IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANDA WAI, et al.,	
Plaintiffs,	
v.	Civil Action No. 1:97CV01551
ALLSTATE INSURANCE COMPANY, et al.,	Judge Harold H. Greene
Defendants.	

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO THE MOTIONS TO DISMISS BY DEFENDANTS ALLSTATE AND STATE FARM

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I. INTRODUCTION

The United States submits this brief as amicus curiae in support of Plaintiffs' opposition to the Motions to Dismiss filed by Defendants Allstate and State Farm. In this case, Plaintiffs allege that Defendants have refused to provide home insurance on the basis of disability, in violation of the Fair Housing Act, 42 U.S.C. §§ 3601 et seq., and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq.

This brief addresses four of the arguments raised by the Defendants: (1) whether Plaintiff Thanda Wai may state claims under the Fair Housing Act and the Americans with Disabilities Act; (2) whether Plaintiffs' Fair Housing Act claims are barred by the McCarran-Ferguson Act; (3) whether Plaintiffs have failed to state any claim under the Fair Housing Act; and (4) whether the Americans with Disabilities Act covers the terms of insurance policies.[1] As explained in detail below, none of Defendants' arguments have merit.

First, Plaintiff Thanda Wai, as the landlord for a group home for persons with disabilities, may assert claims under both the Fair Housing Act, 42 U.S.C. §§ 3601 et seq., and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. It is irrelevant that Ms. Wai is a landlord and is not herself disabled. The Fair Housing Act prohibits discrimination on the basis of the disabilities of persons residing in the home, 42 U.S.C. §§ 3604(f)(1)(B), (f)(2)(B), and both Acts prohibit discrimination on the basis of the disabilities of persons "associated" with Ms. Wai. 42 U.S.C. §§ 3604(f)(1)(C), 3604(f)(2)(C), and 12182(b)(2)(E).

[1] The United States does not express any view on Defendants' arguments regarding standing.

Second, all courts which have considered the argument that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq., bars claims under the Fair Housing Act have rejected this contention. See, e.g., Nationwide Mutual Insurance Co. v. Cisneros, 52 F.3d 1351, 1360-63 (6th Cir. 1995), cert. denied 116 S. Ct. 973 (1996); NAACP v. American Family Mutual Insurance Co., 978 F.2d 287, 293-97 (7th Cir. 1992), cert. denied, 113 S. Ct. 2335 (1993). Defendants have not provided any rationale which would justify a departure from the weight of authority on this issue.

Similarly, since 1989 when the United States Department of Housing and Urban Development promulgated its Fair Housing Act regulations, every court considering the issue has found that the Fair Housing Act applies to discriminatory denials of home insurance. See, e.g., Nationwide, 52 F.3d at 1360; American Family, 978 F.2d at 301. Following this line of authority, Plaintiffs' allegations in the present case state claims that Defendants have violated the Fair Housing Act, 42 U.S.C. §§ 3604(f)(1), (f)(2), and (f)(3)(B). As explained in detail below, the fact that the homeowner was able to find less desirable substitute coverage from another insurance company cannot protect Defendants from liability under the Act.

Finally, the plain language of the ADA and the goals behind it demonstrate that the ADA would bar unjustified discrimination in insurance practices like those alleged in Plaintiffs' complaint. Despite Defendants' contentions, the ADA covers not only physical access to insurance offices, but it also prohibits disability-based discrimination in the terms and conditions of insurance policies.

II. FACTUAL ALLEGATIONS

As set forth in Plaintiffs' Complaint, Plaintiff Thanda Wai is the co-owner of a single family home in Maryland. Complaint ¶ 15.[2] Ms. Wai is required by the terms of her mortgage to carry insurance on this house. Complaint ¶ 2. At the time she purchased her home in 1994, Ms. Wai obtained homeowners insurance from Defendant Allstate Insurance Company. Complaint ¶ 15. In 1995, Ms. Wai entered into an agreement to rent the house to Christians for Assisted Living for the Mentally Retarded Association (CALMRA), which placed into the home three women with disabilities and a live-in counselor. Complaint ¶ 16.

Shortly thereafter, Ms. Wai contacted her Allstate agent and attempted to change her home insurance policy to a standard landlord policy. Complaint ¶ 17. After the Allstate agent inquired about the tenants of the home and was told that they were three women with disabilities and a live-in counselor, the Allstate agent stated that Allstate could not provide a standard landlord policy or any other home insurance for Ms. Wai. He advised Ms. Wai she would have to obtain commercial insurance from another carrier. Complaint ¶ 18.

Ms. Wai subsequently contacted State Farm in an attempt to obtain a standard landlord policy. The State Farm agent also refused to provide Ms. Wai with any home insurance after learning that the residents of the home were three women with disabilities and a live-in counselor. Like Allstate, State Farm suggested that Ms. Wai contact another agency. Complaint ¶ 19.

[2] Only Defendants Allstate and State Farm have filed motions to dismiss, and as stated in Plaintiffs' Brief, Plaintiffs Arthur Verbit and Oxford House, Inc. do not assert claims against these Defendants. Accordingly, this amicus brief will only address the facts and claims regarding Defendants Allstate and State Farm and Plaintiffs Wai and the Fair Housing Council of Greater Washington, Inc.

Ultimately, Ms. Wai was able to obtain a commercial insurance policy from Hartford Fire Insurance Company. The premiums for this policy cost significantly more than for standard landlord insurance, and the policy provides less desirable and less extensive coverage. In particular, Ms. Wai's present policy does not provide any liability coverage. Complaint ¶ 20.

III. ARGUMENT

A. Plaintiff Thanda Wai May Maintain Claims Under the Fair Housing Act and the Americans with Disabilities Act

Defendants contend that Plaintiff Thanda Wai may not assert claims under the Fair Housing Act or the Americans with Disabilities Act (ADA) because she is a landlord and is not herself disabled. Defendants' arguments misconstrue the scope of these Acts.

Ms. Wai alleges that Defendants Allstate and State Farm refused to provide her with insurance coverage for her house after learning that the occupants of her home would be three women with disabilities and their live-in counselor. Complaint ¶¶ 17-19. Accordingly, Ms. Wai alleges that Defendants have discriminated on the basis of disability in violation of the Fair Housing Act, 42 U.S.C. §§ 3604(f)(1), (f)(2), and (f)(3)(B), and the ADA 42 U.S.C. § 12182(b)(1)(E). Ms. Wai is a proper plaintiff for each of these claims.[3]

First, Ms. Wai properly alleges that Defendants have discriminated on the basis of the disabilities of the residents of her house. Under the Fair Housing Act, both Section 3604(f)(1) (prohibits making housing unavailable) and Section 3604(f)(2) (prohibits discrimination in the provision of services) bar discrimination on the basis of "a handicap of . . . (B) a person residing

[3] In Section C below, this Brief addresses the differences among these Fair Housing Act claims and the reasons why each states a claim under the Act. In Section D below, this Brief discusses ADA coverage.

in . . . that dwelling" (emphasis added). To make such a claim, it does not matter that Ms. Wai is not herself disabled. The alleged discrimination was due to the disabilities of her residents, and Ms. Wai is an "aggrieved person" within the meaning of 42 U.S.C. § 3602(i), because she has been injured by Defendants' discriminatory acts. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208-12 (1972) (white tenants were "persons aggrieved" by landlord's discrimination against minorities); United Farm Bureau Mutual Ins. Co. v. Metropolitan Human Relations Comm'n, 24 F.3d 1008, 1015 (7th Cir. 1994) (white homeowner may bring claim that insurance company engaged in redlining on the basis of race); Secretary, U.S. Dept. Housing and Urban Development v. Blackwell, 908 F.2d 864, 873 (11th Cir. 1990) (white tenants who suffered economic losses as a result of Defendants' discrimination against black purchasers were "aggrieved persons").[4]

Second, under both the Fair Housing Act and the ADA, Ms. Wai is "associated with" the disabled residents of her house. Both Sections 3604(f)(1) and 3604(f)(2) of the Fair Housing Act also prohibit discrimination on the basis of "a handicap of . . . (C) any person associated with that buyer." Ms. Wai, who purchased and owns the house, is associated with the people who live there. This is a common situation, and "group home" cases under the Fair Housing Act are frequently brought by the homeowners rather than or in addition to the disabled residents. See, e.g., Marbrunak, Inc. v. City of Stow, 974 F.2d 43 (6th Cir. 1992); Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285 (D. Md. 1993). The ADA has a similar provision

[4] Contrary to the suggestion by Defendant State Farm, see Reply Brief at 9, the Court in Clifton Terrace Assoc. v. United Technologies Corp., 929 F.2d 714, 720-21 (D.C. Cir. 1991), only held that a landlord could not assert claims under 42 U.S.C. §§ 1981 and 1982 on behalf of its tenants. There was no similar finding under the Fair Housing Act, under which "aggrieved person" is defined very broadly.

making it "discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, or accommodations, or other opportunities to an individual or entity because of the known disability" of someone with whom the individual has a "relationship or association." 42 U.S.C. § 12182(b)(2)(E); Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 47-48 (2d Cir. 1997) (drug and alcohol rehabilitation center discriminated against because of its association with its clients); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1320 (C.D. Cal. 1996) (insurance company excluded an individual from coverage based on his association with an individual who is HIV-positive).

Defendants contend that Ms. Wai's connection with her tenants is too attenuated to qualify under these provisions, because Ms. Wai leased her house to the group home provider, CALMRA, which in turn contracted with the disabled residents. This formality does not, however, change the fact that Ms. Wai, as landlord, was allegedly injured by Defendants as a result of the disabilities of the residents of her home. Nor does it matter that Ms. Wai is a landlord. When landlords are injured by discriminatory housing practices, the Fair Housing Act and the ADA protect them as well. See United States v. City of Hayward, 36 F.2d 832 (9th Cir. 1994) (Fair Housing Act claim by owner of mobile home park who was penalized by City after permitting families with children to reside in park), cert. denied, 116 S. Ct. 65 (1995); cf. Oak Ridge Care Center, Inc. v. Racine County, 896 F. Supp. 867 (E.D. Wis. 1995) (court upheld ADA association claim of property owner, who was discriminated against when prospective buyer, a drug and alcohol rehabilitation facility, was denied zoning permits); H.R. Rep. No. 101-485, 101st Cong., 2d Sess., pt. 2 at 62 (1990) (The ADA's "protection is not limited to those who have a familial relationship with the individual. Indeed, one of the amendments defeated by the

Committee was an amendment that would have limited the provision to only certain associations and relationships.").

Similar situations to Ms. Wai's were considered by the courts in United States v. Scott, 788 F. Supp. 1555 (D. Kan. 1992), and United States v. Wagner, 940 F. Supp. 972 (N.D. Tex. 1996). In both cases, non-disabled homeowners sought to sell their homes to organizations that planned to establish group homes for disabled persons in the houses, but the sales were blocked by groups of neighbors. As with Ms. Wai who has rented to CALMRA, in both Scott and Wagner the homeowners dealt with organizations, and did not attempt to contract directly with the disabled residents. Nonetheless, the homeowners in both cases were found to be "aggrieved persons" under the Fair Housing Act, 42 U.S.C. § 3604(i). Scott, 788 F. Supp. at 1561; Wagner, 940 F. Supp. at 979. As the Scott court stated, although the sellers of the home were:

> not themselves disabled, the Act allows them to be beneficiaries of the proscription against handicap discrimination. . . . That plaintiffs may sue under the Fair Housing Act for injuries they have suffered as a result of housing discrimination against third parties is a well established principle. [citing Trafficante, 409 U.S. 205(1972)].

788 F. Supp. at 1561; see also Oak Ridge, 896 F. Supp. at 872 ("standing for associational suits must be as broad under the ADA as the FHA").

Accordingly, Ms. Wai may state claims under the Fair Housing Act because the alleged acts of discrimination were taken "because of the handicap of . . . (B) a person residing in" her home, 42 U.S.C. §§ 3604(f)(1)(B), 3604(f)(2)(B), and under both Acts because Ms. Wai is associated with the disabled residents of her home. 42 U.S.C. §§ 3604(f)(1)(C), 3604(f)(2)(C), and 12182(b)(2)(E).

B. Plaintiffs' Claims under the Fair Housing Act Are Not Barred by the McCarran-Ferguson Act

Defendants contend that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq., bars Plaintiffs' claims under the Fair Housing Act, 42 U.S.C. §§ 3601 et seq. However, every court which has addressed the issue, has refused to bar such claims. See Nationwide Mutual Insurance Co. v. Cisneros, 52 F.3d 1351, 1360-63 (6th Cir. 1995), cert. denied 116 S. Ct. 973 (1996); United Farm Bureau Mutual Insurance Co., Inc. v. Cisneros, 24 F.3d 1008, 1016 (7th Cir. 1994); NAACP v. American Family Mutual Insurance Co., 978 F.2d 287, 293-97 (7th Cir. 1992), cert. denied, 113 S. Ct. 2335 (1993); Mackey v. Nationwide Insurance Co., 724 F.2d 419, 420-21 (4th Cir. 1984); McDiarmid v. Economy Fire & Casualty Co., 604 F. Supp. 105, 108-09 (S.D. Ohio 1984); Dunn v. Midwestern Indemnity American Fire and Casualty, 472 F. Supp. 1106, 1111-12 (S.D. Ohio 1979). This Court, too, should find that McCarran-Ferguson poses no bar to Fair Housing Act claims.

In enacting the McCarran-Ferguson Act, Congress's "primary concern" was to "ensure that the States would continue to have the ability to tax and regulate the business of insurance." Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217-218 (1979). To that end, Congress protected state laws regulating insurance from inadvertent preemption by federal statutes:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. §1012(b).

As the statutory language makes clear, the McCarran-Ferguson Act does not dictate "unqualified deferral to state law." John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank, 114 S. Ct. 517, 525 (1993). The mere fact that a state regulates insurance does not prevent the application of a general federal statute to insurance practices; rather, the McCarran-Ferguson Act applies only where the federal statute's application would "invalidate, impair, or supersede" some specific state law regulating insurance. The Supreme Court has at least implicitly recognized that the statutory text requires a showing of a specific conflict between some particular state law and the federal statute at issue. See United States Dep't of Treasury v. Fabe, 113 S. Ct. 2202, 2211 (1993) (McCarran-Ferguson Act imposes "a rule that state laws enacted `for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise") (emphasis added). The lower courts have made that recognition explicit. See, e.g., Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., Inc., 50 F.3d 1486, 1489 (9th Cir. 1995), cert. denied, 116 S. Ct. 418 (1995); American Family, 978 F.2d at 295-297; Mackey, 724 F.2d at 421; Cochran v. Paco, Inc., 606 F.2d 460, 464 (5th Cir. 1979).

There is no such conflict in the present case. Like many states, Maryland regulates insurance and prohibits discrimination by insurers on the basis of disability. Among other provisions, Maryland's insurance law prohibits discrimination on the basis of "race, creed, color, sex, religion, national origin, place of residency, blindness, or other physical handicap or disability." Md. Code, Insurance, § 27-501 . However, this fact does not preclude application of the Fair Housing Act to discriminatory insurance practices in that state. As the United States Court of Appeals for the Seventh Circuit observed in American Family, 978 F.2d at 295,

regarding similar insurance statutes in Wisconsin, "[d]uplication is not conflict." See also McDiarmid, 604 F. Supp. at 109 (noting that "allowing Plaintiffs' Title VIII claim to proceed will not invalidate, impair, or supersede § 3901.21 [of the Ohio Code pertaining to insurance], since Title VIII does not permit anything that § 3901.21 prohibits and Title VIII does not prohibit anything that §3901.21 permits.").

Defendants contend that this Court should not follow the numerous other courts considering this issue, because under Maryland law, the Insurance Commissioner has exclusive jurisdiction over insurance matters.[5] Defendants maintain that permitting claims of discrimination to be litigated in another forum, namely in Fair Housing Act lawsuits, would disturb "the finely calibrated regulatory structure" that Maryland has established by conferring exclusive jurisdiction on the Insurance Commission. Allstate Br. at 16. However, the State of Maryland itself has determined that the Insurance Commissioner's jurisdiction is not exclusive in discrimination cases, and thus, the enforcement provisions cited by Defendants fail to demonstrate that Fair Housing Act lawsuits would "invalidate, impair, or supersede" any state law.

Specifically, in a passage of Maryland's Insurance Code actually quoted by Allstate in its brief, the State of Maryland has provided that "[t]he Human Relations Commission has concurrent jurisdiction with the [Insurance] Commissioner over alleged discrimination on the basis of race, creed, color or national origin." Md. Code, Insurance, § 2-202, quoted in Allstate

[5] Defendants do not assert that Maryland's scheme is unique in this regard among the state insurance codes considered in the above-cited cases. Rather, they argue that none of the defendants in the other cases made this argument. See Allstate Reply Br. at 9.

Br. at 15.[6] Moreover, the Court of Appeals of Maryland has held that the Human Relations Commission has jurisdiction to enforce the state statute barring discrimination in public accommodations against insurance companies. Equitable Life Assurance Society v. Commission on Human Relations, 290 Md. 333, 430 A.2d 60 (Md. 1981). This statute prohibits discrimination in "accommodations, advantages, facilities, privileges, sales, or service because of the race, sex, creed, color, national origin, marital status, or physical or mental handicap of any person." Md. Code Ann., Art. 49B, § 8 (emphasis added). In Equitable Life Assurance, the Court of Appeals of Maryland found that the fact that the Insurance Commissioner is responsible for regulating insurance in the state:

> is not inconsistent with the legislature assigning to the [Human Relations] Commission the responsibility of ferreting out unfair discrimination (as provided within Section 8) by those licensed to engage in the insurance industry. We find that the activities of the Insurance Commissioner and the Commission in exposing and correcting unfair discrimination in insurance may co-exist, each agency having been authorized to act by the legislature.

290 Md. At 338, 430 A.2d at 63. This analysis applies equally well to the present situation, and demonstrates that Fair Housing Act lawsuits may co-exist with the Insurance Commissioner's jurisdiction without impairing Maryland's insurance scheme.[7]

Nor have Defendants demonstrated any other conflict between application of the Fair Housing Act and the operation of state insurance law. Accordingly, the McCarran-Ferguson Act should not bar the Plaintiffs' Fair Housing Act claims in this suit.

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[6] Maryland recodified its Insurance Code in late 1997, subsequent to the filing of Allstate's Brief. The version quoted by Allstate was not substantively different, and was codified at Md. Code Ann. Art. 48A, § 25(4)(a).

[7] Moreover, as explained in Plaintiff's Brief at 20, Defendants' reliance on Magan v. Medical Mutual Liability Insurance Society, 81 Md. App. 301, 567 A.2d 503 (1989) is misplaced.

C. Plaintiffs Have Stated Claims that Defendants Have Discriminated in Violation of the Fair Housing Act

Every court which has addressed whether the Fair Housing Act applies to discriminatory denials of homeowners insurance has upheld such application, since the Department of Housing and Urban Development (HUD) issued its regulation in 1989 expressly stating that the Act covers such denials. See Nationwide Mutual Insurance Co. v. Cisneros, 52 F.3d 1351, 1360 (6th Cir. 1995), cert. denied 116 S. Ct. 973 (1996); United Farm Bureau Mutual Insurance Co., Inc. v. Cisneros, 52 F.2d 1351 (7th Cir. 1994); NAACP v. American Family Mutual Insurance Co., 978 F.2d 287, 301 (7th Cir. 1992), cert. denied, 113 S. Ct. 2335 (1993); Strange v. Nationwide Mutual Insurance Co., 867 F. Supp. 1209, 1212, 1214-15 (E.D. Pa. 1994). Although each of the above cases involved insurance discrimination on the basis of race rather than disability, the Plaintiffs' allegations in this suit similarly state proper claims for relief under the Fair Housing Act.

1. Plaintiffs Have Stated a Claim that Defendants Have Made Housing Unavailable in Violation of 42 U.S.C. § 3604(f)(1)

Defendants argue that Plaintiffs cannot state a claim under Section 3604(f)(1) because no disabled person was actually denied a place to live as a result of Defendants' refusal to provide Ms. Wai with insurance coverage. However, Defendants cannot escape liability due to the fact that Ms. Wai was able to find less desirable substitute coverage and did not lose her house.

First, a denial of homeowners insurance does indeed make housing unavailable. As the United States Court of Appeals for the Seventh Circuit explained, "[l]enders require their borrowers to secure property insurance. No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable." N.A.A.C.P. v. American Family Mut. Ins. Co., 978

F.2d 287, 297 (7th Cir. 1992), cert. denied, 113 S. Ct. 2335 (1993); accord Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1359 (6th Cir. 1995) (noting "the direct connection of availability of property insurance and ability to purchase a house"), cert. denied, 116 S. Ct. 973 (1996). Here, Plaintiffs allege that the individual Plaintiffs must carry landlord insurance "because mortgage lenders require it and because it is necessary to protect against financial losses." Complaint at ¶ 2. Accordingly, Ms. Wai could lose her house if she were unable to obtain insurance, and thus the housing would be unavailable, both to Ms. Wai and to the disabled residents.

As noted above, all courts that have considered this issue since 1989, have held that the Fair Housing Act covers insurance discrimination; they have done so largely in reliance on HUD's Fair Housing Act regulations which were promulgated that year. HUD's regulations provide that unlawful discrimination under the Act includes "[r]efusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race, color, religion, sex, handicap, familial status or national origin." 24 C.F.R. § 100.70(d)(4). Courts have uniformly held that HUD's interpretation is reasonable and entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). See, e.g., Nationwide, 52 F.3d at 1359; American Family, 978 F.2d at 300; Strange v. Nationwide Mutual Insurance Co., 867 F. Supp. 1209, 1214 (E.D. Pa. 1994).

Under Chevron, HUD's construction need not be "the reading the court would have reached if the question initially had arisen in a judicial proceeding." Chevron, 467 U.S. at 843 n.11. Rather, the Secretary's regulation outlawing discriminatory insurance practices must be upheld if it is "based on a permissible construction of the statute." Id. at 843. Here, HUD's

construction not only is permissible but is supported by the broad and inclusive statutory text and the over-arching purpose of the Act. Obtaining homeowners' insurance is an integral part of the process of buying a house. Further, a judgment as to whether the availability of property insurance "otherwise makes unavailable or denies housing" is, as the Supreme Court has noted in another context, precisely the type of "judgment[] about the way the real world works . . . that agencies are better equipped to make than courts." Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 651 (1990). Thus, as the Seventh Circuit has held, "Section 3604 is sufficiently pliable that its text can bear the Secretary's construction. Courts should respect a plausible construction by an agency to which Congress has delegated the power to make substantive rules." American Family, 978 F.2d at 300.[8]

Defendants contend that nonetheless, this Court should not follow the unanimous position of federal courts considering insurance discrimination cases under the Fair Housing Act since

[8] Defendant State Farm contends that this Court should not rely on HUD's regulations because several Congressional Reports on HUD's appropriations legislation have included language expressing "concern" by some Members of Congress regarding HUD's interpretation of the Fair Housing Act. State Farm Reply Br. at 10 n.3. However, these Members of Congress have not been successful in enacting legislation to overrule HUD's interpretation. For example, in 1995, Congress voted to delete the proposed section of HUD's appropriations bill which, as described in the 1995 Reports cited by State Farm, would have prohibited HUD from spending any money to enforce the Fair Housing Act against property insurers. See 141 Cong. Rec. S14363 (Sept. 27, 1995) (agreeing to amendment deleting prohibition, as set forth at 141 Cong. Rec. S14355).

Thus, if anything, these unsuccessful legislative efforts indicate that Congress has acquiesced in and ratified HUD's interpretation. See Patterson v. McClean Credit Union, 491 U.S. 164, 201 (1989) (When "Congress has considered and rejected an amendment" changing an interpretation of a statute, this is "evidence of congressional acquiescence that is 'something other than mere congressional silence and passivity.'" (citation omitted)). Moreover, even if language in Congressional Reports divorced from accompanying legislation had any significance, the passages cited by State Farm have not been fully accepted by Congress. See, e.g., 143 Cong. Rec. S10741-42 (Oct. 9, 1997) (statement of Sen. Moseley-Braun) (taking "exception" to language "regarding the Fair Housing Act and property insurance.")

1989, because the United States Court of Appeals for the District of Columbia Circuit has interpreted the Fair Housing Act differently in Clifton Terrace Assoc. Ltd. v. United Technologies Corp., 929 F.2d 714 (D.C. Cir. 1991). However, Defendants' reliance on Clifton Terrace is misplaced. In that case, the D.C. Circuit held that an apartment complex owner's complaint that an elevator manufacturer refused to provide elevator service for the complex failed to state a claim under Section 3604(f)(1) of the Fair Housing Act. The Court reasoned that "elevator service is a matter of habitability, not availability, and does not fall within the terms" of Section 3604(f)(1)'s prohibition of making housing unavailable. 929 F.2d at 719. Defendants contend that insurance coverage, like elevator service, is simply a matter concerning habitability.

As explained above, however, because of the direct connection between the ability to obtain and maintain property insurance and the ability to maintain ownership of a house, insurance coverage does affect the availability of housing. Moreover, as Plaintiffs point out, Br. at 27, in the Clifton Terrace decision itself, the D.C. Circuit quoted the portion of HUD's regulations providing that discrimination includes refusing to provide "property or hazard insurance for dwellings," and the Court agreed that "the denial of certain essential services relating to a dwelling" could make housing unavailable in violation of Section 3604(f)(1). 929 F.2d at 719-20. Further, since deciding Clifton Terrace, the D.C. Circuit has recognized that "the language of the [Fair Housing] Act is 'broad and inclusive' and must be given a 'generous construction.'" Samaritan Inns, Inc. v. District of Columbia, 114 F.3d 1227 (D.C. Cir. 1997) (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972)).

Defendants further rely upon cases such as Southend Neighborhood Improvement Assoc. v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984) (city's failure to repair and maintain

properties it owned did not make housing unavailable to neighboring property owners); Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1283 (3d Cir. 1993) (refusing "to find that the County violated the statute by making housing unavailable to itself"); and Michigan Protection and Advocacy Service, Inc. v. Babin, 18 F.3d 337, 344-46 (6th Cir. 1994) (defendants, who funded alternate purchaser for house in "normal economic competition" and did not impede any actual transaction by group home provider, did not "make housing unavailable"), to support their argument for a narrow reading of Section 3604(f)(1). But insurance coverage may be readily distinguished from the situations cited by Defendants. Unlike the denials of insurance at issue in the present case, neither Southend Neighborhood nor Growth Horizons nor Babin involved conduct which directly affected the Plaintiff's ability to obtain or retain a home. Indeed, the Sixth Circuit has distinguished its own decision in Babin from insurance coverage, noting that:

> However, in Babin, we also acknowledged that the phrase "otherwise make unavailable" might extend to "other actors who, though not owners or agents, are in a position directly to deny a member of a protected group housing rights." [18 F.3d] at 344. Babin is distinguishable from the present case [involving insurance]. Unlike Babin, the availability of property insurance has a direct and immediate affect on a person's ability to obtain housing.

Nationwide, 52 F.3d at 1360. Further, courts have interpreted the term "otherwise make unavailable or deny" to cover a variety of discriminatory practices with far more indirect effects on the availability of housing than the denial of home insurance. See, e.g., Heights Community Congress v. Hilltop Realty, Inc., 774 F.2d 135, 140 (6th Cir. 1985) (real estate steering), cert.

denied, 475 U.S. 1019 (1986); Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, N.Y., 436 F.2d 108 (2d Cir. 1970) (refusal to permit sewer hookup), cert. denied, 401 U.S. 1010 (1971).

Nor does it matter that Ms. Wai had already purchased her house and was attempting to obtain a new landlord policy to replace her standard homeowners policy. Defendants rely on the language in Southend Neighborhood noting that the plaintiffs already owned the property which was allegedly damaged by defendants' actions. 743 F.2d at 1210. But that case did not involve any allegation that defendants' actions could cause the plaintiffs to lose their property. By contrast, Ms. Wai has alleged that the terms of her mortgage required her to maintain insurance, and without the insurance she could lose the home. Complaint ¶ 2. Moreover, in United Farm Bureau, the Seventh Circuit held that a refusal to renew an insurance policy on an already owned house can make housing unavailable within the meaning of the Fair Housing Act. 24 F.3d at 1015.

Defendants also attempt to hide behind the fact that Ms. Wai was able to obtain a less desirable and more expensive commercial insurance policy from another carrier, and consequently did not lose her house. But Ms. Wai's successful efforts to mitigate her damages do not protect Defendants from liability. Plaintiffs allege that at the time Defendants acted, they refused to provide any insurance coverage to Ms. Wai after learning who resided in her home. Thus, Defendants acted to make housing unavailable. The fact that another carrier subsequently provided less desirable coverage is irrelevant. Defendants' argument is equivalent to asserting that a landlord did not discriminate in denying an apartment on the basis of race because the apartment seeker was able to find another apartment. This is wholly untenable. See McDonald

v. Verble, 622 F.2d 1227, 1233 (6th Cir. 1980) ("The fact that subsequent to the filing of a lawsuit, the sale of the property was consummated with the [plaintiffs], does not alter the prior discriminatory conduct [of refusing to sell the house on the basis of race].")[9]

Nor can Defendants escape liability based upon the fact that Ms. Wai's disabled tenants did not suffer any injury as a result of Defendants' conduct. To state a claim under the Fair Housing Act, a landlord who has chosen to protect the rights of members of protected classes need not "capitulate" to acts of discrimination and pass on the injury to his or her tenants. See United States v. City of Hayward, 36 F.3d 832, 836 (9th Cir. 1994) (landlord who was penalized by City after admitting families with children to mobile home park stated claim even though no families with children were ever denied housing), cert. denied, 116 S. Ct. 65 (1995). As explained in Section A above, because Ms. Wai is herself an "aggrieved person," she may bring a Fair Housing Act claim on her own behalf.

In sum, Plaintiffs have stated a claim under Section 3604(f)(1), namely that by refusing to provide insurance coverage for Ms. Wai's home, Defendants made housing unavailable on the basis of the handicaps of the residents of that home, who are associated with Ms. Wai.

[9] In fact, even had Defendants themselves offered the more expensive, less desirable commercial insurance policy, Plaintiffs would still have stated a claim that Defendants made housing unavailable. As the Seventh Circuit has found, by providing only hazard insurance rather than a complete homeowners policy, "the cost of owning a home or real property is increased, perhaps prohibitively. . . This undoubtedly could make owning and retaining real property unavailable; simply preventing foreclosure is not sufficient to make housing 'available.'" United Farm Bureau Mut. Ins. Co., Inc. v. Metropolitan Human Relations Comm'n, 24 F.3d 1008, 1014 n.8 (7th Cir. 1994).

2. Plaintiffs Have Stated a Claim that Defendants Have Discriminated in the Provision of Services in Violation of 42 U.S.C. § 3604(f)(2)

Defendants also assert that Plaintiffs fail to state a claim under Section 3604(f)(2) of the Fair Housing Act because the prohibitions of this Section apply only to landlords who discriminate in the provision of services, and not to third parties. However, Defendants have misinterpreted this Section of the Act.

First, both the Sixth and Seventh Circuits have held that the prohibition against discrimination in housing services applies to insurance companies. Nationwide, 52 F.3d at 1356-60; American Family, 978 F.2d at 297-301.[10] Contrary to Defendants' argument, these cases allow claims of discrimination in services "against a non-governmental, third party service provider when the plaintiff is the property owner." See Allstate Reply at 15-16. In both Nationwide and American Family, the courts permitted the plaintiffs to assert claims against insurance companies alleging not only that they had made housing unavailable, but also that they had discriminated in the provision of services.

As discussed above regarding the prohibitions on making housing unavailable, here too the courts have relied on HUD's interpretation of the Fair Housing Act as set forth in its regulation. See 24 C.F.R. § 100.70(d)(4). In considering the issue, both the Sixth and Seventh Circuits have conducted an analysis under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and concluded that HUD's interpretation was reasonable. See Nationwide, 52 F.3d at 1359; American Family, 978 F.2d at 300.

[10] Both cases considered Section 3604(b), the parallel provision applying to race discrimination, rather than to Section 3604(f)(2) itself. However, as all parties to this case have acknowledged, there are no substantive differences in these provisions.

The full text of the relevant HUD regulation provides as follows:

> (b) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to engage in any conduct relating to the provision of housing or of services and facilities in connection therewith that otherwise makes unavailable or denies dwellings to persons. . .
>
> (d) Prohibited activities relating to dwellings under paragraph (b) of this section include, but are not limited to: . . .
>
> (4) Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

24 C.F.R. § 100.70 (emphasis added). Thus, discrimination in insurance is listed as an example both of discrimination "relating to the provision of housing" and of discrimination relating to the provision "of services and facilities in connection therewith." This language clearly demonstrates that HUD has determined that insurance discrimination may violate both Section 3604(f)(1) and 3604(f)(2).

Moreover, in cases involving group homes for persons with disabilities, numerous courts have held that Section 3604(f)(2) applies to third parties, typically municipalities, which have imposed different terms and conditions on the basis of disability. See, e.g., Bangerter v. Orem City Corp., 46 F.3d 1491, 1498 (10th Cir. 1995) (permitting claim against city under Section 3604(f)(2) to challenge restrictions placed on operation of group home for persons with disabilities); Horizon House Dev. Serv., Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 693 (E.D. Pa. 1992) (municipality violated Section 3604(f)(2) by imposing 1,000 foot spacing requirement for group homes), aff'd mem., 995 F.2d 217 (3d Cir. 1993). These cases further demonstrate that the prohibitions of Section 3604(f)(2) apply to third parties like Defendants.

Once again, Defendants rely on Clifton Terrace Assoc. v. United Technologies Corp., 929 F.2d 714 (D.C. Cir. 1991), to argue that this Court should not follow the weight of authority on this issue and should find instead that Section 3604(f)(2) does not apply to insurance companies. Defendants maintain that in the D.C. Circuit, Clifton Terrace stands for the proposition that no third party service provider may be held liable for discrimination in the provision of housing services. Allstate Br. at 23. But Clifton Terrace does not support Defendants' argument.

In Clifton Terrace, the Court noted that Section 3604(f)(2) applies to "those who otherwise control the provision of housing services and facilities." 929 F.2d at 720. The Court went on to note that "the provision of such services primarily falls under the control of the provider of housing — the owner or manager of the property." Id. (emphasis added). The Court did not, however, state that Section 3604(f)(2) applied only to landlords. Here, it is Defendants and not landlords who control the provision of the service of home insurance. Further, in Clifton Terrace, the D.C. Circuit stated that it was endeavoring to conform its interpretation of Section 3604(f)(2) to HUD's regulations. See id. ("We believe this construction is consistent with HUD's interpretation of 804(b) and (f)(2).") Yet, unlike the issue of elevator service addressed by the Clifton Terrace Court, property insurance is explicitly covered by HUD's regulations. Accordingly, a holding that discrimination in property insurance violates Section 3604(f)(2) is fully consistent with the D.C. Circuit's opinion in Clifton Terrace.

Finally, Defendants are incorrect in stating that "the facts of this case are even weaker" than those in Clifton Terrace, because there the plaintiff alleged that as owner, it had a legal duty to provide elevator service. See Allstate Br. at 23. Here, Plaintiffs have alleged that Ms. Wai is

required by the terms of her mortgage to maintain property insurance. Complaint ¶ 2. Without insurance, Ms. Wai would lose the house.

Thus, Plaintiffs have properly stated a claim that by refusing to provide property insurance to Ms. Wai, Defendants have discriminated in the provision of services in violation of Section 3604(f)(2).

3. Plaintiffs Have Stated a Claim that Defendants Have Failed to Make a Reasonable Accommodation in Violation of 42 U.S.C. § 3604(f)(3)(B)

Plaintiffs' final claim under the Fair Housing Act is that Defendants have failed to make a reasonable accommodation in violation of Section 3604(f)(3)(B) of the Fair Housing Act. Defendants contend that this section of the Act only applies to claims against landlords, and that it may not be violated unless disabled persons have actually been denied housing. These contentions lack merit.

Section 3604(f)(3)(B) requires "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a disabled person] equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Under this section, the Fair Housing Act "imposes an affirmative duty to reasonably accommodate handicapped persons." City of Edmonds v. Washington State Building Code Council, 18 F.3d 802, 806 (9th Cir. 1994), aff'd, 115 S. Ct. 1776 (1995). Specifically, the reasonable accommodation provision requires Defendants to waive or make changes in otherwise neutral rules to permit people with disabilities to occupy the housing of their choice. See, e.g., Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996).

Contrary to Defendants' argument, the reasonable accommodation provision does not impose duties only on landlords. Rather, courts have routinely applied this section of the Act

against third parties, typically municipalities, in cases involving group homes and other residences for persons with disabilities. See, e.g., Smith & Lee Assoc., Inc. v. City of Taylor, 102 F.3d 781, 795-96 (6th Cir. 1996) (city violated Section 3604(f)(3)(B) by failing to make reasonable accommodation for group home); Hovsons 89 F.3d at 1102-05 (township violated Section 3604(f)(3)(B) by refusing to permit nursing home in residential area); City of Edmonds, 18 F.3d at 806 (city required to make reasonable accommodation).

Moreover, as discussed above regarding Plaintiffs' Section 3604(f)(1) claim, Defendants cannot escape liability under the reasonable accommodation provision based on the fact that Ms. Wai was able to obtain less desirable insurance coverage from a different insurance company. To prove a violation of the reasonable accommodation provision, Plaintiffs need not show that disabled persons were forced out on the street. For example, in City of Taylor, the Sixth Circuit found that plaintiffs had proven a violation of the reasonable accommodation provision even though the group home continued to operate for over five years without the requested accommodation, while the case was being litigated. 102 F.3d at 796. In that case, the Court found that the requested accommodation, permitting the home operators to house additional residents, was necessary because the group home was not economically viable with only the six residents permitted by the City. Id. The group home had continued to operate at a loss for over five years during the litigation, "surviving only because [the home's operators] have continued to transfer personal funds into the corporation to keep the home running" with six residents. United States v. City of Taylor, 872 F. Supp. 423, 439 (E.D. Mich. 1995), aff'd in relevant part, 102 F.3d 781 (6th Cir. 1996). Similarly, in the present case, the fact that Ms. Wai has managed to retain her home does not defeat a reasonable accommodation claim, provided that Plaintiffs are

ultimately able to show that the requested accommodation is necessary to afford equal housing opportunity.

Rather, Section 3604(f)(3)(B) requires that accommodations be made when they may be necessary to provide persons with disabilities an "equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(b). As the Sixth Circuit has explained, under the necessity prong of the test, "[p]laintiffs must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice." City of Taylor, 102 F.3d at 795. Under this standard, Plaintiffs have stated a claim that Defendants have failed to make a reasonable accommodation in violation of 42 U.S.C. § 3604(f)(3)(B).

D. Title III of the ADA Covers the Terms and Conditions of Insurance Policies

Defendants argue two alternative theories in support of their motions to dismiss the ADA claims in this action. First, they argue that Title III of the ADA requires only physical access to physical facilities and thus does not cover Plaintiffs, whose insurance dealings did not occur in Defendants' offices, and who are not alleging a lack of physical access. Defendants argue alternatively that even if Title III's coverage exceeds mere physical access to physical facilities, Title III does not prohibit disability-based discrimination in the terms or conditions of insurance policies. Defendants' theories contravene congressional intent in enacting Title III, as evidenced by Title III's plain language, its goals, and the Department of Justice's Title III regulation and interpretive guidance, which are entitled to deference.

1. Title III of the ADA Prohibits Disability-Based Discrimination Beyond the Denial of Physical Access to a Physical Facility

Defendants argue that Title III guarantees only physical accessibility to a physical facility.[11] As explained below, this restrictive reading of Title III is contrary to the statute's plain language and underlying purposes. In light of the broad statutory language and Congress's sweeping remedial goals in enacting the ADA, courts have properly rejected Defendants' argument. See, e.g., Carparts Dist. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12, 19-20 (1st Cir. 1994); Chabner v. United of Omaha Mut. Life Ins. Co., No. C-95-0447-MHP, 1998 WL 37750 at *4 (N.D. Cal. Jan. 26, 1998); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1165 (E.D. Va. 1997); Attar v. Unum Life Ins. Co., No. CA 3-96-CV-0367-R, 1997 WL 446439 at *11-*12 (N.D. Tx. Jul. 19, 1997); Baker v. Hartford Life Ins. Co., No. 94 C 4416, 1995 WL 573430 at *3 (N.D. Ill. Sept. 28, 1995); World Ins. Co. v. Branch, 966 F. Supp. 1203, 1207 (N.D. Ga. 1997); Cloutier v. Prudential Ins. Co. Of America, 964 F. Supp. 299, 301-03 (N.D. Cal. 1997); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 425 (D.N.H. 1996); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321 (C.D. Cal. 1996).[12]

The broad language of Title III clearly refutes Defendant's contention that the statute guarantees only physical accessibility to places of public accommodation. Congress used

[11] The ADA is divided into five titles covering disability-based discrimination: Title I prohibits discrimination in employment; Title II prohibits discrimination in State and local government programs, services, and activities; Title III prohibits discrimination in public accommodations and commercial facilities; Title IV establishes accessible telecommunications systems; and Title V contains miscellaneous provisions applicable to the four other titles. See generally 42 U.S.C. §§ 12101 et seq.

[12] But see Parker v. Metropolitan Life Ins. Co.,121 F.3d 1006, 1010-11 (6th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998); Pappas v. Bethesda Hosp. Ass'n, 861 F. Supp. 616, 620 (S.D. Ohio 1994).

decidedly broad language to state both the goals of the ADA and the proscriptions of Title III. Nothing in the statute, explicit or implicit, would support Defendants' cramped interpretation of Title III's comprehensive provisions.

The congressional statement of purpose in the ADA shows that Congress intended to invoke a fundamental change in the treatment of individuals with disabilities in all aspects of society. The ADA states that Congress sought to "invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).[13] Congress cited the historical reasons for such a sweeping change:

> discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
>
> . . . .
>
> individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

Id. at §§ 12101(a)(3),(5).

Given these broad goals, Congress used broad language in Title III's general non-discrimination provisions, to cover all aspects of public accommodations. These provisions state, in relevant part:

[13] A copy of Congress's statement of findings and purposes behind the ADA, 42 U.S.C. § 12101, is attached hereto as Exhibit A.

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a) (emphasis added). Thus, despite Defendants' contention that Title III guarantees only physical access to physical places, there is simply no statutory language or even an implication in the Act supporting their theory. See Cloutier, 964 F. Supp. at 302 ("Nothing within the plain language of the statute lends itself to such a narrow reading."); Kotev, 927 F. Supp. at 1321 ("Title III's plain language does not refer to access to physical structures . . . . Whether viewed in isolation or in the context of the rest of the ADA, this section does not bar only discrimination in access to physical structures.").

If Congress were concerned only with physical access, it could have accomplished its goal by drafting 42 U.S.C. § 12182(a) to guarantee equal access only to the "facilities" of a public accommodation. But Congress worded the statute more broadly to guarantee the "full and equal enjoyment": not only the "facilities," but also the "goods, services, . . . privileges, advantages, and accommodations" of a place of public accommodation. 42 U.S.C. § 12182(a). Interpreting Title III to guarantee only physical accessibility would render most of this principal Title III provision superfluous, thus violating a fundamental canon of statutory construction. See United States v. Alaska, 117 S. Ct. 1888, 1918 (1997) (courts must avoid interpretation that renders words redundant or superfluous). Such an interpretation would also run counter to the broad tenor of the provision as a whole.

The relevant definition of "public accommodation" in Title III also evidences that Congress sought to guarantee more than just getting people in the door. A "public accommodation" is defined as a private entity, the operations of which affect commerce, and

which owns, operates, or leases a "place of public accommodation." 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104. Title III lists twelve types of businesses as illustrative examples of covered "places of public accommodation." One of the categories, "service establishments," specifically includes the examples of an insurance office and a "travel service." 42 U.S.C. § 12181(7)(F). As the First Circuit explained in Carparts Distribution Center v. Wholesaler's Ass'n of New England, the inclusion of a "travel service," which is a business that typically transacts most of its operations outside the walls of its office, shows that Congress contemplated that "service establishments" would "include providers of services which do not require a person to physically enter an actual physical structure." 37 F.3d at 19.

Moreover, adopting Defendants' interpretation of Title III would render sizeable parts of the statute surplusage, contrary to canons of statutory construction and judicial rules. For example, several of Title III's specific proscriptions would be meaningless under Defendants' theories. Congress amplified the Title III general non-discrimination provision, discussed above, by listing several specific actions or failures to act that would constitute discrimination. 42 U.S.C. § 12182. Several specific obligations would have no meaning if Title III were only intended to cover physical access, for example: (a) the obligation to eliminate unnecessary eligibility requirements that tend to screen out individuals with disabilities; (b) the obligation to make reasonable modifications to policies, practices, and procedures, where necessary to afford services to individuals with disabilities; (c) the obligation to furnish auxiliary aids and services -- such as sign language interpreters or Brailled documents -- where necessary for communication with individuals with disabilities. Id. at §§ 12182(b)(2)(A)(i)-(iii). Congress could not have intended to limit Title III to mere physical access and include all of these provisions that are

unrelated to this type of access. The illogic of such an interpretation has been recognized and the misinterpretation of the ADA was rejected by many courts. See, e.g., Kotev, 927 F. Supp. at 1322; Cloutier, 964 F. Supp. at 302; Doukas, 950 F. Supp. at 426.

In addition, Defendants' flawed interpretation would effectively eliminate coverage for several of the categories of protected persons with disabilities described in the statute. The ADA defines protected individuals with disabilities as persons who: (a) have a physical or mental impairment that substantially limits one or more major life activities; (b) who have a record of such an impairment; or (c) who have been regarded as having a such an impairment. 42 U.S.C. §§ 12102(2). Persons in the latter two categories would have no ADA redress under Defendants' theories, because they generally would not be hampered by a lack of physical access to a facility. See Kotev, 927 F. Supp. at 1321-22. The same is also true for another category of protected individuals, persons like the Plaintiffs, who have been discriminated against because of their known association with individuals with disabilities. 42 U.S.C. 12182(b)(1)(E). Finally, another significant group of persons specifically protected by the ADA, persons with mental disabilities, would gain little benefit from being granted only physical access. There is no question that Congress intended the ADA to protect this group of individuals.[14] Under Defendants' interpretation, persons with mental disabilities would only be protected to the extent that they also have physical disabilities. If this were so, Congress's specific statutory language and legislative discussions of mental disabilities would be meaningless.

Most relevant to the instant case is a provision in Title V of the ADA which would be superfluous under Defendants interpretation. See 42 U.S.C. § 12201 et seq. Title V contains

[14] Id.; H.R. Rep. No. 485 (II) at 27, 45; S. Rep. at 22-23.

many miscellaneous provisions related to the other titles, among which is Section 501(c), which delineates certain insurances practices that will be deemed not to violate the ADA. Id. at § 12201(c).[15] If Congress had intended only to cover the physical aspects of insurance offices, Section 501(c) would not have been necessary, or, at the very least, would have been much simpler. See Kotev, 927 F. Supp. 1316, 1322 (C.D. Cal. 1996) ("[Defendant Insurance Company] has not explained why insurers would need this 'safe harbor' provision under Title III if insurers could never be liable under Title III for conduct such as the discriminatory denial of insurance coverage."); Chabner, 1998 WL 37750 at *5.

Courts have recognized that the narrow reading of Title III urged by Defendants would thwart Congress's broad goals and policies behind the ADA. The First Circuit stated that interpreting Title III to cover only access to a place of public accommodation "would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages, available indiscriminately to other members of the general public." Carparts, 37 F.3d at 20. The First Circuit also noted that "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." Id. at 19; accord Lewis v. Aetna Life Insurance Co, 982 F. Supp. 1158, 165 (E.D. Va. 1997) ("It is even more difficult to believe that Congress intended this result to apply to the insurance industry, whose goods and services (insurance policies) are routinely purchased by customers who never set foot in an insurance office . . . .").

[15] Section 501(c) is quoted in its entirety in Section 2.a, infra.

2. The ADA Prohibits Discrimination in the Terms and Conditions of Insurance Contracts

Defendants' alternative argument, that, even assuming that aspects beyond the physical access of insurance offices are covered, Title III does not cover the content of insurance policies, is similarly contradictory to the plain language and spirit of the ADA. The Department of Justice, the enforcing agency for Title III, recognized that the ADA's language and its legislative history clearly demonstrate congressional intent to prohibit unfounded disability-based discrimination in the terms and conditions of insurance policies. Congressional intent guided the Department in promulgating its Title III regulation and preamble, and Technical Assistance Manual, and each is entitled to deference. Most courts -- in fact, to our knowledge, all courts that have addressed the issue directly except for the two relied upon by Defendants -- have upheld ADA coverage of insurance policies. See, e.g., Branch., 966 F. Supp. at 1208; Cloutier, 964 F. Supp. at 301-03; Doukas, 950 F. Supp. at 425-26; Kotev, 927 F. Supp. at 1321-23; Attar, 1997 WL 446439 at *10-*12; Baker v. Hartford Life Ins. Co., 1995 WL 573430 at *4.

a. Coverage of the Terms And Conditions Of Insurance Policies Is Evident From The ADA's Plain Language

It is well settled that remedial statutes, such as the ADA, are to be interpreted broadly to further their underlying purposes. Jefferson County Pharmaceutical Ass'n v. Abbott Labs., 460 U.S. 150, 159 (1983); Gomez v. Toledo, 446 U.S. 635, 639 (1980). This rule of statutory construction applies with special force here in view of Congress's sweeping goals behind the ADA. See City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (giving "generous construction" to the Fair Housing Act in light of its 'broad and inclusive' goals). See also Arnold

v. United Parcel Service, Inc., 1998 WL 63505 (1st Cir., Feb. 20, 1998) (interpreting the ADA in light of Congress's broad remedial purposes).[16]

As discussed above, the expansive language of Title III's general non-discrimination provision prohibits disability-based discrimination in all aspects -- "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations" -- of covered entities. 42 U.S.C. § 12182(a). Covered entities under Title III include the owner, operator, lessor, or lessee of an insurance office. Id. at § 12181(7)(F). Insurance policies are the principal "goods, services, . . . privileges, [or] advantages" offered by insurance offices. Disability-based discrimination in the terms or conditions of insurance policies surely constitutes an infringement of the "full and equal enjoyment" of an insurance company's "goods, services, . . . privileges, [or] advantages," within the plain meaning of Title III. Outright rejection of a person based on their own disability or, as in Plaintiffs' case, their association with persons with disabilities, plainly constitutes a denial of the "full and equal" enjoyment of the insurance office's goods and services. See Doukas, 950 F. Supp. at 427 ("The language . . . logically extends not only to access to the good, but to the nature of the good itself."). Likewise, an insurance company that has a policy of excluding persons with particular disabilities from coverage, as Defendants appear to have, would be using "eligibility criteria that screen out" individuals with disabilities from "fully and equally enjoying" the goods and services offered by insurers, in violation of the clear language of the ADA. 42 U.S.C. § 12182(b)(2)(A)(i). See Cloutier, 964 F. Supp. at 302-03.

[16] See discussion in Section D.1, supra, of Congress's goals behind of the ADA.

The Doukas Court recognized the importance of insurance to individuals with disabilities and why Congress would include the terms and conditions of insurance policies within the coverage of the ADA:

> There can hardly be a'good' or 'service' more central to the day-to-day life of a seriously disabled person than insurance -- for it is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society.

Doukas, 950 F. Supp. at 427.

Defendants rely principally on dictum in Parker v. Metropolitan Life Ins. Co., to claim that the contents of insurance policies should not be covered by Title III. 121 F.3d 1006 (6th Cir. 1997). However, Parker, which concerned a long-term disability benefit plan issued through an employer, is inapposite here, where Plaintiffs sought property insurance directly from the insurer, completely unrelated to the employment context.[17] That distinction is potentially important, because Title I of the ADA covers employment, and the interplay of the different titles was partly determinative in the outcome of Parker, while there is no similar Title I issue in this case. The Parker court explicitly limited its holding: "We have . . . held only that a long-term disability plan obtained through an employer is not a public accommodation under Title III of the ADA." Id. at 1014; see Chabner, 1997 WL 37750 at *6 (distinguishing itself from Parker, because Chabner purchased insurance directly, instead of through an employer).[18] Even the Parker Court

[17] In addition to Parker, Defendants rely on Leonard F. v. Israel Discount Bank of New York, 967 F. Supp. 802 (S.D.N.Y. 1997), which also involved an insurance plan incident to employment.

[18] To the extent that the Parker court issued dictum implying that Title III does not cover the terms and conditions of any insurance policy, the United States respectfully disagrees with such interpretation and urges this Court to decline to adopt its reasoning.

acknowledged that "Title IV [sic] of the ADA may address the contents of insurance policies provided by a public accommodation." 121 F.3d at 1012. Indeed, no courts have adopted Defendants' ADA interpretation outside of the employment setting. The cases involving privately purchased insurance have universally held that Title III does cover the terms and conditions of those insurance policies.[19]

As discussed earlier, the very existence of Section 501(c), and the language it uses confirm that Title III was meant to prohibit unjustified differential treatment for people with disabilities in the terms and conditions of insurance policies. It states:

> (c) INSURANCE — Titles I through IV of this Act shall not be construed to prohibit or restrict --
>
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of title I and III.

42 U.S.C. § 12201(c). The section creates a limited exemption for certain insurance practices that would otherwise violate Titles I, II, and III of the ADA. If the broad language of Title III did not otherwise cover insurance polices, there would have been no need for Congress to emphasize

[19] Even some cases involving employment-based insurance have refused to adopt Defendants' interpretation. See, e.g., Lewis, 982 F. Supp. 1158; Attar v. Unum Life Ins. Co., 1997 WL 446439 (N.D. Tx. 1997).

in Section 501(c) that certain insurance practices were exempted from Title III's scope. Kotev, 927 F. Supp. at 1322; Chabner, 1998 WL 37750 at *5.

Although Section 501(c) creates a limited exemption for certain actuarial based practices, it does not nullify Title III's prohibitions against discrimination in the terms and conditions of insurance policies. Section 501(c) does not insulate policies where they are inconsistent with state law or where they are used as a subterfuge to evade the purposes of the ADA; it ensures the full and equal enjoyment of the goods and services of an insurance provider to persons with disabilities. As explained below, the legislative history of Section 501(c) makes clear that, despite the limited exemption provided for certain practices, the ADA prohibits insurance companies from treating people differently on the basis of disability, unless such differential treatment is justified.[20]

b. The Department of Justice's Title III Regulation and Technical Assistance Manual Interpret Title III to Cover Disability-Based Discrimination in the Terms and Conditions of Insurance Policies

In the commentary to its Title III regulation, the Department emphasized that the statute "reach[es] insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified." 28 C.F.R. pt. 36, App. B at 619. The Department's guidance further emphasized that Title III covers

[20] Defendant Allstate, in its reply brief, proposes an additional and unique argument, that the ADA does not cover property insurance, because Section 501(c) covers only health benefit plans. Defendant appears to be arguing that the phrase "that administers benefit plans" modifies all of the entities preceding it. The guidance to the Department of Justice's regulation specifically rejects such a reading. 28 C.F.R. pt. 36, App. B at 620. Further, if one were to accept Allstate's argument, it would follow that the terms and conditions of property insurance policies are generally covered, without the benefit of the 501(c) exemption for policies not inconsistent with state law.

"unjustified discrimination in all types of insurance provided by public accommodations." Id. at 620. The Department adopted the same interpretation of the statute in its Technical Assistance Manual, stating that "[i]nsurance offices are places of public accommodation, and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer." Title III Technical Assistance Manual § III-3.11000 (Nov. 1993) (attached hereto as Exhibit B).

Congress expressly delegated authority to the Department of Justice to promulgate binding regulations interpreting Title III, 42 U.S.C. § 12186(b), and to issue a technical assistance manual providing guidance about the statute's requirements. See 42 U.S.C. § 12206(c)(3). The Department of Justice is the only federal office with authority to enforce the provisions of Title III. See 42 U.S.C. § 12188(b)(1)(B). In view of Congress's delegation, the Department's regulations must be given "legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute." United States v. Morton, 467 U.S. 822, 834 (1984); accord ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994), citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 844 (1984). The same is true of the preamble or commentary accompanying the regulations since both are part of a department's official interpretation of legislation. Stinson v. United States, 508 U.S. 36, 45 (1993); see also Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). As further interpretation by an enforcement agency, the Department's Technical Assistance Manual is also entitled to substantial deference. See Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 n.8 (2d Cir. 1997); Ferguson v. City of Phoenix, 931 F. Supp. 688, 694-96 (D. Ariz. 1996); Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 36-37 n.4 (D. D.C. 1994). Cf.

Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 587 (D.C. Cir. 1997) (Technical Assistance Manual represents "authoritative departmental position"), cert. denied, Pollin v. Paralyzed Veterans of America, 118 S. Ct. 1184 (1998).

The Department of Justice's interpretation of Title III is also supported by the legislative history of the ADA. Various committee reports and floor debates make clear that Title III prohibits insurance companies from discriminating against individuals with disabilities in insurance coverage unless such differential treatment is justified. For example, both the House and Senate reports emphasize that, under Titles I through III of the ADA, "a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks." H.R. Rep. No. 485, pt. 2, supra, at 136; S. Rep. No. 116, 101st Cong. 2d Sess., at 84. Similarly, the committee reports explain that a public accommodation may "not refuse to insure, . . . or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles, or is related to actual or reasonably anticipated experience." H.R. Rep. No. 485, supra, at 71 (1990); S. Rep. No. 116, supra, at 85. See also 136 Cong. Rec. H4623 (July 12, 1990) (Rep. Owens); 136 Cong. Rec. H4624-4625 (July 12, 1990) (Rep. Edwards); 136 Cong. Rec. S9697 (July 13, 1990) (Sen. Kennedy); Cloutier, 964 F. supp. at 303. ("The legislative history supports this narrow reading of the § 501(c) exemption."); Kotev, 927 F. Supp. at 1322-23("Language in the committee reports indicates that Congress intended to reach insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences were justified.").

c. Defendants' Misconstrue the Title III Regulation

Defendants, too, attempt to use the Department's regulation to support their theory. Defendants cite an inapposite regulatory provision, while ignoring the regulatory provisions discussed above, which directly affirm coverage of the terms and conditions of insurance. Defendants claim that a regulatory provision exempting public accommodations from having to alter inventory or purchase special inventory for individuals with disabilities also protects insurers who discriminate on the basis of disability in their policies. The relevant portions of that provision state:

> **§ 36.307 Accessible or special goods**
>
> (a) This part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.
>
> . . . .
>
> (c) Examples of accessible or special goods include items such as Brailled versions of books, books on audio cassettes, closed-captioned video tapes, special sizes or lines or clothing, and special foods to meet particular dietary needs.

28 C.F.R. § 36.307.

It is obvious from a reading of these two provisions and the preamble discussion of those provisions that they do not apply to Defendants' argument. Id.; 28 C.F.R. pt. 36, App. B at 630-31. This provision only prevents an insurance company from having to change the scope of the type of product it sells. For example, an insurance company that traditionally sells only life insurance need not change the scope of its business by also offering disability insurance policies,

even though person with disabilities may have a great need for such coverage. This provision does not insulate an insurance company from offering its services on a nondiscriminatory basis.[21]

Thus, it is clear from the ADA's broad language and goals, the Department of Justice's regulation and interpretation of the ADA, and the weight of judicial authority, that the ADA prohibits discrimination in the terms and conditions of insurance policies, as well as access to insurance offices. To carve out a gaping exception to the ADA's protection of individuals with disabilities, as Defendants urge, would undermine Congress's intent and would render individuals with disabilities without protection and redress in a critical area of their lives.

[21] The words and context of this provision also show that it was intended primarily to protect providers of consumer goods. Sellers of consumer goods often have no control over the availability, design, or production of accessible consumer goods. Insurance companies, in contrast, control the terms and conditions of their policies and can ensure that policies do not discriminate.

IV. CONCLUSION

For the foregoing reasons, the United States, as amicus curiae, urges this court to deny Defendants' motion to dismiss and to find that the Plaintiffs' complaint has stated a cause of action under the Fair Housing Act, and to find that Title III of the ADA covers the terms and conditions of insurance policies.

Respectfully submitted,

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