IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PROJECT LIFE, INC. et al.,	:	
Plaintiffs,	:	
v.	:	**Civil Action No. WMN-98-2163**
PARRIS GLENDENING, et al.,	:	
Defendants.	:	
	:	

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THE UNITED STATES OF AMERICA'S MOTION
FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

The United States of America, by its undersigned counsel, moves for leave to participate as *amicus curiae* in the above-captioned case and to file a memorandum of law, submitted herewith, briefing the issues raised in Defendants' Motion to Dismiss or, in the Alternative, to Certify Questions for Interlocutory Review and for a Stay, currently pending before the Court. The grounds for this motion are:

1. Plaintiffs filed this action in the Circuit Court for Baltimore City on or about June 9, 1998. Defendants subsequently removed this action to the United States District Court for the District of Maryland on or about July 6, 1998.

2. Plaintiffs seek injunctive relief and monetary damages under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.*, and the Maryland Discrimination in Housing Act, Md. Code Art. 49B § 22, based on Defendants' denial of a long-term berth in Maryland's port for the former U.S.S. Sanctuary, a decommissioned hospital ship upon which

Plaintiffs intend to operate a short-term residential, educational, and training program for recovering substance abusers.

3. Defendants moved to dismiss the complaint or, in the alternative, for summary judgment, on or about July 31, 1998. Defendants maintained, *inter alia*, that neither the ADA nor the FHA were applicable to the facts as alleged by Plaintiffs.

4. This Court denied Defendants' motion by Order dated November 30, 1998. The Court specifically declined to find, as Defendants had urged, that the ADA and FHA were inapplicable based on the pre-discovery factual record.

5. Less than two months after the entry of the Court's November 30, 1998 Order, and before the commencement of discovery, Defendants now move once again to dismiss the complaint. In the pending motion, Defendants argue that this suit is not ripe for adjudication. In the alternative, Defendants request that the Court certify the question of the applicability of the ADA and FHA to the United States Court of Appeals for the Fourth Circuit. Defendants also request that the Court stay discovery and dismiss defendants David L. Winstead and Tay Yoshitani.

6. The United States has significant responsibilities for implementing and enforcing the ADA and FHA, including, pursuant to statutory directive, the promulgation of implementing regulations. Accordingly, the United States has a strong interest in ensuring that the case law developed in this

suit is consistent with the United States' interpretation of the relevant statutes and the Department of Justice's regulations implementing Title II of the ADA, 28 C.F.R. pt. 35, and the FHA. Presently, the United States seeks leave to participate as *amicus curiae* to address the issue of the applicability of the ADA and FHA to the facts of this case.

7. Permitting persons to appear as friends of the court through the filing of *amicus* briefs "can contribute to [a] court's understanding" of the issues involved in a particular lawsuit. *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir. 1987). The United States has routinely filed *amicus curiae* briefs in both trial and appellate courts in cases raising questions regarding the reach of the ADA and the FHA. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990); *Galloway v. Superior Court*, 816 F. Supp. 12 (D.D.C. 1993).

8. The United States District Court for the District of Maryland has been receptive to the filing of *amicus* briefs by the United States on issues involving the interpretation of the ADA and FHA. *See, e.g., Baltimore Neighborhoods, Inc. v. T.R. Seven Oaks LLC.*, ___ F. Supp. ___, Case No. B96-2071 (D. Md. April 4, 1997)(Black, J.); *Williams v. Wasserman*, ___ F. Supp. ___, Case No. CCB-94-880 (D. Md. Jan. 12, 1999)(Blake, J.).

9. The United States' participation in this case is of significance because the ultimate resolution of this case has important implications for the interpretation of the ADA and FHA. The United States believes that its interests may be affected by the outcome of this case because it requires the interpretation of both statutes under a novel set of facts. Furthermore, the United States believes its views will be of assistance to the Court and the parties in addressing the issues raised in the litigation, not only with respect to Defendants' pending motion but also as to any subsequent motions, if any, filed in this suit.

WHEREFORE, the United States of America requests that this Court grant it leave to participate as *amicus curiae* and to file the accompanying Memorandum of Law. A proposed Order is attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of March, 1999, copies of the United States of America's Motion for Leave to Participate as *Amicus Curiae* were mailed, first class postage prepaid, to:

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	:	

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ORDER

Upon consideration of the United States of America's Motion for Leave to Participate as *Amicus Curiae*, any opposition thereto, and the applicable law, it is this _____ day of March, 1999,

ORDERED, that the United States of America's Motion for Leave to Participate as *Amicus Curiae* **BE**, and the same hereby **IS**, **GRANTED**; and, it is further

ORDERED, that the Clerk of Court accept for filing the Memorandum of Law of the United States of America as *Amicus Curiae*; and it is further

ORDERED, that the Clerk of Court mail a copy of this Order to all counsel of record.

_____
William M. Nickerson
United States District Court
Judge

IN THE UNITED STATES DISTRICT COURT
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MEMORANDUM OF LAW OF THE
UNITED STATES OF AMERICA AS AMICUS CURIAE

The United States of America, by its undersigned counsel, submits this Memorandum of Law as *Amicus Curiae*.

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I. INTRODUCTION

Plaintiffs bring this action seeking injunctive relief and monetary damages under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.*, and the Maryland Discrimination in Housing Act, Md. Code Art. 49B § 22, based on Defendants' denial of a long-term berth in Maryland's port for the former U.S.S. Sanctuary, a decommissioned hospital ship upon which Plaintiffs intend to operate a short-term residential, educational, and training program for recovering substance abusers.

Defendants moved to dismiss the complaint or, in the alternative, for summary judgment, on or about July 31, 1998. Defendants maintained, *inter alia*, that neither the ADA nor the FHA were applicable to the facts as alleged by Plaintiffs. This Court denied Defendants' motion by Order dated November 30, 1998. The Court specifically declined to find, as Defendants had urged, that the ADA and FHA were inapplicable based on the pre-discovery factual record.

Less than two months after the entry of the Court's November 30, 1998 Order, and before the commencement of discovery, Defendants once again move to dismiss the complaint. In the pending motion, Defendants argue that this suit is not ripe for adjudication. In the alternative, Defendants request that the Court certify the question of the applicability of the ADA and FHA to the United States Court of Appeals for the Fourth Circuit. Defendants also request that the Court stay

discovery and dismiss defendants David L. Winstead and Tay Yoshitani.[1]

Defendants' motion must be denied for several independent reasons. With respect to Defendants' ripeness challenge, their contention that this case is not ripe for adjudication until the Maryland Port Administration ("MPA") decides whether to grant the Sanctuary a berth simply ignores the many years of harm that Plaintiffs have endured as a result of Defendants' discriminatory denial of a long-term berth for the Sanctuary. As for Defendants' request for certification under 28 U.S.C. § 1292(b), Defendants have failed to demonstrate that exceptional circumstances warrant an immediate interlocutory appeal. Moreover, Defendants' request for certification does not meet the stringent requirements of § 1292(b). Finally, the legal questions presented for certification are inextricably interwoven with the facts of this case and are therefore not appropriate for interlocutory appellate review.

Accordingly, for the reasons set forth in greater detail below, the United States, as *amicus curiae*, respectfully submits that this Court should deny Defendants' Motion to Dismiss, or in the Alternative, to Certify Questions for Interlocutory Review and For a Stay.

[1/] This *amicus* Memorandum does not address the latter two issues.

II. ARGUMENT

A. Plaintiffs' Complaint is Ripe for Adjudication

Defendants contend that this case is not ripe for adjudication because the "MPA has not yet decided whether to approve or reject Project Life's proposal for berthing the Sanctuary at an MPA pier." *Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, to Certify Questions for Interlocutory Review and for a Stay* [hereinafter "*Defendants' Memo.*"] at 2. Defendants claim that the Advisory Council established to consider Plaintiffs' request for a berth will make a recommendation to the MPA in April 1999, and the MPA will sometime thereafter issue a final decision on Plaintiffs' request. *Id.* at 3. Thus, Defendants argue, "[u]ntil the Advisory Council make[s] a recommendation and the MPA makes a final decision on plaintiffs' request, there is no ripe and justiciable claim for this Court to consider." *Defendants' Memo.* at 2-3.

Defendants' ripeness challenge is easily dismissed because it ignores the full breadth and scope of Plaintiffs' complaint. As this Court noted in its November 30, 1998 Memorandum, Project Life has been negotiating with the MPA since 1994 to find a suitable permanent berth for the Sanctuary. *November 30, 1998 Memorandum* at 2. Furthermore, the Court correctly observed that the record as currently developed supports a finding that the MPA has made it an express condition, imposed as "the result of discrimination on the part of Defendants

against recovering substance abusers," that Plaintiffs obtain "community support" before the Sanctuary can be given a permanent berth. *Id.* at 2-3. Finally, the record establishes that Plaintiffs' request for reasonable accommodation, *Plaintiffs' Opposition to Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment* [hereinafter "*Plaintiffs' Opp.*"] at Exhibit 21, has been denied by virtue of Defendants' contention that Plaintiffs are not legally entitled to relief under the FHA. These facts, when accepted as true, as they must be, *Byrd v. Gate Petroleum Co.*, 845 F.2d 86, 87 (4th Cir. 1988), firmly support Plaintiffs' claim that the delay in locating a berth, the denial of reasonable accommodation, and the imposition of the community support requirement constitute past and on-going discrimination that has harmed Plaintiffs. *See Complaint* at ¶¶ 46-48 (defendants' actions have (a) injured and are injuring Project Life and its clients; (b) resulted in monetary damages to Project Life due to its inability to assure grantors that it has a permanent berth; and (c) harmed Project Life's clients by preventing them from participating in the program.). *See also Potomac Group Home Corp. v. Montgomery County, MD*, 823 F. Supp. 1285, 1295 (D. Md. 1993) (holding "neighbor notification" provision of Montgomery County ordinance violated FHA on its face by creating explicit classification based on disability that was unsupported by any legitimate justification). *Accord: Larkin v. State of Michigan Dept. of Social Services*, 89 F.3d 285, 289

(6th Cir. 1996).

With respect to Plaintiffs' FHA claim, "numerous courts have stressed that housing discrimination causes a uniquely immediate injury." *Assisted Living Associates of Moorestown, L.L.C. v. Moorestown Township*, 996 F. Supp. 409, 427 (D.N.J. 1998). The court in *Moorestown* observed that "[s]uch discrimination, which under the FHA includes a refusal to make reasonable accommodations, makes these controversies ripe." *Id*. The Fourth Circuit itself has observed that a violation occurs under the FHA when an individual or entity "is first denied a reasonable accommodation, irrespective of the remedies granted in subsequent proceedings." *Bryant Woods Inn, Inc. v. Howard County, Maryland*, 124 F.3d 597, 602 (4th Cir. 1997).[2] Thus, Defendants' denial of Plaintiffs' request for reasonable accommodation makes this case ripe for judicial review.

In short, the mere fact that the MPA has not yet decided whether to lease a berth to the Sanctuary is merely evidence of continuing discrimination and does not negate the many years of discrimination and resultant injury that Plaintiffs have endured. Accordingly, Defendants' contention that this case is not ripe for adjudication must necessarily fail.

B. Defendants' Request for Certification under 28 U.S.C. § 1292(b) is Meritless

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[2/] The Fourth Circuit noted in *Bryant Woods* that FHA claims are "unlike takings claims, which do not ripen until post-decisional procedures are invoked without achieving a just compensation." *Bryant Woods*, 124 F.2d at 602. Thus, the taking cases cited in support of Defendants' ripeness argument are simply inapposite.

Defendants move, in the alternative, to amend this Court's November 30, 1998 Order to allow an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit under 28 U.S.C. § 1292(b). Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, that application for appeal hereunder shall not stay proceedings in the district court unless the district court or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b)(emphasis in original).

There are several independent reasons why Defendants' certification request must be denied. First, Defendants have failed to demonstrate that this case presents exceptional circumstances warranting immediate appellate review. Second, Defendants' request for certification does not meet the stringent requirements of § 1292(b). Finally, the legal questions presented for certification are inextricably interwoven with the as yet not fully-developed facts of this case and are therefore not suited to certification under § 1292(b).

1. Certification Under § 1292(b) is an <u>Exceptional Remedy Granted Only in Rare Cases</u>

Section 1292(b) permits a district court to certify

an interlocutory order for immediate appeal under only exceptional circumstances. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S. Ct. 2454, 2461, 57 L. Ed. 2d 351 (1978)(only "exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment."); *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 265, 102 S. Ct. 3081, 3082, 73 L. Ed. 2d 754 (1982)(appeals under this section are a rare exception to the final judgment rule that generally prohibits piecemeal appeals); *President and Directors of Georgetown v. Madden*, 660 F.2d 91, 97 (4th Cir. 1981)(interlocutory appeals should be granted in exceptional circumstances only); *Beck v. Communication Workers of America*, 468 F. Supp. 93, 95 (D. Md. 1979)(Blair, J.)("Section 1292(b), a narrow exception to the longstanding rule against piecemeal appeals, is limited to exceptional cases.").

The legislative history of § 1292(b) "indicates that it [is] to be used only in extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation. It [is] not intended merely to provide review of difficult rulings in hard cases." *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966)(per curium).

Because interlocutory appeals are disfavored, "[t]he party seeking certification has the burden of showing that exceptional circumstances justify a departure from the 'basic policy of postponing appellate review until after the entry of

a final judgment.'" *Fukuda v. Los Angeles County*, 630 F. Supp. 228, 229 (C.D. Cal. 1986)(quoting *Coopers & Lybrand*, 437 U.S. at 475, 98 S. Ct. at 2461, 57 L. Ed. 2d 351); *Clark-Dietz v. Associates-Engineers, Inc., v. Basic Constr. Co.*, 702 F.2d 67, 68-69 (5th Cir. 1983)("The basic rule of appellate jurisdiction restricts review to final judgments, avoiding the delay and extra effort of piecemeal appeals. Section 1292(b) appeals are exceptional."). *Accord In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd*, 459 U.S. 1190 (1983).

Defendants point to no exceptional circumstances favoring immediate appellate review. Rather, Defendants seek to circumvent the normal process of the District Court in hopes of obtaining a favorable decision on appeal. Defendants contend that "[i]t would be helpful to the Court and the parties to have a ruling on [the legal issues involved] before proceeding with discovery and post-discovery motions in this case." *Defendants' Memo.* at 7. This is not the type of exceptional circumstance warranting certification. *Coopers & Lybrand*, 437 U.S. at 475, 98 S. Ct. at 2461, 57 L. Ed. 2d 351; *Hollywood Motor Car Co.*, 458 U.S. at 265, 102 S. Ct. at 3082, 73 L. Ed. 2d 754; *Beck*, 468 F. Supp. at 95.

2. Defendants' Request for Certification Does Not Meet the Stringent Requirements of § 1292(b)

Defendants' request for certification is also defective because it fails to meet the stringent requirements of § 1292(b). Before a district court may certify an order for interlocutory appeal under § 1292(b), the court must find that

the order satisfies three requirements: (1) the order presents a controlling question of law; (2) substantial ground for difference of opinion exists concerning that question; and (3) an immediate appeal will materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); *President and Directors of Georgetown College v. Madden*, 660 F.2d 91, 96 (4th Cir. 1981); *Leading Edge Tech. Corp. v. Sun Automation, Inc.*, ___ F. Supp. ___, 23 U.S.P.Q 2d 1161, 1173-74 (D. Md. 1991)(Harvey, J.). If any one of these criteria is not met, the district court cannot certify the order for interlocutory appeal. *Aparicio v. Swan Lake*, 643 F.2d 1109, 1110 n.2 (5th Cir. 1981); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd*, 459 U.S. 1190 (1983).[3]

a. Controlling Question of Law

Defendants contend that whether the ADA and FHA apply to this case is a controlling question of law as to which there is substantial ground for difference of opinion. *Defendants' Memo.* at 5. Defendants offer no compelling support for their argument.

i. The ADA Claim

Defendants maintain that because the MPA does

[3/] The Supreme Court has observed that "even if the district judge certifies an order under § 1292(b), the appellant still 'has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after entry of a final judgment.'" *Coopers & Lybrand*, 437 U.S. at 475, 98 S. Ct. 2461, 2461 L. Ed. 2d (quoting *Fisons, Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir. 1972)).

not provide services of the type Plaintiffs seek to any persons or organizations, regardless of disability or non-disability, it cannot discriminate against Plaintiffs if it refuses to provide such services to Project Life. *Defendants' Memo.* at 8. This argument, however, ignores the factual record, which is at worst ambiguous as to whether Defendants provide to others the services that Plaintiffs seek. Indeed, the record to date reveals that the MPA does provide the services that Plaintiffs seek to non-water-borne commerce such as the S.S. John Brown, a floating museum, and to numerous layberthed naval vessels, all berthed at MPA piers.[4] Additional discovery may very well reveal that the MPA provides the services Plaintiffs seek to other non-waterborne commercial vessels. In any event, whether the MPA provides the services Plaintiffs seek is a factual question that requires further development before appellate review is appropriate. *See* Section II(B)(3), *infra*.

More importantly, Defendants have misconstrued the term "controlling legal question," as that term is employed under § 1292(b). Defendants claim that the "controlling legal question" ripe for certification is whether the ADA is *applicable* to the facts as alleged in the complaint. They contend that the berth that Plaintiffs seek does not constitute a "program, service, or activity" subject to coverage under

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[4/] This of course assumes that the MPA's statutory mandate is to lease berths only for the purpose of increasing "waterborne commerce," a proposition advanced by Defendants that is not at all clear from a reading of MPA's empowering statute.

Title II of the ADA because the Sanctuary's services are residential in nature. Thus, Defendants conclude, the ADA is not applicable.

That the ADA is in fact applicable to the facts as alleged is made clear by the Supreme Court's recent decision in *Pennsylvania Department of Corrections v. Yeskey*, ___ U.S. ___, 118 S. Ct. 1952, 1954, 141 L. Ed. 2d 215 (1998)(applying ADA to prisons). In deciding whether prisons are covered under the ADA, the Court in *Yeskey* held that the nature of the particular service rendered by a public entity is irrelevant for purposes of determining whether Title II of the ADA applies. *Yeskey*, __ U.S. at ___, 118 S. Ct. at 1954-55. The Court had no trouble concluding that because state prisons fall squarely within the statutory definition of a "public entity,", 42 U.S.C. § 12131(1)(B), the ADA plainly applies to the "services, programs, or activities" provided by such entities. 42 U.S.C. § 12132.[5] *See also Gorman v. Bartch*, 152 F.3d 907, 912-13 (8th Cir. 1998)(post-arrest transportation of wheelchair user by police); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 40-41 (2d Cir. 1997)(zoning); *Crowder v. Kitaqawa*, 81 F.3d 1480, 1483-84 (9th Cir. 1996)(state quarantine requirements relating to carnivorous animals,

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[5/] The Court observed that "the fact that a statute can be '"applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth"'". *Yeskey*, __ U.S. at ___, 118 S. Ct. at 1954-55 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499, 105 S. Ct. 3275, 3286, 87 L. Ed. 2d 346 (1985)).

including guide dogs). The same analysis applies here: Because the MPA is a "public entity" involved in providing "services, programs, or activities," i.e., the leasing of berths, the ADA clearly covers the MPA.

Defendants do not dispute, and the Court has in fact held, that the services that the MPA provides are the services of a public entity. *November 30, 1998, Memorandum* at 4. What Defendants claim, however, is that they have not violated the ADA because they do not lease berths for residential purposes. That question, however, is not one involving the *application* of the ADA, but instead goes to the merits of the case. Thus, the actual issues to be resolved in this case are whether Defendants have unlawfully imposed conditions upon Plaintiffs that have not been imposed on other port tenants, and whether Defendants have refused to provide a berth to the Sanctuary as a result of community opposition. Because those questions go to the merits of the case and require further factual exploration, interlocutory appellate review at this stage of the proceedings is simply inappropriate.

Defendants also contend that their discussions with Project Life and with community residents about the possibility of providing a long-term berth for the Sanctuary cannot subject them to the ADA. *Defendants' Memo.* at 8. Again, Defendants' argument misses the mark. It is not that Defendants' participation in discussions with community residents subjects them to liability under the ADA. Rather, it is their

imposition of additional criteria and the denial of a long-term berth based on what Defendants learned in those discussions that gives rise to liability under the ADA.

The factual record establishes that over the many years of negotiation with the MPA, Plaintiffs were denied a long-term berth for the Sanctuary because of community opposition to the program that Plaintiffs seek to operate. As the Court noted in its November 30, 1998 Memorandum, Defendants "offered locations agreeable to Project Life, only to later withdraw the offers in response to opposition from neighboring co-tenants or community members." *November 30, 1998 Memorandum* at 2. Indeed, several automobile importers voiced their opposition to a long-term lease on the basis that Project Life's clients would disrupt business in the Port. As one automobile importer stated:

> I am writing to express my grave concern at the possibility of the Sanctuary returning to berth at Childs Street. To put it simply, its reappearance and eventual use as a drug addiction treatment facility would be deeply damaging and possibly fatal to our business at the Atlantic and Chesapeake Terminals adjacent to it. . . .
>
> [I]f the Sanctuary returns, it has been made very clear to us both by Chrysler and our other car customers that they will not be able to use the Atlantic Terminal primarily for reasons of general marketing and security. . . . Also, at times there are up to 5,000 new cars parked at the facility with doors open and keys in the ignition. These cars have a value of up to $40,000 each and will, by necessity, be parked within a few yards of the Sanctuary. . . . The risks are too high and the perception too negative.

Plaintiffs' Opp. at 12 n.6.

Moreover, in a subsequent meeting with the relevant

parties at the World Trade Center in 1997, Defendants explained that they felt compelled to adhere to the desires of their "customers," including the automobile importers, and therefore deny the Sanctuary a berth. *Plaintiffs' Opp.* at 12-13. As a result of this community opposition, Defendants have demanded that Plaintiffs satisfy certain conditions before the Sanctuary is afforded a long-term berth -- conditions that Defendants have not imposed on other port tenants.[6] Thus, it is not just Defendants' denial of the berth based on community concerns, but also their decision to impose additional, discriminatory eligibility requirements before granting or denying the Sanctuary a long-term berth (e.g., requiring Project Life to solicit community support, to agree to use a particular entrance at Pier 6, etc.) that subjects Defendants to liability under the ADA. *See* 42 U.S.C. § 12182(b)(2)(A)(i). Indeed, it is precisely this type of repugnant discrimination that Congress had in mind when enacting the ADA.[7]

[6/] In early April 1998, the Maryland Port Administration indicated that it would consider leasing a long-term berth to the Sanctuary provided two preconditions were met: (1) Project Life must obtain a determination under HB 149 by the ADAA that the berth is appropriate and safe for public access; and (2) Project Life must obtain community support for any such location. In late April 1998, the Maryland Department of Transportation imposed additional conditions on Project Life for leasing a berth: (3) the Advisory Council must approve the use of a pier by Project Life; and (4) Project Life's clients and staff must use the Hull Street entrance to the North Locust Point Terminal to get to Pier 6, not the main Key Highway entrance used by all other entities leasing berths at North Locust Point. *Plaintiffs' Opp.* at 16-17.

[7/] In enacting the ADA, Congress made express findings about the status of people with disabilities in our society and

In fact, Congress provided that the ADA's remedies are available not only to persons who are being subjected to discrimination on the basis of disability but also to anyone "who has reasonable grounds for believing that such person is about to be subjected to discrimination. 42 U.S.C. § 12188(a). In this case, then, Project Life can invoke the ADA not merely on the basis of the imposition of discriminatory eligibility criteria or actual denial of a berth; it also has the opportunity to show that it has reason to believe that it will be denied a berth and is therefore about to be subjected to discrimination.

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determined that they were subject to continuing "serious and pervasive" discrimination that "tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2). Evidence before Congress demonstrated that persons with disabilities were sometimes excluded from public services for no reason other than distaste for or fear of their disabilities. *See* S. Rep. No. 116, 101st Cong., 1st Sess. 7-8 (1989) (citing instances of discrimination based on negative reactions to sight of disability) (Senate Report); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 (1990) (same) (House Report). Indeed, the United States Commission on Civil Rights, after a thorough survey of the available data, documented that prejudice against persons with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, 23-26 (1983); *see also* Senate Report, *supra*, at 21. The negative attitudes, in turn, produced fear and reluctance on the part of people with disabilities to participate in society. *See* Senate Report, *supra*, at 16; House Report, *supra*, at 35, 41-43. Congress thus concluded that persons with disabilities were "faced with restrictions and limitations . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7).

Finally, Defendants argue that the General Assembly's recent legislative enactments -- specifically, House Bill 187 and Senate Bill 584 -- cannot subject them to liability under the ADA. This court has already determined, however, that whether Defendants are subject to liability under the ADA rests upon whether Plaintiffs have been denied services by reason of their disability. *November 30, 1998 Memorandum* at 4. Because the Court has found that there exists a genuine dispute as to why the Sanctuary has been denied a long-term berth, Defendants cannot escape liability at this stage of the proceedings. Defendants' argument concerning the General Assembly's recent amendments, therefore, is of no moment.

ii. The FHA Claim

Defendants contend that whether the FHA applies in this case is also a controlling question of law subject to immediate interlocutory appellate review under § 1292(b). This Court properly determined based on closely analogous legal precedent that the Sanctuary, if made operational, would be a dwelling within the meaning of the FHA. *November 30, 1998 Memorandum* at 5 (citing *United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992)).[8] The Court correctly

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[8] This Court's holding is consistent with other cases that have ruled that a variety of analogous structures are "dwellings" under the Act, including a nursing home for elderly residents, *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102 (3d Cir. 1996) and *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220 (D.P.R. 1991); seasonal vacation bungalows, *United States v. Columbus Country Club*, 915 F.2d 877, 881 (3d Cir.

determined that there existed "no reasoned basis to distinguish this case from any other 'services or facilities' case." *November 30, 1998 Memorandum* at 6. Consequently, the sole legal issue to be determined is whether leasing a berth to a residential facility would involve more than a "reasonable accommodation." *November 30, 1998 Memorandum* at 6. As discussed in greater detail below, that inquiry is an inherently fact-specific one that is not appropriate for interlocutory appeal. *See* Section II(B)(3), *infra*; *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996)("'The reasonable accommodation inquiry is highly fact-specific, requiring a case-by-case determination.'")(quoting *United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413, 1418 (9th Cir. 1994)).

Defendants contend that the controlling legal issue with respect to Plaintiffs' FHA claim is "whether jurisdiction that is contingent upon the Sanctuary's ultimate success in the litigation on the FHA claim can be invoked under the FHA at the

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1990), *cert. denied*, 501 U.S. 1205 (1991); a home for orphans and other children, *Hughes Memorial Home*, 396 F. Supp. at 549; a residential school for emotionally disturbed children, *United States v. Massachusetts Industrial Finance Agency*, 910 F. Supp. 21, 26 n.2 (D. Mass. 1996); a facility for people with HIV, *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989); a homeless shelter, *Woods v. Foster*, 884 F. Supp. 1169 (N.D. Ill. 1995); housing for migrant farm workers, *Lauer Farms, Inc. v. Waushara County Board of Adjustment*, 986 F. Supp. 544 (E.D. Wis. 1997); *Hernandez v. Ever Fresh Co.*, 923 F. Supp. 1305 (D. Ore. 1996) and *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1328 (D. Ore. 1996); and a time-share apartment complex, *Louisiana Acorn Fair Housing v. Quarter House, Oak Ridge Park, Inc.*, 952 F. Supp. 352 (E.D. La. 1997).

outset of the litigation, as the basis for the suit's *current* jurisdiction." *Defendants' Memo.* at 6 (emphasis in original).[9] Although not a model of clarity, Defendants' argument appears to be that because the Sanctuary is not operational, it is not a dwelling, and Plaintiffs therefore are not entitled to protection under the FHA. This argument simply defies logic as well as precedent.

Defendants' argument, if accepted, would enable the MPA to deprive this Court of jurisdiction to entertain Plaintiffs' claim so long as it continues to discriminate by denying the Sanctuary a long-term berth. Put differently, the contingent nature of Plaintiffs' FHA claim rests solely in Defendants' hands; so long as they deny the Sanctuary a berth, it is not a dwelling subject to protection under the FHA. This is not, and obviously cannot be, the law. *See*, *e.g.*, *Innovative Health Systems v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997); *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 182 (3d Cir.), *cert. denied*, 484 U.S. 849 (1987).

In addition, the statute itself defines an "aggrieved person" to include not only those persons who have already suffered injury but also any person who "believes that such person *will be injured* by a discriminatory housing practice

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[9/] Defendants phrase their interpretation of the controlling question of law differently at page 7 of their Memorandum: "whether jurisdiction can be premised upon a contingency that has not yet occurred, and will not occur unless the Court takes jurisdiction and the plaintiffs prevail." *Defendants' Memo.* at 7.

that is about to occur." 42 U.S.C. § 3602(i)(2)(emphasis supplied).[10] It also defines "dwelling" to include not only structures which are presently "occupied" but those "*intended for occupancy*" as well as any "*vacant land which is offered for sale or lease for the construction or location thereon of any such ... structure ....*" (emphasis supplied). Moreover, were Defendants' argument correct, the Act could not be applied in cases of discriminatory zoning or land use practices where the housing has not yet been built. Yet courts have long held that the FHA reaches such discriminatory practices. *See Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 257 n.6 (1st Cir. 1993) ("The phrase 'otherwise make unavailable or deny' encompasses a wide array of housing practices, and specifically targets the discriminatory use of zoning laws and restrictive covenants") (citations omitted); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988); *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 422 U.S. 1022 (1976); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1068 (4th Cir. 1982) (withdrawal from multi-city low income housing authority); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *United States v. City of Black*

[10/] As already noted, the same is true of the ADA. *See* 42 U.S.C. § 12188(a)(1)(remedies are available to any person who is being subjected to discrimination or who has reasonable grounds for believing that discrimination is about to occur).

Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1022 (1975) (rezoning to prohibit apartments); *Atkins v. Robinson*, 545 F. Supp. 852 (E.D. Va. 1982), *aff'd*, 733 F.2d 318 (4th Cir. 1984) (veto by county board of proposed housing project).[11]

b. Substantial Ground for Difference of Opinion

In addition to demonstrating that a controlling question of law supports certification, which Defendants have

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[11] The legislative history of the 1988 amendments to the FHA, which made it unlawful to discriminate on the basis of handicap, confirms that Congress intended these holdings to apply with equal force to zoning actions that discriminate on such a basis. The report of the House Judiciary Committee on the legislation states:

> [Section 804(f)] would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of unrelated people, these requirements have the effect of discriminating against persons with disabilities.
>
> The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. *The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional and special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.*

H.R. Rep. 100-711, *Fair Housing Amendments Act of 1988*, House Committee on the Judiciary, at 24 (June 17, 1988) ("House Report"), reprinted in 1988 U.S.C.C.A. N. 2173.

failed to do, Defendants must also show that there exists substantial ground for difference of opinion with respect to Plaintiffs' ADA and FHA claims. 28 U.S.C. § 1292(b); *Madden*, 660 F.2d at 96. Significantly, Defendants have not cited any conflicting legal authority that there exists substantial doubt about the law as applied in this case. The lack of such a showing, which is a staple of successful motions under § 1292(b), is a sufficient basis in and of itself to deny Defendants' request for certification. *See, e.g.*, *Genentech, Inc. v. Novo Nordisk A/S*, 907 F. Supp. 97, 100 (S.D.N.Y. 1995); *Shipping Corp. of India, Ltd. v. American Bureau of Shipping*, 752 F. Supp. 173, 175 (S.D.N.Y. 1990).

In the absence of any conflicting legal authority, Defendants are left to argue that "direction from the Court of Appeals on these legal issues would shape the parties' litigation and the Court's resolution of the remaining issues throughout any continuation of the case." *Defendants' Memo.* at 6. Such an argument could be made by any unsuccessful movant in the district court, and certainly does not warrant the exceptional relief Defendants seek. In actuality, Defendants' argument merely evidences a disagreement with this Court's November 30, 1998 Memorandum and Order.

In ruling on a § 1292(b) request for certification, it is not enough that Defendants merely disagree with this Court's decision. "[A] motion [under § 1292(b)] should not be granted merely because a party disagrees with the ruling of the

district judge." *Max Daetwyler Corp. V. Meyer,* 575 F. Supp. 280, 282 (E.D. Pa. 1983); *United States v. Grand Trunk Western R.R.*, 95 F.R.D. 463, 471 (W.D. Mich. 1981)(denying certification because the moving party "merely questions the correctness" of the court's ruling); *Clark-Dietz v. Associates-Engineers, Inc., v. Basic Constr. Co.*, 702 F.2d 67, 68-69 (5th Cir. 1983)("An interlocutory appeal assuredly does not lie simply to determine the correctness of a judgment of liability.").

Because a party's mere disagreement with a district court's ruling does not constitute a "substantial ground for difference of opinion" within the meaning of § 1292(b), the "difference of opinion" necessary to support certification must arise out of genuine doubt as to the correct legal standard applied in the particular case. *Cardona v. General Motors Corp.*, 939 F. Supp. 351, 353 (D.N.J. 1996). Defendants have not cited to any authority that casts doubt on this Court's holdings.

Defendants also argue that certification is warranted because the issues presented in this case "raise issues of first impression that may occur again in future cases." *Defendants' Memo.* at 6. The mere fact, however, that this case presents a novel factual scenario is not sufficient to warrant certification under § 1292(b). The courts have made clear that "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to

demonstrate a substantial ground for difference of opinion." *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996); *FDIC v. First National Bank of Waukesha*, 604 F. Supp. 616, 622 (E.D. Wis. 1985).

In sum, "Section 1292(b) was not meant to substitute an appellate court's judgment for that of the trial court." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 866 (2d Cir. 1996). Defendants' disagreement with this Court's November 30, 1998 Memorandum and Order is insufficient to warrant the exceptional relief that they seek under § 1292(b).

3. The Legal Questions Presented for Certification are Inextricably Interwoven with the Facts of this Case and are Therefore Not Appropriate for Immediate Interlocutory Appellate Review

The Supreme Court recently made clear that a court may not take an interlocutory appeal under § 1292(b) when the appealed legal issues involve factual determinations. *Johnson v. Jones*, 515 U.S. 304, 318-19, 115 S. Ct. 2151, 2159, 132 L. Ed. 2d 238 (1995). In *Johnson*, the Supreme Court held that the defendants could not "appeal a district court's summary judgment order insofar as that order determined whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* In the present case, this Court ruled that the

record developed to date presents a genuine dispute of material fact. Because the legal issues in this case are inextricably interwoven with the facts, certification to the Fourth Circuit would be imprudent. *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 630 (2d Cir. 1991)(when the controlling issues are factual rather than legal, § 1292(b) certification is unavailable).

As the courts have made clear, "[i]t does not serve § 1292(b)'s intended purpose to rule on an ephemeral question of law that may disappear in the light of a complete and final record." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 864 (2d Cir. 1996); *Slade v. Shearson, Hammill & Co., Inc.*, 517 F.2d 398, 400 (2d Cir. 1974)(declining to resolve legal question on undeveloped factual record, noting that "an abstract answer to an abstract question is the least desirable of judicial solutions."); *Arnett v. Gerber Scientific, Inc.*, 575 F. Supp. 770, 771 (S.D.N.Y. 1983)(legal question "must arise in a sufficiently developed factual context to 'sharply define the legal issues raised.'")(quoting *Dewitt v. American Stock Transfer Co.*, 440 F. Supp. 1084, 1088 (S.D.N.Y. 1977)). For example, in declining to grant certification under § 1292(b), the court in *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 864 (2d Cir. 1996), noted that "we are reluctant to rely on what may turn out to be an incomplete record to clarify legal doctrine for the district court's guidance." *Id.* *See also Oneida Indian Nation v. County of Oneida*, 622 F.2d 624,

628 (2d Cir. 1980)(declining to decide issues that might vanish upon full development of the factual record).

In the present case, this Court specifically held with respect to Plaintiffs' ADA claim that "there is a genuine dispute of material fact as to why the Sanctuary has been denied a permanent home." November 30, 1998 Memorandum at 4. The Court correctly determined that "[b]ased on the record currently before the Court, a jury could reasonably conclude that it was the Port [Administration's] illegal deference to co-tenant and community prejudices against recovering substance abusers that has delayed the lease of a berth." *Id.* at 4-5. In light of this factual dispute, and the need for further development of the record, it would be inappropriate to saddle the Court of Appeals with an interlocutory appeal at this stage of the proceedings.

Similarly, with respect to Plaintiffs' FHA claim, this Court held that "it remains a disputed question of fact as to whether leasing a berth to a residential facility would involve more than a "'reasonable accommodation.'" *November 30, 1998 Memorandum* at 6. Because "'[t]he reasonable accommodation inquiry is highly fact-specific, requiring a case-by-case determination,'" *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3d Cir. 1996)(quoting *United States v. California Mobile Home Park Management Co.*, 29 F.3d 1413, 1418 (9th Cir. 1994)), resolution of Plaintiffs' FHA claim requires the further development of the factual record before the Court of

Appeals can properly render a decision.

In sum, premature appellate review at this stage of the proceedings would risk the development of unsound precedent in areas of significant importance. *Johnson*, 515 U.S. at 318-19. Here, the circumstances do not warrant a departure from the basic policy of postponing appellate review until after the entry of a final judgment in the district court.

III. CONCLUSION

For the foregoing reasons, the United States, as *amicus curiae*, submits that the Court should deny Defendants' Motion to Dismiss or, in the Alternative, to Certify Questions for Interlocutory Review and for a Stay.

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