individual landlords control over twenty million of the fifty million

27. *How Much Does It Cost to Remodel for Disability Accommodation?*, HOMEADVISOR, <http://www.homeadvisor.com/cost/environmental-safety/remodel-for-disability-accommodation> [<http://perma.cc/F34H-A9RT>].

28. *See id.*

29. *Disability Accommodation Cost Guides*, *supra* note 23; *see Disability Remodeling Cost Guide*, EARLYEXPERTS, <http://earlyexperts.net/costs-guides/disability-remodeling> [<http://perma.cc/5THF-4GKR>].

30. *See* Brian Carmody, *Best Property Management Companies*, INVESTOPEDIA, <http://www.investopedia.com/best-property-management-companies-5115158> [<http://perma.cc/PEL6-KH6X>] (listing some of the leading American property developers and managers).

31. *About Us*, GREYSTAR, <http://www.greystar.com/about-greystar/about> [<http://perma.cc/77AZ-TZ8U>].

32. *Business Services*, LINCOLN PROP. CO., <http://www.lincolnapts.com/business-services> [<http://perma.cc/PBV5-GPE9>]; Lincoln Property Company, LINKEDIN, <http://www.linkedin.com/company/lincoln-property-company> [<http://perma.cc/92TD-TWTW>].

rental units in the United States.³³ These mom-and-pop landlords own an average of three properties, which generate an estimated annual net profit of ten thousand dollars per property.³⁴ Given this modest rental income, individual landlords and similarly-situated corporations may lack the wherewithal to ensure that their properties comply with ADA accessibility standards. Congress could protect these landlords through minimum thresholds paralleling the applicability of the FHA to multi-family properties containing four or more units.³⁵ However, because forty percent of the rental market is at stake and there is a shortage of accessible and affordable housing, it may be prudent for Congress to require landlords who control a sufficient number of properties to comply with ADA standards. The legislative process would inform Congress of the threshold at which smaller landlords need to offer accessible rentals, and the FHA's applicability to owners of at least four single-family homes offers a good starting point.³⁶

The above discussion segues to the economic justifications for applying Title III of the ADA to individual rental dwellings. In its current form, the ADA obliges landlords to bear the costs of making the public areas of their properties disability-accessible absent undue burdens identified by reference to the financial and human resources of the property and its parent corporate entities.³⁷ It makes sense to use the same framework for rental homes. The earnings gap experienced by persons with disabilities and their predisposition to low-income status means they may not be able to afford residential modifications necessary for their independent living. But corporations—like Greystar and the Lincoln Property Company—that develop and manage supersize portfolios of rental properties are better able to fund disability-related modifications on behalf of their tenants. And the undue burden test would shield small corporate and mom-and-pop landlords from administrative and economic impositions that may threaten their survival.³⁸ Extending the ADA to rental dwellings would therefore strike an appropriate balance between facilitating the access of persons with disabilities to independent living and the economic interests of landlords who own rental properties.

33. Catherine Reed, *29 Insightful Landlord Statistics—2022*, FLEX (Apr. 18, 2022), <http://getflex.com/blog/landlord-statistics> [<http://perma.cc/B9BU-PWRY>].

34. *Id.*

35. *See* United States v. Noble Homes, Inc., 173 F. Supp. 3d 568, 572 (N.D. Ohio 2016).

36. *See* 42 U.S.C. § 3603(b)(1).

37. 28 C.F.R. § 36.104 (2016).

38. *See id.*

2. The Airbnb Conundrum

Legislative efforts to extend ADA Title III to individual rental dwelling units will naturally implicate short-term bookings on Airbnb and other similar platforms. While the ADA strictly prohibits any disability discrimination by hotels, Airbnb is an unusual hospitality business because it does not directly franchise, manage, or own a hotel and resort portfolio.³⁹ Airbnb is instead an intermediary “broker between hosts who temporarily sublet their homes and guests who seek affordable and unconventional places to stay.”⁴⁰ This business model complicates accessibility issues for people with disabilities because the ADA “was never designed to cover private citizens, such as Airbnb hosts,” and the continuing development of the “largely unregulated sharing economy thus complicates whether the ADA applies to these new types of largely person-to-person transactions.”⁴¹ Besides, the ADA’s transient housing provision “specifically applies only to places with more than five rooms to rent and are not occupied by the homeowner as a place of residence”; these conditions are seldom met on Airbnb, so “many hosts are not legally prohibited from discriminating” and thus subject their Airbnb guests with disabilities to pre-ADA conditions.⁴²

This lack of legal protections may partially explain why the vacation rental industry is a hotbed of discrimination against individuals with disabilities. A 2016 study investigated the accessibility of almost four thousand Airbnb listings by requesting bookings through fake able-bodied and people with disabilities.⁴³ The study participants covertly solicited Airbnb hosts across the United States by posing as guests who were nondisabled or had disabilities such as blindness, cerebral palsy, dwarfism, or spinal cord injuries.⁴⁴ Disability discrimination was obvious from the study results.

Those without disabilities were offered preapprovals—that is, following an initial inquiry about availability, hosts may make approval automatic once a guest requests a booking—75% of the time, whereas those with

39. Mason Ameri & Douglas L. Kruse, *Study Shows How Airbnb Hosts Discriminate Against Guests With Disabilities as Sharing Economy Remains in ADA Gray Area*, CONVERSATION (May 12, 2020, 8:34 AM), <http://theconversation.com/study-shows-how-airbnb-hosts-discriminate-against-guests-with-disabilities-as-sharing-economy-remains-in-ada-gray-area-127416> [<http://perma.cc/Y65L-ZA3X>].

40. *Id.*

41. *Id.*

42. *Id.*; accord 42 U.S.C. § 12181(7)(A); *Sanzaro v. Ardiente Homeowners Ass’n*, 364 F. Supp. 3d 1158, 1174 (D. Nev. 2019); ROCKY MTN. ADA CTR., ARE VACATION RENTAL PROPERTIES BUSINESSES SUBJECT TO THE AMERICANS WITH DISABILITIES ACT OF 1990? 3, (2018), http://rockymountainada.org/sites/default/files/2018-12/vrp_rapid_response_report.pdf [<http://perma.cc/JBZ8-YPUU>].

43. Ameri & Kruse, *supra* note 39.

44. *Id.*

disabilities had a much harder time, depending on the disability. Those with dwarfism were preapproved 61% of the time, while people with blindness were at 50%. Guests suffering from cerebral palsy were at 43%. And having a spinal cord injury meant a preapproval rate of just 25%. Overall, the more extreme the disability, like using a wheelchair, the more discrimination our disabled “guests” endured.⁴⁵

In collecting this data, the study participants tried to interact with every host to gain insight into how people with disabilities are perceived.⁴⁶ Although some hosts were welcoming, others reacted negatively.⁴⁷ One host demanded an “animal cleaning” fee from a blind guest with a guide dog, in addition to the “typical cleaning fee assessed to all guests.”⁴⁸ Another host “was especially disrespectful toward a traveler with blindness by replying, ‘Um. That’s a new one. How do you drive?’”⁴⁹ A third host discouraged a “traveler with cerebral palsy, blaming an architectural constraint. ‘Our place has a very narrow and circular stairway, so it would be too difficult for you,’ the host said.”⁵⁰ Apart from these anecdotes, Haben Girma, a prominent DeafBlind Harvard Law School graduate and disability rights lawyer, had a bad Airbnb experience when she booked an apartment in London, only to have the host cancel her reservation upon learning that “her guide dog would be joining her.”⁵¹ Girma educated the host on the ADA and the parallel Equality Act in the United Kingdom, but the host refused to reinstate her reservation under the premise that “the property would be undergoing some work during her scheduled stay.”⁵² Interestingly, Girma’s nondisabled friend tried to book the same dates at the same property a mere five days later, and the host accepted the reservation.⁵³ Such transparent discrimination exemplifies the housing challenges faced by persons with disabilities.

Congress could address disability discrimination in the vacation rental market by extending ADA Title III to Airbnb and other similar platforms, as urged by two commentators, Douglas Kruse and Mason Ameri.⁵⁴ Practical considerations should nevertheless inform any such legislation. Because Airbnb is a conduit between hosts and guests and relies on hosts to supply

45. *Id.*

46. *See id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Megan Rose Dickey, *How Airbnb Handles Discrimination Claims*, TECHCRUNCH (Nov. 19, 2019, 3:32 PM), <http://techcrunch.com/2019/11/19/how-airbnb-handles-discrimination-claims> [<http://perma.cc/H3CY-ZB7V>].

52. *Id.*

53. *Id.*

54. *See Ameri & Kruse, supra* note 39.

its inventory of properties, it cannot directly supply disability-accessible rentals without significant disruption to its business model. And disability rights advocates concede that “it would not be realistic or sensible to force every mom-and-pop listing on Airbnb to become ADA-compliant.”⁵⁵ Given this background, a two-part legislative solution would balance the needs of people with disabilities with the interests of Airbnb and its hosts. First, Congress should define short-term vacation rentals as “transient lodging” for ADA accessibility purposes.⁵⁶ Second, Congress should amend Title III of the ADA to extend to professional Airbnb hosts who list a threshold number of properties and require these professional hosts to make at least some of their properties accessible.⁵⁷ Congress can base its discussion of the appropriate threshold on the FHA’s application to property owners who own four or more homes.⁵⁸

If adopted with the other ADA amendments proposed in this Article, the foregoing approach to the *Airbnb problem* would eliminate legal gray areas between rental dwellings, short-term vacation bookings, and transient housing by treating them the same under the ADA. Focusing on professional hosts would protect small individual hosts with few properties from financial ruin while recognizing the reality that “[t]he majority of Airbnb listings now come from professional managers. Individual hosts have shrunk from 47% of all listings as recently as March 2018, to 37%. Small property managers (between 2 and 20 listings) comprise the largest portion of Airbnb supply.”⁵⁹ And the private right of action in the ADA would circumvent any reluctance by Airbnb and its peers to enforce disability rights. People like Girma would no longer fall victim to possible business reluctance to meaningfully punish discriminatory hosts who generate the booking fee revenue on which Airbnb and its vacation rental peers rely.⁶⁰

B. THE FHA

The FHA is another piece of the federal statutory puzzle for prospective and existing tenants with disabilities. It has four main components relevant to rental dwellings for individuals with disabilities. First, the FHA requires certain multifamily dwellings scheduled for initial occupancy after March

55. *Id.*

56. *See* *Regents of the Mercersburg Coll. v. Republic Franklin Ins. Co.*, 458 F.3d 159, 166 (3d Cir. 2006) (citing, *inter alia*, 28 C.F.R. § 36.402(b) (2022) and 28 C.F.R. pt. 36 app. A (2022)).

57. *See* *Airbnb at IPO Part I: Who Are Today’s Airbnb Hosts and How Loyal are They?*, TRANSPARENT (Nov. 4, 2020) [hereinafter *Airbnb at IPO*], <http://seetransparent.com/blog/airbnb-at-ipo-part-i-who-are-todays-airbnb-hosts-and-how-loyal-are-they> [<http://perma.cc/7CFU-B7TA>].

58. *See* 42 U.S.C. § 3603(b)(1).

59. *Airbnb at IPO*, *supra* note 57.

60. *See* Dickey, *supra* note 51.

13, 1991, to be designed and constructed so that they are readily usable by people with disabilities. Second, the FHA generally bans discriminatory conduct against prospective and existing renters with disabilities. Third, the FHA compels landlords to implement and pay for reasonable accommodations requested by individuals with disabilities. Fourth, the FHA supplements the ADA by requiring landlords to allow people with disabilities to make reasonable modifications to rental homes at their own expense. The following Section analyzes these parts of the FHA and the coverage gaps that leave individuals with disabilities exposed to discrimination by landlords. This discussion is accompanied by proposed revisions to the FHA that would help strengthen the legal protections given to renters with disabilities under federal law.

1. FHA Design and Construction Standards

The Department of Housing and Urban Development (“HUD”) defines “covered multifamily dwellings” as ground floor units in walk-up buildings with at least four dwellings and every unit in elevator-containing buildings with four or more dwellings.⁶¹ Covered multifamily dwellings set for first occupancy after March 13, 1991, must “have at least one building entrance on an accessible route unless it is impractical to do so because of the terrain or unusual characteristics of the site.”⁶² If a covered multifamily dwelling has an accessible entrance, its common and public areas must be usable by individuals with disabilities and its doors must be wheelchair-width.⁶³ In addition, the relevant units in a covered multifamily dwelling must incorporate several aspects of wheelchair-friendly design: (1) accessible routes into and through the unit; (2) fixtures such as outlets, light switches, and thermostats reachable by wheelchair users; (3) bathroom and kitchen arrangements that allow a wheelchair user to maneuver through the space; and (4) reinforced bathroom walls to facilitate later installation of grab bars around key bathing facilities such as the shower and toilet.⁶⁴ HUD has designated several model building codes as safe harbors which automatically satisfy some or all of its accessible design and construction requirements.⁶⁵

While these accessible design and construction regulations are a step in the right direction, their focus on wheelchair users neglects individuals with other types of disabilities such as hearing or vision difficulties. HUD should rectify this FHA coverage gap by updating the instant regulations to compel

61. 24 C.F.R. § 100.201.

62. *Id.* § 100.205(a).

63. *Id.* § 100.205(c)(1)–(2).

64. *Id.* § 100.205(c)(3)(i)–(iv).

65. *Id.* § 100.205(e).

covered multifamily dwellings to incorporate accessibility and safety features essential to individuals who have sensory impairments. This should be an easy undertaking because HUD can refer to its own Fair Housing Act Design Manual, which sets out features necessary to compensate for hearing and vision difficulties.⁶⁶ For example, call boxes at building entrances and fire alarms in common areas and individual dwelling units are accessible to hearing-impaired people only if they use auditory and visual signals.⁶⁷ And a property is inaccessible to individuals with vision difficulties when it has dangerous objects hanging overhead or protruding from walls such that they cannot be detected through the use of a guidance cane, lacks thirty-six-inch-wide routes around large obstacles, or uses curb cutouts or ramps not easily identifiable with a guidance cane.⁶⁸

New HUD accessibility regulations would increase the supply of rental housing usable by persons with disabilities. In enforcing the FHA, the Department of Justice (“DOJ”) focuses on zoning laws that exclude group homes and ensure that “newly constructed multifamily housing is built in accordance with [FHA] accessibility requirements so that it is accessible to and usable by people with disabilities.”⁶⁹ Architects, builders, developers, and owners can all be held liable for non-compliance with FHA accessible design and construction standards; this is regularly addressed through DOJ enforcement actions.⁷⁰ These cases are typically “resolved by consent decrees providing a variety of types of relief, including: retrofitting to bring inaccessible features into compliance where feasible and where it is not—alternatives (monetary funds or other construction requirements) that will provide for making other housing units accessible.”⁷¹ DOJ may also require landlords to redress violations of FHA accessible design and construction standards through “training on the accessibility requirements . . . ; a mandate that all new housing projects comply with the accessibility requirements, and monetary relief for those injured by the violations.”⁷² And landlords should consider the cost of DOJ enforcement actions before building housing that is inaccessible to people with disabilities.

66. See generally U.S. DEP’T OF HOUS. & URB. DEV., FAIR HOUSING ACT DESIGN MANUAL (1998), <http://www.huduser.gov/portal/publications/PDF/FAIRHOUSING/fairfull.pdf> [<http://perma.cc/DDF9-VXKL>].

67. *Id.* at 42, 99, 269.

68. *Id.* at 26, 102, 107, 109, 111.

69. *Fair Housing Act*, U.S. DEP’T OF JUST., <http://www.justice.gov/crt/fair-housing-act-1> [<http://perma.cc/P4JY-5X77>]. See generally *Housing Discrimination Under the Fair Housing Act*, U.S. DEP’T OF HOUS. & URB. DEV. [hereinafter *Housing Discrimination*], http://www.hud.gov/program_offices/fair_housing_equal_op/fair_housing_act_overview [<http://perma.cc/8DRU-KULG>].

70. See *Fair Housing Act*, *supra* note 69.

71. *Id.*

72. *Id.*

2. The General Ban on Discriminatory Conduct

The FHA outlaws “discrimination on the basis of disability in all types of housing transactions,” and this broad scope gives substantial protection to individuals with disabilities.⁷³ Violations encompass (1) discouraging the rental of a dwelling; (2) falsely stating that rental housing is unavailable; (3) refusing to negotiate or rent housing; (4) using different rental criteria or procedures; (5) imposing additional rental charges; (6) setting modified rental terms and conditions like requiring persons with disabilities to sign liability waivers not sought from other tenants; (7) engaging in adverse actions such as deferment of maintenance, unfair guest eviction, or other harassment; and (8) segregating people with disabilities in certain buildings or neighborhoods, or particular sections thereof.⁷⁴ “The FHA can be violated by either intentional discrimination or if a practice has a disparate impact on a protected class,”⁷⁵ so landlords cannot “otherwise make [rentals] unavailable” to individuals on account of a disability.⁷⁶ For illustration, the United States District Court for the Central District of California had an FHA case where the plaintiffs submitted evidence that an executive for a Pomona, California, landlord collective known as K-KAPS stated that “he did not rent to Blacks, that Blacks were nothing but trouble, and that if K-KAPS got rid of all the Blacks, the problems relating to drugs, crime, and troublesome tenants would stop.”⁷⁷ The district court denied a motion for summary judgment filed by K-KAPS because it found a triable issue of fact on whether K-KAPS violated the FHA by making housing otherwise unavailable to racial minorities.⁷⁸ In another case, the United States District Court for the District of Columbia held that an insurer violated the FHA by refusing to cover landlords renting to section 8 tenants because this insurer’s policy disparately impacted Black and female-led households and made housing otherwise unavailable to these groups.⁷⁹ The long arm of the FHA’s ban on making housing otherwise unavailable on account of protected characteristics is invaluable to persons with disabilities who need equal access to rental housing. Congress should preserve this aspect of the FHA if

73. *See id.*

74. *Housing Discrimination*, *supra* note 69.

75. *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011).

76. *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1356 (6th Cir. 1995).

77. *Inland Mediation Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1132 (C.D. Cal. 2001). The FHA extends to several protected classes, including race and disability, and the legal reasoning in race-based FHA claims is equally applicable to claims relating to disability. *See Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 959 (9th Cir. 2021) (quoting 42 U.S.C. § 3604).

78. *Inland Mediation Bd.*, 158 F. Supp. 2d at 1132, 1143–45.

79. *Nat’l Fair Hous. All. v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 23, 28–34 (D.D.C. 2017).

it updates federal housing law to better address the challenges faced by individuals with disabilities.

3. Reasonable Accommodations and Modifications

The FHA's effectiveness against disability discrimination in rental housing is nevertheless tempered by its distinction between reasonable accommodations and reasonable modifications.⁸⁰ This legal regime does not adequately protect individuals who become disabled while living in a rental dwelling exempt from HUD's accessible design and construction mandate. The separation of reasonable accommodations and reasonable modifications further broaches the possibility that a person with disabilities may be forced to bear the burden of any unlawful noncompliance with HUD accessible design and construction standards. Discriminatory landlords may also use the FHA's treatment of reasonable modifications as a pretext to drive away prospective or existing tenants seen as undesirable on account of a disability. This state of affairs undercuts the FHA's strict prohibition on disability discrimination in rental housing.⁸¹ Congress must address these significant coverage gaps in the FHA to ensure that individuals with disabilities have the same access to rental housing as their nondisabled peers. The disparity in these groups' access to rental housing will otherwise persist.

Illegal disability discrimination under the FHA includes a landlord's "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."⁸² This statutory text compels landlords to implement and pay for any reasonable disability-related accommodations sought by prospective or existing tenants.⁸³ And the FHA prohibits landlords from evading this obligation by conditioning reasonable accommodations on the payment of extra fees, deposits, or rent.⁸⁴ Examples of reasonable accommodations include (1) bypassing an unassigned first-come, first-served parking policy to give a mobility-impaired resident an assigned parking spot convenient to the entrance of their individual dwelling unit; (2) exempting a tenant with a mental disability who is afraid of going out from a general policy of paying rent in-person at the leasing office; and (3) permitting a tenant who has a sensory impairment to keep in their unit a

80. See 42 U.S.C. § 3604(f)(3)(A)–(B); 24 C.F.R. §§ 100.203, 100.204(a) (2022).

81. See Sw. Fair Hous. Council, 17 F.4th at 959 (citing 42 U.S.C. § 3604).

82. 42 U.S.C. § 3604(f)(3)(B).

83. For an overview of this topic, see *Joint Statement of the Department of Housing and Urban Development and the Department of Justice Reasonable Accommodations Under the Fair Housing Act*, U.S. DEP'T OF JUST. (May 14, 2004), <http://www.justice.gov/crt/us-department-housing-and-urban-development> [<http://perma.cc/7UUT-S3V6>].

84. See *id.*

service animal regardless of a generalized no-pets policy.⁸⁵ And a person with disabilities “is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable.”⁸⁶

But reasonable modifications lack comparable legal protections under the FHA. As opposed to reasonable accommodations that concern landlord policies and procedures, reasonable modifications encompass any structural alterations to the interior and exterior of a dwelling unit or the common and public areas of a rental complex.⁸⁷ Under the FHA, it is illegal for a landlord to refuse “to permit, *at the expense of the handicapped person*, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises.”⁸⁸ And landlords can “condition permission for a modification on the renter agreeing to restore the interior of the premises to” its premodification condition.⁸⁹ The FHA operates such that, “while the housing provider must permit the modification, the tenant is responsible for paying the cost of the modification.”⁹⁰ Common reasonable modifications for mobility-impaired persons are adding ramps to building entrances, widening doorways so a wheelchair can pass through, altering walkways to facilitate access to common areas, lowering bathroom and kitchen cabinets to wheelchair height, and installing bathroom grab bars.⁹¹ Outside the mobility context, reasonable modifications for individuals with cognitive or physical disabilities include easily-manipulated appliance and door handles and locks, simplified home security systems, and anti-skid floors and steps.⁹² Hearing-impaired persons may need the reasonable modifications of visual doorbells and smoke alarms.⁹³ And individuals with vision loss may require reasonable modifications such as upgraded lighting, removal of protruding obstacles, color-contrast strips on stair steps, and large print or braille door numbering and directional signage.⁹⁴

85. *Id.*

86. *Id.*

87. See U.S. DEP’T OF HOUS. & URBAN DEV. & U.S. DEP’T OF JUST., REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT 3, 6–7 (Mar. 5, 2008), http://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf [<http://perma.cc/PM9V-4MNR>].

88. 42 U.S.C. § 3604(f)(3)(A) (emphasis added).

89. *Id.*

90. U.S. DEP’T OF HOUS. & URBAN DEV. & U.S. DEP’T OF JUST., *supra* note 87, at 3.

91. *Id.*

92. FAIR HOUS. PARTNERS OF WASH. STATE, REASONABLE ACCOMMODATIONS AND MODIFICATIONS FOR PEOPLE WITH DISABILITIES 15, <http://kingcounty.gov/~media/exec/civilrights/documents/RAmgmt> [<http://perma.cc/HTG3-UHLY>].

93. *Id.*

94. *Id.*

This different treatment of reasonable accommodations and reasonable modifications creates a coverage gap pertaining to dwellings that predate or are exempt from the FHA accessible design and construction standards. One can suddenly become disabled from traumatic events like car accidents, the onset of a debilitating illness, or the deterioration of a medical condition. If an individual becomes disabled while living in a rental dwelling not subject to FHA accessible design and construction standards, inaccessible housing may greatly complicate their daily lives and hinder their recovery. Such circumstances would be especially problematic with regard to long-term disabilities that require structural modifications to the person's dwelling, like wheelchair retrofitting costing tens of thousands of dollars.⁹⁵ Under the FHA, a person who is newly disabled must pay for these structural modifications,⁹⁶ which may be unfeasible if they cannot work and need to conserve their cash, lack relevant insurance, or need to pay medical bills. Although the individual could theoretically relocate to another rental home, that is not an ideal solution because accessible units might be unaffordable for them. Besides, the person's disability could obstruct their efforts to find a new rental dwelling, as would be the case with an individual who must attend many medical appointments that leave no time to research housing options or a new wheelchair user who cannot drive until they obtain a hand-controlled vehicle. The person may also be physically incapable of moving to a new home without hiring movers, and this expense would be compounded by the cost of buying out or terminating their lease at their inaccessible dwelling.

The FHA's separation of reasonable accommodations and modifications also makes it possible that a person with disabilities will bear the cost of unlawful landlord noncompliance with FHA accessible design and construction requirements. Developers and landlords sometimes disregard the relevant HUD regulations,⁹⁷ as shown by the DOJ's emphasis on ensuring that new multifamily housing satisfies FHA accessibility standards and litigation of enforcement actions against entities that violate this aspect of federal law.⁹⁸ It is conceivable that individuals with disabilities will rent dwellings that should be—but are not—compliant with HUD regulations that implement the FHA accessible design and construction requirements. Under such circumstances, the landlord may try to mask its violation of federal law by referencing the FHA provision that directs

95. *How Much Does It Cost To Remodel For Disability Accommodation?*, *supra* note 27.

96. *See* 42 U.S.C. § 3604(f)(3)(A).

97. *See generally* 24 C.F.R. § 100.205 (demonstrating the relevant HUD regulations).

98. *See Fair Housing Act*, *supra* note 69.

residents to pay for reasonable modifications.⁹⁹ If a tenant with disabilities is unaware of the law, they could end up paying for modifications that would be unnecessary but for the landlord's violation of the FHA while the landlord evades its accessibility obligations under that anti-discrimination statute.

Certain landlords may also exploit the FHA's treatment of reasonable modifications as a pretext to discourage prospective or existing tenants viewed as undesirable or troublesome because of a disability. Anti-disability sentiment is an important social issue that remains unaddressed, perhaps because persons with disabilities are not well understood by the general public.¹⁰⁰ As noted earlier, this negative attitude toward individuals with disabilities is reflected in the difficulties they have in securing Airbnb bookings and the disdainful reception they receive from certain Airbnb hosts.¹⁰¹ Some landlords hold analogous prejudices and may use the FHA's reasonable modification regime to get rid of persons with disabilities. In particular, discriminatory landlords may, upon learning about the need for a reasonable modification, falsely tell the individual with disabilities the modification will cost the person an excessive amount of money in the hopes that financial barriers will force the individual to rent elsewhere. Three parts of the FHA are pertinent to such conduct: (1) landlords generally cannot insist on alternative designs or modifications when a tenant's request is reasonable; (2) landlords are responsible for the additional costs stemming from the use of more expensive materials to satisfy the landlord's aesthetic taste; and (3) landlords cannot require that a particular contractor be hired to implement a reasonable modification.¹⁰² These rules do not specifically forbid a landlord from misrepresenting to a person with disabilities that certain modifications are very expensive to drive the person away. While this behavior violates the FHA's prohibition on discouraging the rental of a dwelling on the basis of a disability,¹⁰³ it may be difficult to prove such misconduct. The landlord may involve itself in implementation of the modification to influence the billing process and obtain inflated invoices for labor or materials. Besides, the FHA allows a landlord to require departing residents to undo modifications and restore the interior of the dwelling to its prior condition if "it is reasonable to do so,"¹⁰⁴ meaning when modifications

99. See 42 U.S.C. § 3604(f)(3)(A).

100. See, e.g., Ameri & Kruse, *supra* note 39.

101. See *id.*

102. U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF JUST., *supra* note 87, at 11–12.

103. See *Housing Discrimination*, *supra* note 69.

104. 42 U.S.C. § 3604(f)(3)(A) ("[T]he landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted."). Under this regulation, the landlord must request that the departing resident complete the restoration, meaning that the landlord must affirmatively exercise this right, and it is not a default rule. *Id.*

impact the landlord's "or subsequent tenant's use or enjoyment of the premises."¹⁰⁵ The malleability of this restoration requirement leaves room for unethical landlords to overstate the projected cost of a modification such that it is unpalatable to the person with disabilities, which may not be a high bar given the economic constraints faced by households with individuals with disabilities.

Congress can resolve the foregoing issues with the FHA by compelling landlords to effectuate and pay for reasonable modifications absent undue burdens or fundamental alterations of the landlord's business.¹⁰⁶ In so doing, Congress should make the undue burden and fundamental alteration defenses unavailable when reasonable modifications are necessitated by a landlord's noncompliance with HUD regulations that implement FHA accessible design and construction requirements. These changes to the law would help people who become disabled while living in housing exempt from the FHA accessible design and construction standards, encourage developers and landlords to comply with the associated HUD regulations, incent landlords to help minimize the cost of modifications if possible, prevent landlords from using high modification quotes to discourage renters with disabilities, and reduce the likelihood that people with disabilities will be injured by landlord misconduct. And using the undue burden or fundamental alteration test to identify unreasonable modifications would protect landlords from any disproportionate modification requests that could threaten their continued viability.

4. Exceptions to the FHA

Any FHA analysis would be incomplete without a discussion of its relevant exceptions. First, the "Mrs. Murphy" exception references the metaphorical "Mrs. Murphy's boardinghouse" and exempts from the FHA units in dwellings with living quarters for four or fewer families if the owner occupies one as their residence.¹⁰⁷ Second, single-family dwellings rented or sold without the help of a broker are exempt from the FHA if the owner is a private individual who owns three or fewer single-family homes.¹⁰⁸ Third, certain senior housing facilities are exempt from the FHA's ban on family status discrimination and can refuse to rent to families with minor children.¹⁰⁹ Fourth, housing offered by private clubs and religious groups is exempt from the FHA if the housing provider does not restrict its

105. U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF JUST., *supra* note 87, at 13.

106. *Hollis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 542 (6th Cir. 2014).

107. *See United States v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005).

108. 42 U.S.C. § 3603(b)(1).

109. *Id.* § 3607(b)(1)–(3).

membership on account of race, color, or national origin.¹¹⁰ Fifth, the FHA is inapplicable to cases involving shared living units or the selection of roommates.¹¹¹ Sixth, and finally, the FHA only applies to “dwellings” meant for occupancy as a “residence,” so it may not extend to short-term vacation bookings like those offered through Airbnb and similar platforms.¹¹² In the disability context, the exceptions for Mrs. Murphy-style living arrangements and owners of three or fewer single-family dwellings appear well suited to protecting small-scale landlords against disproportionate requests for disability accommodations or modifications. If Congress amends the FHA such that landlords are required to implement and pay for reasonable modifications requested by a resident with disabilities, it should consider tailoring this upgrade to the law to help protect landlords with fewer financial resources.

C. THE REHAB ACT

The Rehab Act supplements the ADA and the disability-related aspects of the FHA.¹¹³ It applies to federal agencies and private entities that receive federal funding.¹¹⁴ Per section 504 of the Rehab Act, “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of [their] disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹¹⁵ Two aspects of section 504 support renters with disabilities. First, section 504 imposes its own accessible design and construction requirements on multifamily housing projects that benefit from federal funding. Second, section 504 obligates landlords who receive federal financial assistance to implement and pay for reasonable accommodations or structural modifications requested by tenants with disabilities. But the Rehab Act can be improved via congressional action. These Rehab Act-centric topics are discussed in turn below.

For new housing projects built with federal funds, section 504 requires

110. *Id.* § 3607(a).

111. *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1222 (9th Cir. 2012).

112. 42 U.S.C. §§ 3604, 3602(b); see Kendra Craft, *‘Belong Anywhere?’: Addressing Airbnb’s Housing Discrimination Problem*, KY. L.J. ONLINE (Aug. 16, 2021), <http://www.kentuckylawjournal.org/blog/belong-anywhere-addressing-airbnbs-housing-discrimination-problem> [<http://perma.cc/26NJ-BHBE>]; Joseph Bauer, *Vacation Rentals and Accessibility: A Look at the Americans with Disabilities Act and Fair Housing Act*, MYVR (Nov. 28, 2018), <http://blog.myvr.com/do-vacation-rentals-need-to-be-ada-compliant> [<http://perma.cc/47D6-QXSH>] (“Generally speaking, the FHA [does not] apply to transient housing like short-term rentals.”).

113. Vocational Rehabilitation and Other Rehabilitation Services, 29 U.S.C. §§ 701–799.

114. *Wisc. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 746 (7th Cir. 2006).

115. 29 U.S.C. § 794(a).

“5% of the dwelling units, or at least one unit, whichever is greater, to be accessible for persons with mobility disabilities. An additional 2% of the dwelling units, or at least one unit, whichever is greater, must be accessible for persons with hearing or visual disabilities.”¹¹⁶ HUD uses the Uniform Federal Accessibility Standards (“UFAS”) to determine whether dwelling units are suitably accessible under section 504.¹¹⁷ And these new construction standards extend to the federally funded substantial alterations of existing housing projects, which occur when alterations are “undertaken to a project that has 15 or more units and the cost of the alterations is 75% or more of the replacement cost of the completed facility.”¹¹⁸ If such alterations fall below these threshold criteria but less than five percent of the dwelling units in the housing project are disability-accessible, section 504 requires the alterations to be as usable as possible to people with disabilities. Where “alterations to single elements or spaces of a dwelling unit, when considered together, amount to an alteration of [the] dwelling unit, the entire [dwelling] unit shall be made accessible” to residents with disabilities.¹¹⁹

Beyond the above accessibility standards, the Department of Health and Human Services (“HHS”) enacted several regulations pertinent to reasonable accommodations and structural modifications when it implemented section 504 of the Rehab Act.¹²⁰ The HHS regulation most relevant to renters with disabilities obligates landlords who take federal funding to “make reasonable accommodation[s] to the known physical or mental limitations of an otherwise qualified handicapped applicant . . . unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.”¹²¹ Such federally funded landlords thus have a duty to make and pay for reasonable accommodations and structural modifications requested by people with disabilities.¹²² As a result, “Section 504 imposes greater obligations than the Fair Housing Act” because it contemplates landlords “providing and paying for reasonable accommodations that involve structural modifications to units or public and common areas.”¹²³ And the Rehab Act offers a private right of action to redress discrimination by landlords who refuse to accommodate persons with

116. *Section 504: Frequently Asked Questions*, U.S. DEP’T OF HOUS. & URB. DEV., http://www.hud.gov/program_offices/fair_housing_equal_op/disabilities/sect504faq [<http://perma.cc/FS4H-VZP4>] (citing 24 C.F.R. § 8.22(a)–(b)).

117. *Id.* (citing 24 C.F.R. § 8.32(a)).

118. *Id.* (citing 24 C.F.R. § 8.23(a)).

119. *Id.* (citing 24 C.F.R. § 8.23(b)).

120. *Wisc. Cmty. Servs. Inc. v. City of Milwaukee*, 465 F.3d 737, 746–47 (2006) (cleaned up).

121. 28 C.F.R. § 41.53.

122. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 606 n.16 (1999).

123. U.S. DEP’T OF JUST., *supra* note 83; *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 115 (3d Cir. 2018).

disabilities.¹²⁴

The Rehab Act's utility to persons with disabilities nevertheless depends on the definition of federal financial assistance that triggers section 504. Federal financial assistance consists of direct subsidies from the federal government and indirect support received through intermediaries like state agencies.¹²⁵ But the Rehab Act does not apply to private entities that neither directly nor indirectly receive federal financial assistance yet benefit from such funds.¹²⁶ These rules dictate that

[a] HUD funded public housing agency, or a HUD funded non-profit developer of low income housing is a recipient of federal financial assistance and is subject to Section 504's requirements. Therefore, a public housing agency is covered by Section 504, for example, in the operation of its Section 8 [rent assistance voucher program for qualifying low-income households]. [But] a private landlord who accepts Section 8 tenant-based vouchers in payment for rent from a low-income individual is not a recipient of federal financial assistance merely by virtue of such payments. Similarly, while a developer that receives Community Development Block Grant (CDBG) or HOME [Investment Partnerships Program] funds for the rehabilitation of an owner-occupied unit is a recipient for purposes of Section 504, a family that owns the unit is not a recipient because the family is the ultimate beneficiary of these funds.¹²⁷

Congress can strengthen the Rehab Act through a broadened definition of federal financial assistance that includes federal tax exemptions for builders and landlords.¹²⁸ This change in the law would actualize the federal government's power to use the federal tax code to further its public policy objectives like reducing disability-based discrimination in rental housing.¹²⁹ Such a change to the Rehab Act would also favor treating similar state property development initiatives like New Jersey's Payment in lieu of Taxes ("PILOT") program—which lets municipalities exempt developers from

124. See *Anast v. Commonwealth Apartments*, 956 F. Supp. 792, 800 (N.D. Ill. 1997).

125. *Bentley v. Cleveland Cnty. Bd. of Cnty. Comm'rs*, 41 F.3d 600, 604 (10th Cir. 1994); see *Disability Access Requirements*, WASH. STATE HUM. RTS. COMM'N, <http://www.hum.wa.gov/fair-housing/disability-access-requirements> [<http://perma.cc/QMH2-7G3X>] (explaining that if state or local government assistance of a housing project consists of federal funds that pass through the state or local government, this funding triggers Title II of the ADA and section 504).

126. *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468 (1999).

127. *Section 504: Frequently Asked Questions*, *supra* note 116; see 24 C.F.R. § 8.3 (defining "recipient" of federal funds).

128. *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 544 (1983) ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."); see also *Rosenberger v. Rector*, 515 U.S. 819, 859–60 (1995) (Thomas, J., concurring) ("A tax exemption . . . is economically and functionally indistinguishable from a direct monetary subsidy[.] . . . [T]he financial aid to [the recipient] is undeniable.")

129. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 586, 604 (1983) (articulating the principle that tax-exempt entities cannot undermine public policy).

property taxes to encourage urban revitalization—as state funding.¹³⁰ This legal regime would increase the supply of disability-accessible housing by subjecting more privately owned rental housing developments to Title II of the ADA, which extends the accessibility requirements derived from section 504 to all activities, services, and programs offered by public entities, including state and local governments.¹³¹

Individuals with disabilities may also find it difficult to assert their legal rights under the Rehab Act because the public information on a landlord, such as their marketing materials and website, may not indicate whether they are subject to section 504 regulations.¹³² For example, I lived in three Washington, D.C., apartment buildings during and after law school: the Connecticut Gardens, the Drake, and the Gables Westbrooke Place. It is unclear from their websites whether any of these properties were built or altered with federal financial assistance, or whether the properties or their managers receive any federal funding.¹³³ This opacity obscures whether these properties must comply with the Rehab Act's accessible design and construction directives or its reasonable accommodation and modification mandate. In this context, persons with disabilities who find rental housing inaccessible face a difficult choice between opening a possibly contentious dialogue with management staffers who have no incentive to disclose information about federal financial assistance, pursuing legal action that may fail because the Rehab Act does not apply to the property, or moving on and potentially letting their landlord get away with a Rehab Act violation. To facilitate equal access to rental housing for individuals with disabilities, Congress should erase the information advantage now enjoyed by landlords by requiring them to disclose on individual property websites or other like mediums whether the property was built or altered using federal funds or receives federal financial assistance. Such an update to the law will help persons with disabilities obtain accessible rentals by encouraging landlords to engage in the interactive process of finding reasonable accommodations

130. *Tax Abatements: Utilizing New Jersey's "PILOT" Programs*, ARCHER L., <http://www.archerlaw.com/tax-abatements-utilizing-new-jerseys-pilot-programs> [<http://perma.cc/7K9V-N7EZ>] (summarizing the PILOT tax program).

131. *See* Cal. Council of the Blind v. Cnty. of Alameda, 985 F. Supp. 2d 1229, 1235 (N.D. Cal. 2013).

132. *See, e.g.*, Robinson v. Univ. of Utah, No. 2:06CV981DAK, 2007 WL 2688237, at *2 (D. Utah Sept. 11, 2007) ("The current record does not disclose whether [Defendant] was the recipient of federal funds . . . Defendant's Motion to Dismiss . . . should be denied until discovery can provide the necessary evidence to make this determination.").

133. *See generally* Overview, CONN. GARDENS, <http://www.connecticutgardensdc.com> [<http://perma.cc/CX9C-6WWQ>]; *The Drake*, KEENER MGMT., <http://keenermanagement.com/properties/the-drake> [<http://perma.cc/N8HC-8FKB>]; *Home*, WESTBROOKE PLACE, <http://www.westbrookeplace.com> [<http://perma.cc/824V-TCKF>].

or modifications that work for all parties.¹³⁴ This transparency is preferable to landlords using non-disclosure to sidestep their legal obligations under the Rehab Act.

The potential benefits of these proposed changes to the Rehab Act are illustrated by a 2019 incident where HUD punished the City of Los Angeles for its failure to make sixteen “housing developments that received HOME Investment Partnerships and Community Development Block Grant funds from the City” accessible to persons with disabilities.¹³⁵ HUD concluded that Los Angeles (1) did not ensure construction of the minimum number of units accessible to individuals who have mobility and sensory impairments; (2) excused major accessibility barriers in every designated accessible unit surveyed by HUD; (3) failed to carry its burden of ensuring that developers evenly dispersed their disability-accessible units throughout their buildings; (4) permitted the construction of inaccessible public and common-use areas in the relevant properties; and (5) utilized deficient policies and practices that did not “properly identify or require the use of the accessibility standards in its agreements with developers.”¹³⁶

To remedy this violation of the Rehab Act, HUD withheld \$80 million from Los Angeles by rejecting the city’s proposed plan to distribute federal funds via Community Development Block Grants and HOME Investment Partnerships.¹³⁷ Former HUD Secretary Ben Carson informed then-Mayor of Los Angeles Eric Garcetti that, “[a]s you have been notified time and again, the city is unlawfully discriminating against individuals with disabilities in its affordable housing program under federal accessibility laws . . . and has refused to take the steps necessary to remedy this discrimination” in housing.¹³⁸ HUD and Los Angeles officials signed a landmark settlement agreement obliging the city to “pay what will eventually amount to hundreds of millions of dollars to enhance handicap accessibility for residents living in its low-income housing.”¹³⁹ Los Angeles must now

134. See *Aubrey v. Koppes*, 975 F.3d 995, 1009 (10th Cir. 2020).

135. See generally *HUD Finds Los Angeles Continues to Violate Housing Accessibility Laws for People with Disabilities*, NAT’L LOW INCOME HOUS. COAL. (Apr. 8, 2019), <http://nlihc.org/resource/hud-finds-los-angeles-continues-violate-housing-accessibility-laws-people-disabilities> [<http://perma.cc/88EA-HAPT>].

136. *Id.*

137. Katy O’Donnell, *Citing Discrimination, HUD Denies L.A. \$80M*, POLITICO (July 19, 2019, 9:16 PM), <http://www.politico.com/story/2019/07/19/discrimination-hud-los-angeles-1606093> [<http://perma.cc/Q8VB-7EYX>].

138. *Id.*

139. For in-depth discussion, see generally Jessica Guerin, *HUD, City of Los Angeles Reach “Landmark” Settlement in Accessible Housing Dispute*, HOUSINGWIRE (Aug. 5, 2019, 2:24 PM), <http://www.housingwire.com/articles/49777-hud-city-of-los-angeles-reach-landmark-settlement-in-accessible-housing-dispute> [<http://perma.cc/YAC2-C3GY>].

spend twenty million dollars per year over the next ten years on (1) the development of ten thousand new units of affordable housing, fifteen hundred of which must be accessible to people with disabilities; and (2) the retrofitting of housing developments that do not comply with HUD accessibility standards to create another three thousand rental units for persons with disabilities.¹⁴⁰ HUD could treat private landlords that unwisely ignore the Rehab Act similarly.

II. SUPPLEMENTAL STATE RENTER PROTECTION LAWS

The federal laws that address disability discrimination in rental housing may work alongside state anti-discrimination laws that offer comparable or greater protections than their federal analogues. For example, California's Disabled Persons Act, Fair Employment and Housing Act, and Unruh Civil Rights Act parallel the FHA because they dictate that an individual with disabilities "must be allowed, at their own expense, to make reasonable modifications to their dwelling to allow them equal access [to] and enjoyment" of a rental home.¹⁴¹ In contrast, the Washington State Building Code and Washington State Law Against Discrimination augment federal housing laws regarding persons with disabilities.¹⁴² These Washington State laws extend to all multifamily residential buildings with four or more units, irrespective of whether they are publicly assisted or privately owned.¹⁴³ Further, the Washington State Building Code sets out the accessibility requirements mandated by the Washington State Law Against Discrimination, which are more stringent in some ways than the FHA accessible design and construction standards.¹⁴⁴ Because state law can supplement federal law,¹⁴⁵ state legislatures that do not want to wait for Congress to amend the ADA, FHA, and Rehab Act can incorporate this Article's ideas into state law. Such state legislative action would facilitate equal access to rental housing for individuals with disabilities and protect them just as well as amended federal laws. To this point, Texas Property Code Section 92.254 requires landlords to purchase and install a smoke alarm "capable of alerting a hearing-impaired person in the bedroom it serves" when requested by a tenant "as a reasonable accommodation for a

140. *Id.*

141. *Discrimination Laws Regarding People with Disabilities: Equal Services and Housing*, CAL. CIV. RTS. DEP'T, <http://www.dfeh.ca.gov/peoplewithdisabilities/#equalHousingBody> [<http://perma.cc/9E5V-5VYE>] (select "Equal Services and Housing").

142. *Disability Access Requirements*, *supra* note 125.

143. *Id.*

144. *Id.*

145. *See* *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 49–58 (2d Cir. 2018) (upholding a New York state law providing for nuclear power plant emissions credits on the basis that this state law validly supplemented the relevant federal statutes).

person with a hearing-impairment disability.”¹⁴⁶

III. RELEVANT POLICY CONSIDERATIONS

Public policy favors amending the ADA, FHA, and Rehab Act to give landlords more responsibility for implementing reasonable disability-related structural modifications. The anti-disability-discrimination provisions of the ADA, FHA, and Rehab Act “recognize[] that disabilities do not diminish the right to full inclusion in American society.”¹⁴⁷ But these laws are structured so that individuals with disabilities frequently must cover the cost of the structural modifications they need for equal access to rental dwellings. For this reason, the capacity of persons with disabilities to participate in the rental housing market often turns on whether they can afford the required structural modifications. Given the forty-three thousand dollar annual median income for households including individuals with disabilities¹⁴⁸ and the four-to-six thousand dollar¹⁴⁹ average cost of modifying a home for accessibility, current federal law allows economic barriers to exclude persons with disabilities from the rental housing market. These circumstances are antithetical to inclusion of individuals with disabilities in modern American society.¹⁵⁰ Additionally, while the average cost of retrofitting a residence for disability accessibility consumes ten to fifteen percent of the national annual median income for households with individuals with disabilities, the cost of accessibility is trivial to large property developers and managers such as Greystar Real Estate Partners and the Lincoln Property Company.¹⁵¹ Instead of subjecting persons with disabilities to financial hardships that might defeat their efforts to live autonomously, it makes sense for Congress to shift the cost of reasonable modifications to landlords that can better absorb them. This will help facilitate the full inclusion of individuals with disabilities in American society by permitting them to live in a way that reflects who they are as people rather than the effects of their disability. In particular, increased access to rental housing and its associated freedoms would help people with disabilities establish independent lives and fully develop their personal identities, friend circles, and romantic relationships instead of remaining home-bound and dependent on others for accessible housing.

146. TEX. PROP. CODE ANN. § 92.254(a-1) (West 2021).

147. *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 116 (3d Cir. 2018).

148. *Median Household Income*, *supra* note 4.

149. *See supra* notes 23–24.

150. *See Berardelli*, 900 F.3d at 116.

151. *See supra* notes 31–32.

CONCLUSION

Three federal laws, Title III of the ADA, the FHA, and the Rehab Act contain non-discrimination provisions that aim to give individuals with disabilities equal access to rental dwellings. But these statutes have coverage gaps that may hinder the efforts of persons with disabilities to participate in the rental housing market to the same extent as their nondisabled peers. This state of affairs undermines Congress's objective of facilitating full inclusion of individuals with disabilities in modern American society through the ADA, FHA, and Rehab Act. Congress can fix the rental housing-centric issues with these statutes through three incremental amendments. First, Congress should change Title III of the ADA so its accessibility requirements extend to the public areas and individual dwelling units in rental housing complexes. Second, Congress should rewrite the FHA so it imposes on residential landlords an affirmative duty to implement and cover the cost of reasonable accommodations and modifications requested by tenants with disabilities, absent an undue burden on the landlord or a fundamental alteration of the landlord's business or operations. Third, Congress should upgrade the Rehab Act to require all properties built with federal financial assistance or managed by entities that receive federal funding to clearly disclose this information on their websites or via other readily accessible mediums. These changes to the law will help remove financial barriers that undermine the efforts of people with disabilities to secure rental housing that will enable them to live autonomously and fully immerse themselves in modern society.