Necessary Developments: Calibrating the Fair Housing Act's Reasonable Accommodation Provision

Ben Griswold†

The Fair Housing Act prohibits denying people with disabilities "reasonable accommodations." But courts have long split over how to interpret this provision. At the center of the divide is the statutory requirement that an accommodation be "necessary to afford . . . equal opportunity to use and enjoy a dwelling." Courts diverge over whether the statute imposes a strict-necessity standard, requiring that an accommodation be truly indispensable, or a lenient-necessity standard, requiring only that the requested accommodation ameliorate the plaintiff's disability.

Rather than pick one interpretation, this Comment suggests that courts should tailor the necessity standard they employ to the type of case brought. Specifically, reasonable accommodation cases tend to stem from two sources: (1) current housing occupants who were denied a specific accommodation and (2) potential developers who were denied a requested zoning variance. Analyzing the text of the statute, I argue that the term "use and enjoy" invokes common law property ideas that should inform the interpretation of the reasonable accommodation provision. This textual analysis indicates that courts should apply a lenient-necessity requirement to cases brought by housing occupants requesting a specific accommodation but should apply a strict-necessity requirement in cases brought by developers seeking zoning variances. Further, this interpretation of the statute addresses important information asymmetries across the two types of cases, enabling courts to more optimally select for societally beneficial accommodations.

† A.B. 2018, Harvard College; J.D. Candidate 2026, The University of Chicago Law School.

INTRODUCTION

In 2016, Philadelphia resident Carol Vorchheimer owned a unit in a condominium building.[1] Vorchheimer suffered from lung problems and required a rolling walker to get around.[2] To facilitate her ability to come and go independently, Vorchheimer sought permission to leave her walker in the lobby.[3] The building refused.[4] Instead, the building offered several alternative accommodations, such as building staff storing and retrieving the walker when she needed it.[5] Considering the alternative

1 Vorchheimer v. Philadelphian Owners Ass'n, 903 F.3d 100, 103–04 (3d Cir. 2018).
2 *Id.* at 104.
3 *Id.*
4 *Id.*
5 *Id.*

proposals worse, Vorchheimer sued the building for failing to provide her a reasonable accommodation as required by the Fair Housing Act[6] (FHA).[7]

Enacted in 1968, the FHA is a landmark piece of legislation that—for the first time in U.S. history—prohibited discrimination on the basis of certain protected classes in private housing markets.[8] Twenty years later, Congress passed the Fair Housing Amendments Act of 1988[9] (FHAA), which extended FHA protections to people with disabilities. Under the FHAA, it is illegal to "refus[e] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[10]

In denying Vorchheimer her proposed accommodation, did the building unlawfully fail to grant her a reasonable accommodation? Perhaps surprisingly, courts across the country answer that question in a variety of ways. While all federal appellate courts agree that an accommodation must be both "reasonable" and "necessary," they differ in how strictly they define, and therefore how much emphasis they place on, each requirement.

Some courts (such as the Third and Tenth Circuits) employ what I call a *strict-necessity* standard, focusing their inquiry mainly on whether an accommodation was "necessary." The Eleventh Circuit, on the other hand, applies what I call a *lenient-necessity* standard, which imposes a lower bar for necessity and instead focuses primarily on whether the requested accommodation was "reasonable." Still other circuits (such as the Sixth and Seventh) apply a causation-based necessity standard that lies somewhere between these two extremes. Which statutory word a court emphasizes can determine how reasonable accommodation cases are resolved. For Carol Vorchheimer, for example, the Third Circuit's strict-necessity standard doomed her case because, in the presence of viable alternatives, Vorchheimer's preferred accommodation was not "necessary."[11]

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6 Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619).

7 *See Vorchheimer*, 903 F.3d at 104.

8 *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 1:1 (2024).

9 Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended in scattered sections of 42 U.S.C.).

10 42 U.S.C. § 3604(f)(3)(B).

11 *Vorchheimer*, 903 F.3d at 112–13.

The questions raised by *Vorchheimer v. Philadelphian Owners Association*[12] matter. Though the FHA also covers discrimination because of "race, color, religion, sex, familial status, or national origin,"[13] more than half of the roughly 8,500 FHA complaints filed annually with the U.S. Department of Housing and Urban Development (HUD) allege disability discrimination.[14] And of those, a large majority allege a failure to make reasonable accommodations.[15] Accurate statistics on how many total FHA cases are ultimately brought to federal court are elusive. Most complaints filed with HUD do not lead to a lawsuit,[16] but the FHA also authorizes individuals to sue directly without HUD intervention.[17] Still, from 1990 to 2006, as many as 1,300 fair housing cases were filed in federal court every year.[18] Thus, how courts parse the language of the reasonable accommodation provision could affect thousands of suits.

My argument proceeds as follows. In Part I, I trace the history of the Fair Housing Act. In Part II, I outline the existing circuit split over how to interpret the reasonable accommodation provision. In Part III, I propose that whether a court focuses its inquiry on reasonableness or necessity should depend on the type of case presented. Specifically, there are two major categories of reasonable accommodation cases: (1) cases brought by current housing occupants who were denied a specific accommodation and (2) cases brought by potential developers who were denied a requested zoning variance.[19] I argue that because courts typically have more information in cases brought by current housing occupants than in those brought by developers, courts should use different

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12 903 F.3d 100 (3d Cir. 2018).

13 42 U.S.C. § 3604(b).

14 *See State of Fair Housing: Annual Report to Congress: FY 2022*, U.S. DEP'T OF HOUS. & URB. DEV. 66 (2023) [hereinafter *Annual Report*], https://perma.cc/Y6SK-6HPV.

15 *Id.* at 67.

16 HUD attempts to resolve any cases filed with the agency before pursuing litigation. In 2022, approximately 32% of FHA cases filed with HUD ended at this conciliation stage. *See id.* at 68.

17 42 U.S.C. § 3613.

18 Tracey Kyckelhahn & Thomas H. Cohen, *Civil Rights Complaints in U.S. District Courts, 1990–2006*, BUREAU OF JUST. STAT. 3 (2008), https://perma.cc/A5FV-RVJ5.

19 *See, e.g.*, Yates Real Est., Inc. v. Plainfield Zoning Bd. of Adjustment, 404 F. Supp. 3d 889, 916 (D.N.J. 2019):

> [F]ederal housing-discrimination challenges tend to arise in one of two contexts: (a) an existing facility's conditional or unconditional refusal to sell or lease to a member of a protected class; or (b) a zoning board's decision barring construction or a use variance that would ultimately benefit members of a protected class.

necessity standards in each context. In cases brought by current housing occupants requesting a specific accommodation, a lenient-necessity standard is more appropriate. However, in cases brought by developers seeking zoning variances, a strict-necessity standard should predominate. I make this argument first by presenting a statutory interpretation of the reasonable accommodation provision, focusing on the statute's inclusion of the term "use and enjoy."[20] I contend that this term evokes common law property ideas that support treating these two types of cases differently. Second, I analyze the informational imbalances in these two types of cases and discuss how courts should respond to these asymmetries. Finally, I examine some of the implications of my proposal.

I. BACKGROUND AND RELEVANT LAW

In this Part, I briefly outline the key provisions and legislative history of the FHA and FHAA. I then highlight the two most common types of reasonable accommodation cases: those brought by current housing occupants and those brought by developers seeking a zoning variance.

A. The Fair Housing Act

Congress passed the Fair Housing Act in 1968 to "provide, within constitutional limitations, for fair housing throughout the United States."[21] Enacted as Title VIII of the Civil Rights Act of 1968,[22] the FHA sought to address pervasive racial discrimination in private housing markets. The FHA followed the Civil Rights Act of 1964[23] and the Voting Rights Act of 1965[24] as a major civil rights achievement of President Lyndon B. Johnson's administration. Though it was first proposed in 1966, the FHA languished in Congress for two years until it was quickly passed following the assassination of civil rights leader Martin Luther King Jr. in April 1968.[25]

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20 42 U.S.C. § 3604(f)(3)(B).

21 *Id.* § 3601.

22 Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18, 25, and 42 U.S.C.).

23 Pub. L. No. 88-852, 78 Stat. 231 (codified as amended in scattered sections of 5, 28, and 42 U.S.C.).

24 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

25 *See* SCHWEMM, *supra* note 8, § 5:2.

The FHA makes it unlawful to "refuse to sell or rent" or "otherwise make unavailable or deny" housing, or to "discriminate against any person in the terms, conditions, or privileges of sale or rental" of housing, on the basis of a protected characteristic.[26] Protected characteristics include race, religion, national origin, and sex.[27]

The Act limits its scope to "dwellings" but defines the term broadly. Specifically, a dwelling is "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof."[28] In addition to standard family residences, courts have applied the FHA to college dormitories,[29] nursing homes,[30] vacation properties,[31] and even some homeless shelters.[32] Importantly, the definition of dwelling encompasses not just current housing structures, but also vacant land that may be used in residential development.[33]

The FHA authorizes three enforcement mechanisms. First, an "aggrieved person," which the Act defines as someone who claims they have been or soon will be injured by discriminatory housing practices,[34] can file a complaint with HUD.[35] Because the Act clearly covers both existing housing and vacant land that may be used for housing,[36] aggrieved persons include both current housing occupants and potential real estate developers. Cases filed with HUD can then be heard by an administrative law judge, brought to federal district court, or settled with HUD's assistance.[37] Second, an aggrieved person can directly bring a civil suit without first filing an administrative complaint.[38] And finally, the Act authorizes the Attorney General to commence a civil action against any person "engaged in a pattern or practice" of resisting

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26 42 U.S.C. § 3604(a), (b).

27 *See id.*

28 *Id.* § 3602(b).

29 *See, e.g.*, Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 87 (2d Cir. 2000).

30 *See, e.g.*, Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856, 859 (7th Cir. 2018).

31 *See, e.g.*, United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990).

32 *See, e.g.*, Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1048 n.2 (9th Cir. 2007).

33 42 U.S.C. § 3602(b).

34 *Id.* § 3602(i).

35 *Id.* § 3610(a)(1)(A)(i).

36 *Id.* § 3602(b).

37 *See Annual Report*, *supra* note 14, at 69.

38 42 U.S.C. § 3613(a)(2).

the FHA.[39] These enforcement mechanisms are not mutually exclusive.[40]

B. The Fair Housing Amendments Act of 1988

Two decades after passing the FHA, Congress enacted the Fair Housing Amendments Act of 1988, extending housing protections to the disabled. In proposing the FHAA, legislators commented that people with disabilities had often been denied equal access to housing because of fears and stereotypes about their conditions.[41] The FHAA prohibited housing discrimination "because of a handicap of—(A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter."[42]

The FHAA draws much of its language from the Rehabilitation Act of 1973,[43] which provided some of the main civil rights protections for people with disabilities. For example, the FHAA defines "handicap" as:

> (1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities,
> (2) a record of having such an impairment, or
> (3) being regarded as having such an impairment,
> but such term does not include current, illegal use of or addiction to a controlled substance.[44]

This definition is similar to the one used in the Rehabilitation Act.[45] Two years after the FHAA, Congress passed the Americans with Disabilities Act of 1990[46] (ADA), which used nearly identical language.[47]

In addition to extending existing FHA protections to people with disabilities, the FHAA also provided disabled people with additional protections not offered to other protected classes.

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39 *Id.* § 3614(a).

40 *See* SCHWEMM, *supra* note 8, § 4:5.

41 *See, e.g.*, 134 CONG. REC. H4923 (1988) (statement of Rep. Feighan) ("[E]qual opportunity to rent or buy housing has remained but a dream for far too many persons with disabilities. Unfortunately, our society remains riddled with fears and stereotypes about disabilities and the victims of disabling illnesses and conditions.").

42 42 U.S.C. § 3604(f)(1); *accord id.* § 3604(f)(2).

43 Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 et seq.).

44 42 U.S.C. § 3602(h).

45 *See* 29 U.S.C. § 705(9).

46 Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 et seq.).

47 42 U.S.C. § 12102(1).

Chiefly, the FHAA widened the definition of discrimination to include refusals to make "reasonable modifications" or provide "reasonable accommodations" for a person's disability.[48] The reasonable modification requirement obligates landlords to make physical changes to a dwelling necessary to allow a disabled person "full enjoyment of the premises."[49] The disabled person must bear the expense for any such modifications.[50] Reasonable modifications include construction projects such as widening doorways or building a ramp or railing.[51] Most relevant to this Comment, the FHAA also defined discrimination to include the denial of a reasonable accommodation.

C. Reasonable Accommodation Claims

Under the FHAA, discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[52] As the legislative history indicates, the concept of a reasonable accommodation in the FHAA grew out of administrative and judicial interpretations of the Rehabilitation Act.[53] Reasonable accommodation language was also incorporated into the ADA, so courts frequently look to these related statutes when interpreting the FHAA.[54]

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48 *Id.* § 3604(f)(3)(A), (B).

49 *Id.* § 3604(f)(3)(A).

50 *Id.*

51 *See, e.g.*, Elliott v. Sherwood Manor Mobile Home Park, 947 F. Supp. 1574, 1577 (M.D. Fla. 1996) (discussing the construction of a ramp to access a mobile home).

52 42 U.S.C. § 3604(f)(3)(B).

53 SCHWEMM, *supra* note 8, § 11D:8; *see also* 28 C.F.R. § 41.53 ("A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."); H.R. REP. NO. 100-711, at 25, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186 ("The concept of 'reasonable accommodation' has a long history in regulations and case law dealing with discrimination on the basis of handicap." (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), one of the first Supreme Court cases to discuss the reasonable accommodation provision of the Rehabilitation Act)); *id.* at 29 n.74, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2189 ("The concept of reasonable accommodation is well established in regulations and case law.").

54 *See, e.g.*, Schwarz v. City of Treasure Island, 544 F.3d 1201, 1220 (11th Cir. 2008) ("Congress included the reasonable-accommodation concept throughout the Americans with Disabilities Act, and we have applied that statute's reasonable-accommodation requirements on numerous occasions. So we look to case law under the RA and the ADA for guidance on what is reasonable under the FHA."); Shapiro v. Cadman Towers, Inc., 51

Unlike reasonable modifications, reasonable accommodations typically do not require permanent physical changes to a dwelling. More often, reasonable accommodation cases focus on minor alterations to apartments or requests for exceptions to certain rules. Additionally, unlike reasonable modifications, courts routinely require that landlords bear the cost of a reasonable accommodation.[55] Typical examples of reasonable accommodation requests include keeping a service dog in a "no-pets" apartment,[56] moving to a different apartment unit,[57] or reserving a closer parking space.[58]

1. Requirements of reasonable accommodation claims.

A reasonable accommodation claim has four elements.[59] A plaintiff must show (1) that they are handicapped as defined by the statute; (2) that the defendant knew or should have known of the handicap; (3) that the accommodation is reasonable and necessary to afford equal opportunity to use and enjoy a dwelling; and (4) that the defendant refused the accommodation.[60] Prongs (1) and (4) tend to be less disputed. The statute clearly defines "handicap,"[61] and a refusal to accommodate is often easy to establish.[62] Prong (2) can be a thornier issue, but courts often place the onus on landlords to open a dialogue if they doubt a tenant's handicap.[63] Prong (3) is

F.3d 328, 334 (2d Cir. 1995) ("We believe that in enacting the anti-discrimination provisions of the FHAA, Congress relied on the standard of reasonable accommodation developed under section 504 of the Rehabilitation Act of 1973.").

55 *See, e.g.*, *Shapiro*, 51 F.3d at 335 ("[Defendant] can be required to incur reasonable costs to accommodate [plaintiff's] handicap, provided such accommodations do not pose an undue hardship or a substantial burden."); Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996) ("[S]atisfaction of the FHAA's reasonable accommodation requirement 'can and often will involve some costs.'" (quoting *Shapiro*, 51 F.3d at 335)).

56 *See, e.g.*, Castellano v. Access Premier Realty, Inc., 181 F. Supp. 3d 798, 802 (E.D. Cal. 2016).

57 *See, e.g.*, Lloyd v. Presby's Inspired Life, 251 F. Supp. 3d 891, 899 (E.D. Pa. 2017).

58 *See, e.g.*, Astralis Condo. Ass'n v. Sec'y, U.S. Dep't of Hous. & Urb. Dev., 620 F.3d 62, 64 (1st Cir. 2010).

59 Sometimes the reasonable and necessary elements are split up, leading to a five-element test. *See, e.g.*, Overlook Mut. Homes, Inc. v. Spencer, 415 F. App'x 617, 621 (6th Cir. 2011).

60 *See, e.g.*, *Astralis Condo. Ass'n*, 620 F.3d at 67.

61 42 U.S.C. § 3602(h).

62 *See* SCHWEMM, *supra* note 8, § 11D:8. Many courts interpret an extended delay as evidence of a denial. *See, e.g.*, Bhogaita v. Altamonte Heights Condo. Ass'n, 765 F.3d 1277, 1286–87 (11th Cir. 2014).

63 *See, e.g.*, Jankowski Lee & Assocs. v. Cisneros, 91 F.3d 891, 895 (7th Cir. 1996) ("If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue."). *But see* Groner v. Golden Gate Gardens Apts., 250 F.3d 1039, 1047 (6th Cir. 2001).

the most contested element of a reasonable accommodation claim and is often the focus of courts' analyses. Circuit courts across the country disagree about how to apply this element. While there is some disagreement about how to interpret the word "reasonable," courts especially differ in how strictly to interpret the word "necessary." Courts split on whether "necessary" requires that the accommodation be unique and indispensable or whether it merely requires that the accommodation ameliorate the plaintiff's disability.

How courts define "necessary" directly affects the extent to which they rely on a reasonableness analysis. Courts employing a strict-necessity standard will often weed out cases before ever reaching the issue of reasonableness. On the other hand, when courts employ a lenient-necessity standard, more cases will reach and be decided at the reasonableness stage.

These differences in interpretation may have sweeping effects on fair housing claims. As of 2008, up to 1,300 FHA cases were brought in federal court every year.[64] Based on data from complaints filed with HUD, about 40% of suits allege a failure to make reasonable accommodations.[65] Thus, how courts interpret this provision affects a large portion of all fair housing claims. Further, the interpretation of the FHA's reasonable accommodation provision could affect other statutes. Indeed, some courts apply FHA and ADA case law "in tandem" because of the statutes' similarities, suggesting that a change in FHA analysis could have ripple effects into the interpretation of the ADA.[66]

2. Common types of reasonable accommodation cases.

Reasonable accommodation cases tend to arise out of two sets of circumstances: (1) the decision of a landlord or homeowners association to deny a specific accommodation request or (2) the decision of a local zoning board to deny a requested variance that would ultimately benefit people with disabilities.[67] The first group includes requests for service dogs, first-floor apartment units, and parking spaces. Importantly, these requests are made by people

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64 Kyckelhahn & Cohen, *supra* note 18, at 3.

65 *See Annual Report*, *supra* note 14, at 67.

66 *See, e.g.*, Smith v. NYCHA, 410 F. App'x 404, 406 (2d Cir. 2011) (quotation marks omitted) (quoting Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 573 n.4 (2d Cir. 2003)) ("The FHA and the ADA impose similar anti-discrimination standards for persons who suffer from disabilities and, due to their similarities, can be analyzed 'in tandem.').

67 *See* Yates Real Est. Inc. v. Plainfield Zoning Bd. of Adjustment, 404 F. Supp. 3d 889, 916 (D.N.J. 2019).

currently living in or seeking to live in a specific home. Requests for zoning variances look a bit different. While they can sometimes be brought by current housing occupants (for example, ones who just learned their occupancy violated a zoning ordinance),[68] they are more often brought by developers seeking permission to build in a way not normally permitted by local zoning rules.[69] Though these two types of situations are quite different, the same set of rules tends to apply to each.[70] In fact, one court has noted that the process of applying the same standards to these two diverging types of cases has led to some "interpretive difficulties."[71]

II. THE CIRCUIT SPLIT

For a plaintiff to prevail in a reasonable accommodation suit, the requested accommodation must be both "reasonable" and "necessary to afford such person equal opportunity to use and enjoy a dwelling."[72] Courts across the country have read those words to mean different things, though there is generally more consensus on the "reasonable" requirement. I begin with an overview of how courts assess reasonableness. I then turn to the crux of the reasonable accommodation circuit split: how strictly courts read the necessity requirement.

A. "Reasonable" in the FHAA

The statute does not provide guidance on what "reasonable" means.[73] Without a definition, courts have interpreted the term in two main ways.

Starting with where circuits agree, courts widely read "reasonable" as ruling out accommodations that require "undue financial or administrative burdens."[74] This language comes from

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68 *See, e.g.*, Valencia v. City of Springfield, 883 F.3d 959, 963 (7th Cir. 2018).

69 *See, e.g.*, Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 445 (3d Cir. 2002).

70 *See, e.g.*, Wis. Cmty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 749 (7th Cir. 2006) (stating a general test for a reasonable accommodation analysis and noting that "[i]n the zoning context, a municipality may show that a modification to its policy is 'unreasonable if it is so at odds with the purpose behind the rule that it would be a fundamental and unreasonable change'" (quoting Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002)).

71 *Yates*, 404 F. Supp. 3d at 916.

72 42 U.S.C. § 3604(f)(3)(B).

73 *Cf. id.* § 3602 (providing definitions of terms other than "reasonable").

74 *See, e.g.*, Giebeler v. M & B Assocs., 343 F.3d 1143, 1157 (9th Cir. 2003); Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996).

Southeastern Community College v. Davis,[75] one of the first Supreme Court cases to interpret the reasonable accommodation requirement of the Rehabilitation Act. The Court held that the defendant college did not need to make an accommodation that required "a fundamental alteration" of its program or imposed "undue financial and administrative burdens."[76] In essence, the Court suggested that the word "reasonable" provides an upper limit on how much a plaintiff can ask for. The legislative history leading up to the FHAA's enactment indicates that the FHAA adopted this interpretation. Representative Major Owens stated that, under the FHAA, a housing provider must make any "feasible, practicable modifications," but "extreme, infeasible modifications are not required."[77]

Courts routinely apply this standard in the FHAA context. For example, courts often reiterate that landlords (or other housing providers) need not "do everything humanly possible to accommodate a disabled person"[78] or suffer any "undue hardship."[79] More colorfully, the Eleventh Circuit explained that "[t]he difference between [an] accommodation that is required and [a] transformation that is not is the difference between saddling a camel and removing its hump."[80]

While circuits agree that reasonableness acts as a ceiling on what accommodations must be granted, some courts, such as the Second Circuit stop there.[81] But other circuits read "reasonable" to require more. These courts still agree that reasonableness prevents any excessive requests, but they also interpret "reasonable" to require a cost-benefit analysis of the requested accommodation. For example, the Sixth Circuit has held that to determine reasonableness, "the burden that the requested [accommodation] would impose on the defendant . . . must be weighed against the benefits

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75 442 U.S. 397 (1979).

76 *Id.* at 410, 412.

77 134 CONG. REC. H4923 (1988) (statement of Rep. Owens).

78 Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995).

79 Lapid-Laurel L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 462 (3d Cir. 2002).

80 Schaw v. Habitat for Human., 938 F.3d 1259, 1265 (11th Cir. 2019) (alterations in original) (quotation marks omitted) (quoting Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1260 (11th Cir. 2001)).

81 *E.g.*, Austin v. Town of Farmington, 826 F.3d 622, 630 (2d Cir. 2016) ("A requested accommodation is reasonable where the cost is modest and it does not pose an undue hardship or substantial burden on the rule maker."); *see also* Courage to Change Ranches Holding Co. v. El Paso County 73 F.4th 1175, 1204 (10th Cir. 2023).

that would accrue to the plaintiff."[82] Similarly, the First Circuit conducts "a factbound balancing of the benefits that would accrue to the handicapped individual against the burdens that the accommodation would entail."[83] The Seventh[84] and Eleventh Circuits[85] employ similar standards.

Because a cost-benefit reasonableness analysis supplements the requirement that an accommodation not impose an undue burden,[86] showing reasonableness in cost-benefit circuits is more difficult. For example, an accommodation that costs $15,000 but creates $20,000 in benefit will likely fail a reasonableness analysis for creating an undue burden. But an accommodation that costs only $100 may still fail a cost-benefit reasonableness analysis if it does not generate at least $100 in benefits.

Of course, putting dollar values to these costs and benefits is much easier said than done. As the Seventh Circuit has noted, some costs and benefits come from "simply looking at a balance sheet," while others "may be more subjective and require that the court demonstrate a good deal of wisdom in appreciating the intangible but very real human costs associated with the disability in question."[87]

Regardless of the precise standard each circuit employs to assess reasonableness, courts agree that the inquiry is highly

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82 Hollis v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531, 541–42 (6th Cir. 2014). Though *Hollis* involved a reasonable modification claim, later case law made clear that the Sixth Circuit employs the same standard in reasonable accommodation and modification cases. *See* Debity v. Vintage Vill. Homeowners Ass'n, 2024 WL 3936828, at *5 (6th Cir. Aug. 26, 2024) ("[Plaintiffs] argue their FHA claim under these reasonable-modification and reasonable-accommodation theories. Our circuit applies the same elements to both theories.").

83 Summers v. City of Fitchburg, 940 F.3d 133, 139 (1st Cir. 2019).

84 *See, e.g.*, Valencia v. City of Springfield, 883 F.3d 959, 970 (7th Cir. 2018) (noting that an accommodation is reasonable in part because the "benefits likely outweigh the potential costs of implementation"); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002) ("An accommodation is reasonable if it is both efficacious and proportional to the costs to implement it.").

85 *See, e.g.*, *Schaw*, 938 F.3d at 1265 ("Assessing reasonableness 'require[s] a balancing of the parties' needs.'" (quoting *Oconomowoc*, 300 F.3d at 784)); Bhogaita v. Altamonte Heights Condo. Ass'n, 765 F.3d 1277, 1289 (2014) ("[T]he reasonableness determination . . . asks whether the requested accommodation 'is both efficacious and proportional to the costs to implement it.'" (quoting *Oconomowoc*, 300 F.3d at 784)).

86 *See, e.g.*, *Lapid-Laurel*, 284 F.3d at 462 (outlining a cost-benefit analysis while still rejecting accommodations that impose "undue financial and administrative burdens").

87 *Valencia*, 883 F.3d at 968 (quotation marks omitted) (quoting Wis. Cmty. Servs., Inc. v. City of Milwaukee, 465 F.3d 737, 752 (7th Cir. 2006)).

"fact-specific."[88] This is likely because the costs of a particular accommodation will vary greatly based on the accommodation that is requested. The court must be provided with the facts about those costs in order to assess the reasonableness requirement.

B. "Necessary" in the FHAA

There is much more disagreement about the necessity requirement. Interestingly, the statute provides more guidance on how to interpret the word "necessary" than it does for the word "reasonable." While the statute merely includes the word "reasonable" with no further definition, it elaborates that an accommodation must be "necessary to afford such person equal opportunity to use and enjoy a dwelling."[89] Despite these extra words of detail, courts have divided sharply on how to apply the necessity requirement. Circuits split over whether an accommodation is necessary so long as it ameliorates the plaintiff's underlying disability[90] or whether an accommodation is necessary only if it is "indispensable."[91]

1. A lenient-necessity approach.

On one side of the circuit split, the Eleventh Circuit views an accommodation as necessary if it ameliorates the effect of a disability.[92] Under this lenient-necessity approach, the necessity requirement is a low bar, deferring the bulk of the inquiry to the reasonableness stage. Importantly, the availability of viable alternative accommodations does not factor into the lenient-necessity inquiry.[93] If multiple accommodations plausibly ameliorate a disability, they are all necessary. Alternative accommodations are instead relevant to the reasonableness inquiry.

An example is helpful to illustrate this process. In 2008, Ajit Bhogaita, an Air Force veteran suffering from post-traumatic stress disorder (PTSD), acquired an emotional support dog named

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88 *See, e.g.*, Scoggins v. Lee's Crossing Homeowners Ass'n, 718 F.3d 262, 272 (4th Cir. 2013); *Bhogaita*, 765 F.3d at 1289; *Oconomowoc*, 300 F.3d at 784; *Summers*, 940 F.3d at 139.

89 42 U.S.C. § 3604(f)(3)(B).

90 *See, e.g.*, *Bhogaita*, 765 F.3d at 1289 ("[T]he necessity determination . . . asks whether the requested accommodation ameliorates the disability's effects.").

91 *See, e.g.*, *Vorchheimer*, 903 F.3d at 105.

92 *See Bhogaita*, 765 F.3d at 1289; *see also* Douglas v. Kriegsfeld Corp., 884 A.2d 1109, 1133 (D.C. 2005) ("Implicit in the third requirement (need for accommodation) is a showing that the disability has caused the need for accommodation and that the accommodation requested would eliminate the problem.").

93 *See, e.g.*, *Bhogaita*, 765 F.3d at 1289.

Kane.[94] Bhogaita's condominium association prohibited dogs that weighed more than twenty-five pounds.[95] Kane exceeded that limit.[96] The association demanded Bhogaita remove Kane from the unit, and Bhogaita filed suit claiming denial of a reasonable accommodation.[97] In upholding a jury verdict in Bhogaita's favor, the Eleventh Circuit considered that "[s]ome other arrangement, such as having a lighter-weight dog permitted by the Association's policy, might similarly alleviate Bhogaita's symptoms."[98] The court acknowledged that such a question "could be relevant to the reasonableness determination, which asks whether the requested accommodation 'is both efficacious and proportional to the costs to implement it,'" but made clear that the availability of alternatives was not "relevant to the necessity determination, which asks whether the requested accommodation ameliorates the disability's effects."[99] Because Kane helped manage Bhogaita's disability, he was a necessary accommodation even if other possible accommodations existed.

The Eleventh Circuit bases its lenient-necessity interpretation on the text of the FHAA. As the court explained in *Schwarz v. City of Treasure Island*[100]:

> The FHA's reasonable accommodation provision requires only those accommodations that "may be *necessary* . . . to afford *equal* opportunity to use and enjoy a dwelling." The word "equal" is a relative term that requires a comparator to have meaning. In this context, "equal opportunity" can only mean that handicapped people must be afforded the same (or "equal") opportunity to use and enjoy a dwelling as non-handicapped people, which occurs when accommodations address *the needs created by the handicaps.*[101]

The court expressly distinguished between accommodations that ameliorate a disability—thereby providing an equal opportunity to use and enjoy a dwelling—and those that "address[ ] problems

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94 *Id.* at 1281.
95 *Id.*
96 *Id.*
97 *Id.* at 1283.
98 *Bhogaita*, 765 F.3d at 1289.
99 *Id.* (quoting *Oconomowoc*, 300 F.3d at 784).
100 544 F.3d 1201 (11th Cir. 2008).
101 *Id.* at 1226 (emphasis in original) (citations omitted).

not caused by a person's handicap,"[102] which fall outside the scope of the reasonable accommodation provision.[103]

2. A strict-necessity approach.

Other circuits, however, interpret the necessity requirement quite differently. The Third, Fifth, and Tenth Circuits view necessity as imposing a much higher bar. The Third Circuit clearly articulated this strict-necessity approach in *Vorchheimer*.[104] To that court, "'necessary' means 'required.' It is a high standard."[105] What is necessary must be gauged "in light of proposed alternatives."[106] To arrive at this "stringent" interpretation, the Third Circuit focused on the ordinary meaning of the word "necessary."[107] Quoting the Oxford English Dictionary, the court wrote that necessary means something "[i]ndispensable, requisite, essential, needful; that cannot be done without."[108] The *Vorchheimer* opinion canvasses classical books, political addresses, and even a Rolling Stones song to drive this definition home.[109]

With this interpretation, the presence of viable alternative accommodations becomes dispositive. Something cannot be truly indispensable if there is another option available. For the court, "[g]iving the paraplegic a first-floor apartment is one way to give him access and thus equal opportunity to use his apartment. But an elevator would work too."[110] Under such a standard, Vorchheimer's case was doomed. The fact that the building had offered other solutions for storing her walker—even if they were less preferable and arguably hampered her ability to independently come and go—meant that leaving her walker in the lobby could not be necessary.[111] A strict-necessity approach has the effect of shifting control of the reasonable accommodation process from the tenant to

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[102] *Id.*

[103] For example, some courts have held that a tenant's inability to afford rent is a problem not directly caused by their handicap and is therefore outside the scope of the reasonable accommodation provision. *See* Hemisphere Bldg. Co. v. Village of Richton Park, 171 F.3d 437, 440 (7th Cir. 1999).

[104] *See supra* note 11 and accompanying text.

[105] *Vorchheimer*, 903 F.3d at 105.

[106] *Id.*

[107] *Id.* at 106.

[108] *Id.* at 105 (citing *Necessary*, 10 OXFORD ENGLISH DICTIONARY 276 (2d ed. 1989)).

[109] *Id.* at 106.

[110] *Vorchheimer*, 903 F.3d at 108.

[111] *Id.* at 113; *see also* Women's Elevated Sober Living L.L.C. v. City of Plano, 86 F.4th 1108, 1112 (5th Cir. 2023) ("[A] requested accommodation that is preferable to an alternative is not sufficient; it must be essential.").

the landlord. While the tenant initiates the process by requesting an accommodation, a landlord can effectively veto a requested accommodation by providing a suitable alternative, even if the tenant views it as worse.

It is worth emphasizing how different this analysis is from the lenient-necessity approach employed by the Eleventh Circuit. There, Vorchheimer's accommodation would almost assuredly satisfy the necessity requirement, as access to her walker alleviates the effect of her disability. The court would then engage in a fact-specific reasonableness inquiry to assess the costs and benefits of the requested accommodation. Vorchheimer may still have lost after such an inquiry. The court may have found that leaving her walker in the lobby imposed more of a burden than was reasonable. But it would have at least examined the costs and benefits of the various proposals before coming to a decision, and it would not have allowed a landlord to rule out certain accommodations simply by proposing suitable alternatives. Under the Third Circuit's strict-necessity approach, however, the mere presence of alternatives can foreclose any reasonableness analysis.

The Third Circuit is not alone in this interpretation. During his time on the Tenth Circuit, then-Judge Neil Gorsuch authored an opinion reading the reasonable accommodation provision similarly. Judge Gorsuch also turned to dictionaries to establish that "'necessary[ ]' . . . implies more than something merely helpful or conducive. It suggests instead something 'indispensable,' 'essential,' something that 'cannot be done without.'"[112]

Indeed, Judge Gorsuch expressly rejected the more permissive interpretation of "necessary." The plaintiffs argued that an accommodation is necessary anytime it provides a "direct amelioration of a disability's effect," advocating for the lenient-necessity standard, but the Tenth Circuit rejected this standard as inconsistent with the text of the statute.[113] Such a reading would "require landlords not just to accommodate disabilities affecting housing opportunities but to operate as a sort of clinic seeking to cure all ills. And that is not what the text or purpose of this statute requires."[114] The Tenth Circuit made clear that the FHA requires reasonable accommodations that "ensure the disabled

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[112] Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 923 (10th Cir. 2012) (quoting *Necessary*, 10 OXFORD ENGLISH DICTIONARY 276 (2d ed. 1989)).

[113] *Id.* at 924.

[114] *Id.*

receive the *same* housing opportunities as everybody else" but also that it "does not require *more* or *better* opportunities."[115]

Interestingly, most, if not all, courts would likely agree with that statement. For example, even the Eleventh Circuit's opinion in *Schwarz*—which defined an accommodation as necessary if it alleviates the effects of a disability—clarified that:

> If accommodations go beyond addressing [the needs created by handicaps] and start addressing problems not caused by a person's handicap, then the handicapped person would receive not an 'equal,' but rather a better opportunity to use and enjoy a dwelling, a preference that the plain language of this statute cannot support.[116]

Even as the Eleventh Circuit articulated a lenient-necessity standard, it raised some of the same concerns of potential overreach.[117]

Though the courts have quite different standards for necessity, they are each wary of creating rules that extend benefits too far. The Eleventh Circuit achieves this balance with a more permissive necessity standard and then a fact-intensive review of the accommodation's reasonableness. The Tenth Circuit, in contrast, attempts to weed out requests for "more or better opportunities" at the necessity stage.[118]

Though a strict-necessity requirement might at times appear to be a clean rule, even its strong proponents would likely acknowledge that it is fuzzy around the edges. For example, Judge Gorsuch summed up that "the statute requires accommodations that are necessary (or indispensable or essential) to achieving the objective of equal housing opportunities between those with disabilities and those without."[119] Yet in the very next sentence he acknowledged that "in some sense *all* reasonable

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[115] *Id.* at 923 (emphasis in original).

[116] *Schwarz*, 544 F.3d at 1226.

[117] District court decisions applying *Schwarz* have dismissed reasonable accommodation cases that fail to link a requested accommodation to the specific needs created by the plaintiff's disability. *See, e.g.*, Faller v. Casa Bahia at Westshore Yacht Club Condo. Ass'n, 2022 WL 21748026, at *3 (M.D. Fla. Sept. 12, 2022) (dismissing a claim because "the Complaint makes no allegation that mold remediation would address [plaintiff's] specific needs, as an autistic person, because the mold appears to have the same effect" on someone without a disability).

[118] *Cinnamon Hills*, 685 F.3d at 923 (emphasis omitted).

[119] *Id.*

accommodations treat the disabled not just equally but preferentially."[120] Using the example of a blind woman who is given permission to keep a seeing-eye dog in a no-pets building, Judge Gorsuch recognized that "under the FHA it is sometimes necessary to dispense with formal equality of treatment in order to advance a more substantial equality of opportunity."[121] This additional color perhaps shows that even a strict-necessity standard does not clearly distinguish between the reasonable accommodations that should be approved and those that should not.

Judge Gorsuch did not identify exactly when judges should dispense with formal notions of equality in favor of more equality of opportunity, but he acknowledged that a purely textualist reading of "necessary" is not always enough. This opinion suggests that, whether a court subscribes to a strict-necessity standard like the Tenth Circuit or employs a lenient-necessity standard like the Eleventh Circuit, courts will often still need to perform a fact-intensive analysis of the specific case before them.

3. Courts in the middle.

A set of circuits lies in the middle. These circuits phrase their necessity requirements in the language of causation. For example, in *Bryant Woods Inn, Inc. v. Howard County*,[122] an early reasonable accommodation case, the Fourth Circuit described the necessity requirement as having "attributes of a causation requirement."[123] In practice, the courts in the middle require something more than merely ameliorating the effects of a disability, but they do not engage in a strict textual parsing of "necessary."

To better understand this causation approach, consider the Sixth Circuit case of *Anderson v. City of Blue Ash*,[124] which reversed a district court's grant of summary judgment to the defendant city.[125] Plaintiff Ingrid Anderson sought a reasonable accommodation from the city to allow her disabled daughter to keep a miniature horse that had been trained as a service animal.[126] To frame its analysis, the court first articulated that "[t]he necessity

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120 *Id.* (emphasis in original).
121 *Id.*
122 124 F.3d 597 (4th Cir. 1997).
123 *Id.* at 604.
124 798 F.3d 338 (6th Cir. 2015).
125 *Id.* at 363.
126 *Id.* at 346.

element is . . . a causation inquiry that examines whether the requested accommodation or modification would redress injuries that otherwise would prevent a disabled resident from receiving the same enjoyment from the property as a non-disabled person would receive."[127] Though the Sixth Circuit first established that the accommodation here "ameliorates the effects of the disability,"[128] the court then inquired further than a lenient-necessity court by assessing the argument that Anderson's daughter could receive the same therapy at a local farm.[129] Rather than holding that alternative accommodations are not relevant at all to the necessity requirement, as the Eleventh Circuit has, the Sixth Circuit merely held that an "alternative treatment *away from the plaintiff's dwelling*" cannot influence the necessity inquiry.[130] Though this analysis is more searching than a lenient-necessity standard, it still falls far short of assessing whether the accommodation was truly indispensable, as a strict-necessity court would.

The Seventh Circuit also uses a causation-based standard in defining necessity. In its en banc decision in *Wisconsin Community Services, Inc. v. City of Milwaukee*,[131] the court acknowledged that the necessity standard has been described "essentially as a causation inquiry."[132] To see if causation is met, the court asks whether a rule or policy "hurts 'handicapped people *by reason of their handicap,* rather than . . . by virtue of what they have in common with other people, such as a limited amount of money to spend on housing.'"[133] Thus, courts within the Seventh Circuit have rejected requests for financial accommodations[134] and to restore a building's shut-off water[135] because the harm did not stem directly from the plaintiff's disability. As the Seventh Circuit described, "A residence with no water supply is unlivable. Any resident, handicapped or not, would have to find another place to live."[136]

The language of causation can sound similar to the strict-necessity requirement applied by the Third or Tenth Circuits. The

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127 *Id.* at 361 (citing *Hollis*, 760 F.3d at 541).

128 *Id.*

129 *Anderson*, 798 F.3d at 361.

130 *Id.* (emphasis added).

131 465 F.3d 737 (7th Cir. 2006).

132 *Id.* at 749.

133 *Id.* (emphasis in original) (quoting *Hemisphere Bldg. Co.*, 171 F.3d at 440).

134 *See, e.g.*, Terry v. DuPage Hous. Auth., 2024 WL 4679094, at *4 (N.D. Ill. Nov. 5, 2024).

135 Good Shepherd Manor Found., Inc. v. City of Momence, 323 F.3d 557, 562 (7th Cir. 2003).

136 *Id.*

concept of a but-for cause seems to invoke notions of an accommodation being "indispensable."[137] Indeed, the strict-necessity circuits cite to the other circuits' causation language as support for their more exacting reading of the statute.[138] Yet the standards are not the same.

For example, Carol Vorchheimer's request to leave her walker in the lobby likely would have satisfied the Seventh Circuit's causation-based necessity test. A rule preventing objects from being left in the lobby hurts Vorchheimer "by reason of [her] handicap";[139] it does not hurt all building residents equally. Rather than assessing whether leaving the walker in the lobby is truly indispensable, the Seventh Circuit likely would have proceeded to the "fact-specific" reasonableness inquiry.[140] The court may well have arrived at the same final ruling if it had found that Vorchheimer's request was not reasonable, but it would have at least considered the costs and benefits of the request.

Further, a true strict-necessity standard would conduct the bulk of analysis at the necessity stage, eliminating accommodations that are not indispensable before ever reaching the question of reasonableness. But the Sixth Circuit has observed that its inquiries are focused on reasonableness,[141] indicating that its causation-based necessity standard must substantively differ from a strict-necessity standard.

Courts that employ a causation-based necessity standard are particularly relevant to this Comment. In Part III, I suggest an approach that varies the strictness of the necessity requirement based on the type of reasonable accommodation case brought. Such an approach would lie somewhere between the strict- and lenient-necessity standards described in Part II.B.1–2. Because the circuits that phrase their necessity inquiry in terms of causation already occupy a position between those two extremes, these

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137 *Cinnamon Hills*, 685 F.3d at 923 (quoting *Necessary*, 10 OXFORD ENGLISH DICTIONARY 276 (2d ed. 1989)). For example, in torts, an action is a but-for cause "if, in the absence of the act, the outcome would not have occurred," implying that the action was indispensable to the outcome. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. b (AM. L. INST. 2005).

138 *See Vorchheimer*, 903 F.3d at 110 ("Other circuits make the same point using the language of causation. Necessity functions as a but-for causation requirement, tying the needed accommodation to equal housing opportunity.").

139 *Wis. Cmty. Servs.*, 465 F.3d at 749 (quoting *Hemisphere Bldg. Co.*, 171 F.3d at 440).

140 *Oconomowoc*, 300 F.3d at 784.

141 *Hollis*, 760 F.3d at 541 ("[T]he crux of a reasonable-accommodation or reasonable-modification claim typically will be the question of *reasonableness*." (emphasis added)).

circuits might be best positioned to modify their necessity doctrine in the ways proposed in Part III.

4. HUD's interpretation.

Finally, it's worth noting how federal agencies have weighed in on this debate. Created in 1965, HUD is the agency tasked by Congress with administering federal programs that provide housing assistance.[142] The FHA also vests in HUD the responsibility to "affirmatively [ ] further" fair housing.[143] HUD's interpretation of the reasonable accommodation provision most closely aligns with the approach of a lenient-necessity court. Its guidance contemplates the possibility of multiple viable accommodations and encourages housing providers to "discuss with the individual if she is willing to accept the alternative accommodation."[144] After such a discussion, however, HUD cautions that "an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable."[145] In doing so, HUD squarely rejects a strict-necessity approach. Its stated reason for this guidance is largely a practical one. HUD explains that "providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability."[146]

HUD's view may affect claims it attempts to resolve prior to litigation,[147] but its guidance is not binding on courts.[148] Circuits embracing a strict-necessity standard have largely rejected its view. As the Third Circuit stated in *Vorchheimer*, the guidance lacks "the 'power to persuade'" because it "does not purport to parse or define the statutory requirement of necessity, nor to consider what that

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142 *See* An Act to Establish a Department of Housing and Urban Development, Pub. L. No. 89-174, 79 Stat. 667 (1965).

143 42 U.S.C. § 3608(d).

144 *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act*, DEP'T OF JUST. 8 (May 17, 2004), https://perma.cc/355P-RXNF.

145 *Id.*

146 *Id.*

147 *See supra* note 16.

148 Even before *Loper Bright v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), HUD's policy was guidance rather than a regulation, meaning it was not due *Chevron* deference. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (distinguishing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984)). Instead, HUD's interpretation merely merits "respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

word means in common parlance or in other areas of law."[149] Because HUD's guidance is based in policy rather than statutory interpretation, the Third Circuit held that the ordinary meaning of the word "necessary" trumps any respect due to the agency.[150]

III. RECONCILING THE CIRCUITS

In this Part, I contend that whether courts apply a strict- or lenient-necessity standard should depend on the type of case at issue. Recall from Part I that reasonable accommodation cases typically come in two types. One type of case involves a current housing occupant requesting a specific accommodation. Think Vorchheimer asking to leave her walker in the lobby or Bhogaita seeking permission to have a heavier emotional support dog. The other type of case involves requests for zoning variances. Often, these cases involve requests by developers seeking to build or expand facilities that cater to people with disabilities in a way that violates local zoning regulations.[151] Developers phrase their requested zoning variance as a reasonable accommodation. Notably, these two types of cases have quite different fact patterns, yet circuits often apply the same standards regardless of the case type. This can lead to confusion because the precedent in one type of case may not be straightforwardly applied to the other type of case.[152]

I argue that cases brought by current housing occupants requesting a specific accommodation are better suited to a lenient-necessity standard, with most cases then being decided on reasonableness grounds. In contrast, reasonable accommodation cases brought by a housing developer seeking a zoning variance are more suited to a strict-necessity approach. There are two justifications for this. First, by including the term "use and enjoy" in the reasonable accommodation provision,[153] Congress endorsed an interpretation of the statute, rooted in common law property principles, in which necessity depends on surrounding land uses. Second, informational imbalances between the two scenarios should urge courts to modify their necessity doctrine. Specifically, courts are much more likely to have complete information on costs and

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149 *Vorchheimer*, 903 F.3d at 111 (quoting *Christensen*, 529 U.S. at 587).

150 *Id.*

151 *See, e.g.*, Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002); Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains, 284 F.3d 442, 445 (3d Cir. 2002); *Bryant Woods*, 124 F.3d at 599.

152 *See supra* note 71 and accompanying text.

153 42 U.S.C. § 3604(f)(3)(B).

benefits in the context of a current housing occupant than in the context of a developer seeking a zoning variance.

A. The Statute Indicates that Necessity Depends on Surrounding Land Use

Recall that the FHAA forbids a "refusal to make reasonable accommodations . . . when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[154] In this Section, I argue that the term "use and enjoy" invokes common law property rules that imply a more stringent necessity standard in cases involving developers than in those involving current housing occupants.

First, though, it is important to note that the statute itself is ambiguous. Both the Eleventh and Third Circuits arrive at their starkly different necessity standards through statutory interpretation of the same language.[155] Other courts have openly acknowledged the text's lack of clarity. For example, the Seventh Circuit acknowledged that "the plain language of the FHAA provides little guidance concerning the reach of its accommodation requirement."[156]

When the language of a statute does not answer the question, courts often look to the act's legislative history.[157] But this too is complicated in FHAA cases. The 1984 amendments provided little interpretive material.[158] For example, no Senate report exists, and the House Judiciary Committee's report was written prior to a series of amendments that substantially changed the bill.[159] The legislative history of the FHA is even more sparse. In part because the bill was quickly passed in response to Martin Luther King Jr.'s assassination, the FHA has surprisingly minimal legislative history for such an impactful law.[160] Indeed, in the first

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154 *Id.*

155 *See supra* notes 90–91, 108 and accompanying text.

156 *Wis. Cmty. Servs., Inc.*, 465 F.3d at 749; *see also* Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1104 (3d Cir. 1996) ("We acknowledge that precisely what the 'reasonable accommodations' standard requires is not a model of clarity.").

157 *See, e.g.,* United States v. Thayer, 40 F.4th 797, 801 (7th Cir. 2022); Taylor v. United States, 495 U.S. 575, 601 (1990).

158 *See* SCHWEMM, *supra* note 8, § 5:4 ("One of the noteworthy facts about the legislative history of the 1988 Amendments Act is that it produced a relatively small amount of helpful interpretive material.").

159 *Id.*

160 *See id.* § 5:2 ("[T]he Fair Housing Act resulted from a relatively short and intense period of congressional consideration that took place against the background of dramatic

FHA case to reach the Supreme Court, the Court remarked that the "legislative history of the Act is not too helpful."[161]

Nevertheless, the plain text of the statute justifies imposing a higher necessity requirement on developers seeking zoning variances than on current housing occupants. This Comment does not take a position on the meaning of the word "necessary" in isolation. The Tenth Circuit's understanding that it implies an accommodation that is indispensable[162] and the Eleventh Circuit's interpretation that it implies an accommodation that addresses the underlying disability[163] both seem plausible. Instead, I examine the phrase "use and enjoy" to argue that the interpretation of the word "necessary" should depend on the context of the case.

1. The background of "use and enjoy."

As discussed above, courts have focused on the words "reasonable,"[164] "necessary,"[165] and "equal opportunity"[166] in their reasonable accommodation analyses. Very little attention, however, has been given to the words "use and enjoy." But those words have a distinct meaning. Congress could have said equal opportunity to "own or lease" or "access" a dwelling, but it opted for the term "use and enjoy."

Notably, "use and enjoy" is not a new term in law. Instead, it directly evokes the common law property notion of "use and enjoyment," which captures "[t]he pleasure, comfort, and advantage that a person may derive from the occupancy of land."[167] The term "use and enjoyment" crops up throughout property law. For example, the common law definition for private nuisance is an activity "that substantially and unreasonably interferes in a nontrespassory manner with the *use and enjoyment* of land in the other's possession."[168] Likewise, the Supreme Court held in a 1946

national events. . . . [The Act's] legislative history does not include the committee reports and other documents that usually accompany major legislation").

161 Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972).

162 Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 923 (10th Cir. 2012).

163 *Schwarz*, 544 F.3d at 1226.

164 *E.g.*, Giebeler v. M & B Assocs., 343 F.3d 1143, 1157 (9th Cir. 2003); *Hovsons*, 89 F.3d at 1104; Hollis v. Chestnut Bend Homeowners Ass'n, 760 F.3d 531, 541 (6th Cir. 2014).

165 *E.g.*, *Cinnamon Hills*, 685 F.3d at 923; *Vorchheimer*, 903 F.3d at 105; *Schwarz*, 544 F.3d at 1226.

166 *E.g.*, *Lapid-Laurel*, 284 F.3d at 457; *Cinnamon Hills*, 685 F.3d at 924.

167 *Interest in the Use and Enjoyment of Land*, BLACK'S LAW DICTIONARY (12th ed. 2024).

168 *See, e.g.*, 2 RESTATEMENT (FOURTH) OF PROP.: INTERFERENCES WITH, AND LIMITS ON, OWNERSHIP AND POSSESSION § 2.1 (AM. L. INST., Tentative Draft No. 3 2022) (emphasis added).

takings case that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the *enjoyment and use* of the land."[169]

Importantly, at common law, acceptable methods to "use and enjoy" one's land depended on the prevailing use of similar land in the area.[170] This is what Professor Richard Epstein has described as the "live-and-let-live exception" to nuisance.[171] Since the 1800s, courts have acknowledged that "acts necessary for the *common and ordinary use* and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action."[172] In other words, whether someone's use and enjoyment of their land creates a private nuisance (or whether a court accepts that someone's use and enjoyment has been infringed) crucially depends on how others in the area use their land. As the Supreme Court once famously stated: "A nuisance may be merely a right thing in the wrong place[ ]—like a pig in the parlor instead of the barnyard."[173] A similar standard exists in adverse possession cases. There, courts look to the prevailing use of land in the area to assess whether the continuous possession requirement has been met. For example, a Washington court found that occupying a beach house only during the summer met the requirement for continuous possession because summer occupancy "ordinarily marks the conduct of owners in . . . property of like nature and condition."[174]

Delving into the common law interpretation of this term is no idle exercise. Instead, the "imputed common-law meaning" canon of statutory interpretation states that "[a] statute that uses a common-law term, without defining it, adopts its common-law meaning."[175] Notably, the FHAA does not define the phrase "use and enjoy."[176] Especially given the fact that the FHA explicitly

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169 United States v. Causby, 328 U.S. 256, 266 (1946) (emphasis added).

170 *See* Richard A. Epstein, *Property and Necessity*, 13 HARV. J.L. & PUB. POL'Y 2, 7 (1990).

171 *Id.*

172 Bamford v. Turnley (1862), 122 Eng. Rep. 27, 33; 3 B. & S. 62, 83 (Ex.) (emphasis added); *see also* Campbell v. Seaman, 63 N.Y. 568, 577 (1876) ("A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nuisance.").

173 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

174 Howard v. Kunto, 477 P.2d 210, 213–14 (Wash. Ct. App. 1970) (quoting Whalen v. Smith, 167 N.W. 646, 647 (Iowa 1918)).

175 ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 320 (2012).

176 *Cf.* 42 U.S.C. § 3602 (providing definitions of other terms).

governs relationships with real property, the law's use of a common law property term should factor into its interpretation.

How should this common law background inform the interpretation of the text? A reasonable accommodation must be "necessary to afford [a] person equal opportunity to use and enjoy a dwelling,"[177] but property law indicates that this equal opportunity is indexed to how the typical resident (i.e., someone without a disability) uses similar land in the area.[178] For current housing occupants, that framing sounds close to the Eleventh Circuit's lenient-necessity standard. When a current occupant seeks an accommodation, courts can look around at other people in the building or the neighborhood and observe the common use of the land in the area. An accommodation that ameliorates the plaintiff's disability allows them to use and enjoy the land in the prevailing manner (because other residents are not hindered by that disability).

On the other hand, a common law–informed interpretation points the opposite way in cases of developers seeking zoning variances. There, almost definitionally, the prevailing use of the land is likely to be the use required by the zoning rule. Similarly, because no building exists yet, it is much more difficult to know what is truly necessary for the use and enjoyment of the land. Looking to surrounding houses, for example, does not tell us how many units are necessary for a building to be financially feasible.[179] In such cases, the necessity barrier should be higher because showing a typical use and enjoyment is a taller task.

The use and enjoyment inquiry is also more difficult at the developer level because courts must decide the level of generality to use when assessing the prevailing land use. For example, if land is currently zoned for single-family housing, a narrow scope would conclude that the prevailing use in the area is limited only to single-family homes, potentially excluding the possibility of any group home for the disabled. As I discuss in Part III.C, such

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[177] 42 U.S.C. § 3604(f)(3)(B). It is worth reiterating that while the word "dwelling" may evoke images of a home rather than of a vacant lot awaiting development, Congress specifically defined "dwelling" to include "any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." *Id.* § 3602(b).

[178] Note that while the terms "equal opportunity" and "use and enjoy" are closely related, "use and enjoy" provides additional context for how the provision should be interpreted. Equal opportunity tells the courts whom to compare against (i.e., someone without a disability), but "use and enjoy" tells courts what housing activities come within the ambit of the reasonable accommodation clause (i.e., those that are done on similar land in the area).

[179] *See, e.g.*, Oxford House–C v. City of St. Louis, 77 F.3d 249, 252 (8th Cir. 1996) (rejecting a reasonable accommodation suit arguing that a cap of eight residents in a group home made such group homes financially unviable).

an interpretation could thwart the FHAA's goal of ending housing discrimination against the disabled. Instead, I argue that, in the developer context, courts must assess the prevailing use at a higher level of generality (perhaps concluding that that the prevailing use in this hypothetical town is residential and thus a group home could potentially align with that use and enjoyment).

2. A lenient-necessity standard for suits involving current housing occupants.

The statutory command to assess the typical use and enjoyment of land is easily met in the context of a current housing occupant. By and large, the privileges of residential property entail a consistent set of rights, including the ability to come and go freely, the ability to navigate the premises, and the ability to feel a measure of safety and security. We know, without conducting a deep inquiry, that an accommodation allowing a child to access her backyard or a paraplegic to come and go independently will be in line with the typical use and enjoyment of residential land. Whether these requests should be granted ultimately depends more on the reasonableness requirement.

Recall, for example, the plaintiff in *Anderson*, who sought an accommodation to allow her disabled daughter to keep a therapy horse.[180] At first glance, such a case seems to defy any assessment of typical land usage—no one else in the area had a horse in their yard. But, for that specific plaintiff, the accommodation fit well within the typical land use. The possession of land in that area commonly carried with it the right to freely access and enjoy a backyard. Access to a therapy horse, the court acknowledged, allowed Anderson's daughter to "play in her own backyard as nondisabled children can."[181] The assessment of prevailing use, then, has less to do with the specifics of the proposed accommodation than it does the typical activities that an accommodation will allow the plaintiff to participate in. Because the typical benefits of residential properties are fairly constant, courts need not heavily scrutinize this requirement in the context of a current housing occupant. A court can easily establish that the ability for a child to safely access her backyard is included in the typical use and enjoyment of residential land. Note too that courts always have

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[180] *Anderson*, 798 F.3d at 346.

[181] *Id.* at 362.

the backstop of the reasonableness analysis to weed out unacceptable accommodations, but courts are much more likely to reach the reasonableness stage if they employ a lenient-necessity standard.[182] Thus, the ease of the use and enjoyment inquiry should push courts toward applying a lenient-necessity standard in these contexts.

Note once more that the strictness of the necessity inquiry matters for how cases are resolved. A strict-necessity standard will often prevent courts from ever considering the costs and benefits of a specific proposal. For example, once the court in *Vorchheimer* held that the requested accommodation was not necessary, it did not need to consider the value of Vorchheimer being able to come and go independently or the costs of leaving a walker in the lobby.[183] But in a case like *Vorchheimer,* the language of "use and enjoy" should push courts toward applying a lenient-necessity standard, which would almost assuredly have progressed to a cost-benefit reasonableness inquiry. Thus, implementing this interpretation of the "use and enjoy" language would tangibly affect plaintiffs across the country who seek reasonable accommodations by forcing courts to at least weigh the costs and benefits of the accommodation.

3. A strict-necessity standard for suits brought by real estate developers.

The use and enjoyment inquiry is not so simple for cases brought by developers and instead should push courts toward a strict-necessity requirement. While the typical residential uses of land do not much vary, the requirements for the buildings themselves vary quite a bit. A court cannot, without much inquiry, answer the questions of whether a building must have five units versus ten to be viable, whether eight parking spots are too many or too few, or whether a swimming pool will be therapeutically essential for the people who ultimately live there. These are hard questions. If we take seriously the "use and enjoy" language of the statute, they are questions that require the court to take a look at the typical use in the area. Every plaintiff, regardless of whether they are a housing occupant or a developer, is required by the

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[182] For example, a plaintiff with PTSD who requests a therapy dog versus a therapy elephant will still be seeking to access a prevailing use of the land (the ability to be free from disability-level anxiety), but only one of those accommodations is reasonable.

[183] *See supra* note 111 and accompanying text.

statute to show that their requested accommodation is "necessary to afford . . . equal opportunity to use and enjoy a dwelling."[184] A current housing occupant can much more easily show (without requiring deep inquiry by courts) that an accommodation ameliorates their disability in an activity that falls within typical residential uses. A developer cannot make a similar showing with the same ease. It is less clear what falls within the ambit of a typical use in the developer context, and therefore courts must conduct a more searching inquiry to ensure that the necessity requirement is met. Such an in-depth inquiry is the basis of a strict-necessity requirement.

Juxtapose the scenario in *Anderson* to the case of *Bryant Woods*. In *Bryant Woods*, an established group home sought a zoning variance to expand from eight to fifteen residents.[185] When the application was denied, the developer sued under the reasonable accommodation provision. The challenge presented to the court in assessing the typical use and enjoyment should already seem harder than in *Anderson*. Courts have a sense of what accommodations would give a disabled child already living in housing equal access to a typical use and enjoyment of her land. But they likely do not have a similar intuition for whether the typical use and enjoyment of the surrounding land is most consistent with an eight-person, fifteen-person, or even ninety-person group home. To ascertain this crucial information about the prevailing land use, the court analyzed data on other group homes in the area. It noted that more than thirty other assisted-living facilities operating in the county housed eight residents or fewer, suggesting that the plaintiff's current size was already viable and that to expand would be inconsistent with the typical use and enjoyment of land. Indeed, the court commented that "[i]f Bryant Woods Inn's position were taken to its limit, it would be entitled to construct a 10-story building housing 75 residents, on the rationale that the residents had handicaps."[186] Such a "10-story building" would clearly violate the typical use and enjoyment of land in the area. That the court in *Bryant Woods* needed to undertake a more rigorous inquiry—one that mirrors the strict-necessity standard by assessing the viability of alternative options—results from the fact that the use and enjoyment of land is simply harder to evaluate in the developer context than in the current occupant context.

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184 42 U.S.C. § 3604(f)(3)(B).

185 *Bryant Woods*, 124 F.3d at 599.

186 *Id.* at 605.

Finally, in highlighting the importance of the use and enjoyment inquiry, I do not suggest that developers can only bring reasonable accommodation claims when there is already other housing for disabled people in the area. Such thinking would lead to exactly the type of segregation the FHAA proscribed and that courts have rejected.[187] Indeed, the limited legislative history of the FHAA makes clear that "[t]he Act is intended to prohibit the application of special requirements through land-use regulations . . . that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community."[188] Courts should not, and generally do not, reject reasonable accommodation claims in the zoning context simply because no other group homes exist in the area.[189]

Instead, a court trying to apply the typical use and enjoyment of a residential area to a proposed group home would inquire into what is required to make the proposed group home financially viable or medically effective.[190] Achieving a baseline level of financial and medical viability facilitates disabled people living in the neighborhood, allowing them to access the typical residential use and enjoyment of land. But proposals that go beyond what is needed to provide residential access may violate that use and enjoyment. Thus, courts in such cases undertake searching inquiries to establish what is necessary to provide residential access and what goes beyond that point.[191]

B. Information-Forcing Benefits

Varying the intensity of the necessity inquiry based on whether a reasonable accommodation case is brought by a current housing occupant or a developer seeking a variance can also be justified by informational differences. Specifically, courts are much more likely to have access to complete information on the costs and benefits of an accommodation in the context of a current occupant than a potential developer. Because of these informational asymmetries, courts will be better positioned to select the

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[187] *See, e.g.*, Smith & Lee Assocs. v. City of Taylor, 102 F.3d 781, 794–95 (6th Cir. 1996) (defining equal opportunity under the FHAA as "giving handicapped individuals the right to choose to live in single-family neighborhoods, for that right serves to end the exclusion of handicapped individuals from the American mainstream").

[188] H.R. REP. NO. 100-711, at 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185.

[189] *See, e.g.*, *Hovsons*, 89 F.3d at 1105 (emphasizing the FHAA's goal of allowing people with disabilities to access communities of their choice).

[190] *See Vorchheimer*, 903 F.3d at 109; *Lapid-Laurel*, 284 F.3d 442, 460–61.

[191] *See, e.g.*, *Lapid-Laurel*, 284 F.3d at 461.

socially beneficial accommodations in cases brought by a current occupant than by a developer. When coupled with the statutory reading of the term "use and enjoy," the information differences between these two types of reasonable accommodation cases suggest differential applications of a strict- or lenient-necessity standard depending on the context of the case. Moreover, the presence of information asymmetries goes beyond mere policy concerns. In many areas of the law, informational concerns shape legal doctrine outside of what is prescribed by statute.

1. Selecting socially beneficial accommodations.

Many academics have explained property law as guiding society toward efficient allocations of resources,[192] and the reasonable accommodation provision can be viewed in such a framework. To illustrate this connection, I define a societally efficient accommodation as one in which the benefit to the plaintiff outweighs the accommodation's costs (which could accrue to the housing provider or to a wider group of people, such as other residents in the building or members of the town). For example, if an accommodation would provide a plaintiff with $200 of value and only cost a landlord $100, then it is societally efficient. If the same accommodation would cost a landlord $300, it is not efficient. Note once more that valuing these costs and benefits is easier said than done. Courts that accept the cost-benefit approach to reasonableness have acknowledged the difficulties inherent in these valuations.[193]

Nonetheless, a reasonableness analysis can be thought of as the courts' attempt to select for societally efficient accommodations. Recall from Part II.A that many courts have directly described the reasonableness inquiry as a cost-benefit analysis.[194] Remember too that not all societally efficient accommodations are reasonable because courts uniformly interpret "reasonable" as protecting the housing provider from any "undue hardship."[195] Thus, the reasonableness standard attempts to select for those societally beneficial accommodations that do not require too large of a redistribution from housing provider to disabled occupant.

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[192] *See, e.g.*, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967); LOUIS KAPLOW & STEVEN SHAVELL, ECONOMIC ANALYSIS OF LAW 1683 (2002).

[193] *See, e.g.*, Valencia v. City of Springfield, 883 F.3d 959, 968 (7th Cir. 2018).

[194] *See, e.g.*, Davis v. Echo Valley Condo. Ass'n, 945 F.3d 483, 491 (6th Cir. 2019).

[195] *Lapid-Laurel*, 284 F.3d at 462.

To properly weigh costs and benefits, courts need access to information on those costs and benefits.[196] With full information, courts can arrive at a societally desirable outcome, granting accommodations when the benefit exceeds the cost and denying them when it does not. When such information is lacking, however, courts will be less likely to arrive at an efficient outcome. Thus, the degree to which we should rely on a reasonableness test is linked to the court's ability to gather accurate information about the problem. Further, the amount of information available to a court crucially depends on whether the suit is brought by a current housing occupant or by a developer seeking a zoning variance.

a) Current housing occupants. In any reasonable accommodation case, the parties have access to different information. But in the context of current housing occupants, the parties are able to collectively provide the court with most of the relevant information to conduct an informed reasonableness analysis. For example, a tenant might know the costs of her disability and the benefits she would experience if granted an accommodation. Unless the tenant comes forward with this information, a landlord (or a court) will not have access to it. Likewise, the housing provider may have much more information about the costs of providing any particular accommodation. They may know (better than the tenant or the court) how much it costs to replace a shower or how angry other tenants will be if a walker is left in the middle of the building lobby.

Some courts have explicitly considered these informational asymmetries in choosing where to place the burden of persuasion in a reasonable accommodation case. For example, in the Third Circuit, the plaintiff is responsible for showing that an accommodation is necessary. But after this showing, the burden shifts to the defendant to demonstrate that the accommodation is unreasonable.[197] The court justified this approach by noting that a defendant "is in the best position to provide evidence concerning what is reasonable or unreasonable."[198] Similarly, other circuits require only a prima facie showing of reasonableness from the plaintiff before the burden shifts to the defendant to demonstrate the costs of the

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196 Even when courts do not employ a cost-benefit reasonableness analysis, they still need information to assess whether the costs impose an undue burden.

197 *Lapid-Laurel*, 284 F.3d at 458.

198 *Id.*

proposal.[199] Under such a burden-shifting approach, each party is incentivized to come forward with the information to which they have better access. To meet their burdens of proof, the plaintiff reveals the benefit they would get from any accommodation, and the housing provider produces evidence of the cost of providing such an accommodation. A court can then systematically evaluate whether the accommodation is cost-benefit justified.

Even when circuits do not rely on a burden-shifting approach, they tend to agree that the reasonableness inquiry is highly "fact-specific" or "factbound."[200] Why the reasonableness inquiry must be fact-specific is clear—conducting a cost-benefit analysis or assessing whether an accommodation imposes an undue burden requires a lot of information about costs and benefits.

And when courts have access to such complete information—as they often do in cases of current housing occupants—relying on a reasonableness approach is much more likely to achieve the societally optimal outcome. If courts have the information they need to select for societally efficient accommodations, a reasonableness analysis makes a lot of sense from a policy perspective. Employing a strict-necessity approach in such cases rejects these inquiries even when full information is available to them. A court relying on a strict-necessity requirement cuts off cases in which the accommodation may be socially optimal.

b) Developers seeking zoning variances. The story is different, however, in cases involving zoning variances. When a developer raises a reasonable accommodation argument in pursuit of a zoning variance, courts are worse positioned to conduct an accurate cost-benefit analysis. There are two reasons for this.

First, courts have much less information in the zoning variance context. Because the housing has not yet been developed, courts cannot know what the final product will look like, who will live there, and precisely what disabilities they may have. For example, a building that will be restricted only to veterans may cater to more people with PTSD but likely would not exclusively house people with PTSD.[201] A court would struggle to conduct an accurate cost-benefit analysis without knowing how many people

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[199] *See, e.g.*, *Oconomowoc*, 300 F.3d at 783; Schaw v. Habitat for Human., 938 F.3d 1259, 1265 (11th Cir. 2019).

[200] *See supra* note 88 and accompanying text.

[201] *See* Yates Real Est. Inc. v. Plainfield Zoning Bd. of Adjustment, 404 F. Supp. 3d 889, 925–29 (D.N.J. 2019).

with disabilities would benefit from the accommodation. Likewise, it is hard to know ex ante what specific zoning variances would be required for a building to be financially viable.[202]

Second, in the zoning context, the costs and benefits are far more diffuse. Costs and benefits could accrue to hundreds, if not thousands, of people, making them much more difficult to fully account for. The benefits of having more housing available for people with disabilities are significant, but they will accrue to people who do not yet live there and are not before the court when the variance is sought. The costs of a zoning variance may be even more diffuse, potentially affecting the rest of a town through traffic patterns, school enrollment, or city planning.[203]

The Seventh Circuit, for example, weighs a town's "interest in applying its facially neutral law to all applicants for a special use approval" in their cost-benefit analysis.[204] The court notes that "[p]ublic input is an important aspect of municipal decision making; we cannot impose a blanket requirement that cities waive their public notice and hearing requirements in all cases involving the handicapped."[205] Nebulous concepts such as the importance of public input are much harder to evaluate in a cost-benefit analysis than, say, the cost of building a new fence.[206]

Courts therefore will struggle to fully account for the costs and benefits of a decision in the zoning variance context. In fact, Judge Richard Posner characterized such a cost-benefit analysis in the zoning context as an "unwieldy analytical task for a court to undertake."[207] In such instances, it may make less sense to rely on a reasonableness analysis. Because of their inability to accurately conduct a cost-benefit analysis, courts could instead rely more on the necessity requirement.

While a strict-necessity analysis does not seek to select for societally beneficial accommodations (i.e., those in which the benefit outweighs the cost), it places the onus on plaintiffs to

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[202] *See, e.g.*, Hemisphere Bldg. Co. v. Village of Richton Park, 171 F.3d 437, 439 (7th Cir. 1999).

[203] *E.g.*, *Lapid-Laurel*, 284 F.3d at 464–66 (deciding that a town's denial of a variance was reasonable largely because of potential effects on traffic patterns); *Schaw*, 938 F.3d at 1266–67 (considering traffic congestion, noise, and "adverse effects on neighborhood parking").

[204] United States v. Village of Palatine, 37 F.3d 1230, 1234 (7th Cir. 1994).

[205] *Id.*

[206] *See, e.g.*, Debity v. Vintage Vill. Homeowners Ass'n, 2024 WL 3936828, at *1 (6th Cir. Aug. 26, 2024).

[207] *Hemisphere Bldg. Co.*, 171 F.3d at 439–40.

clearly describe why the proposed variance is needed over acceptable alternatives. In the absence of accurate information about costs and benefits, requiring the plaintiff to meet this higher necessity burden might be a court's most effective way of selecting for positive-value accommodations, even if that is not the standard's purpose.

For example, in *Bryant Woods*—in which an established group home sought a variance to expand from eight to fifteen residents[208]—members of the neighborhood urged against the variance, citing concerns about traffic, congestion, and even intimations that the home was operating a junk-hauling business.[209] Evaluating these concerns against the potential benefit that might result from housing additional disabled residents sounds precisely like the type of "unwieldy analytical task" Judge Posner warned against.[210] Instead, the Fourth Circuit rejected the plaintiff's reasonable accommodation claim on strict-necessity grounds, ruling that the plaintiff had done nothing to show that expansion was needed for the group home to be financially viable or to improve therapeutic benefit.[211] By noting that more than thirty other assisted-living facilities operating in the county housed eight or fewer residents, the court concluded that plaintiff's current size was already viable.[212] It is entirely possible that expanding from eight to fifteen patients would have been societally beneficial. It is also possible that the diffuse costs to the neighborhood would have swamped the benefits. Because the court was armed with so little information to accurately assess those costs—as it so often is in the developer context—the plaintiff's failure to show that the expansion was necessary was likely a good heuristic to separate accommodations that are societally beneficial from those that are not.

Further, inquiries under the strict-necessity standard likely consume fewer judicial resources. A necessity inquiry is less fact-intensive than the reasonableness inquiry, and a court that employs a strict-necessity approach is more likely to resolve the case before needing to turn to the reasonableness analysis. For example, the court in *Vorchheimer* did not have to assess the benefits

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208 *Bryant Woods*, 124 F.3d at 599.

209 *Id.* at 600.

210 *Hemisphere Bldg. Co.*, 171 F.3d at 439–40.

211 *Bryant Woods*, 124 F.3d at 605.

212 *Id.* at 600.

accrued by the plaintiff and compare those to the diffuse costs imposed on other building residents due to her walker being left in the lobby. The court merely had to confirm that other viable alternative accommodations existed, and the inquiry ended. Similarly, the court in *Bryant Woods* did not have to attempt to evaluate the diffuse costs of increased traffic; it merely had to establish that the group home's current size was already viable. In the context of a current housing occupant, cutting off the inquiry at the necessity stage may keep the courts from arriving at the societally optimal outcome. However, in the zoning variance context—when courts lack the information needed to conduct reliable cost-benefit analyses—it may make sense to simply rely on the less complicated judicial method if courts are unlikely to be able to ex ante select for the societally beneficial accommodations under either method.

2. Doctrinal implications of information asymmetries.

Even accepting that, due to information asymmetries, courts can arrive at better outcomes by relying more on the reasonableness inquiry in current occupant cases than in developer cases, it is not immediately clear why that argument is relevant. Should courts allow such informational concerns to shape how they construe an ambiguous statute? I argue yes. Moreover, I suggest that this is nothing new in law. Courts that are concerned with differential access to information often introduce doctrinal mechanisms like burden-shifting approaches to address those informational issues.

Perhaps the best example of this practice arises in tort law. While the plaintiff usually has the burden of proving each element of a tort, this burden can shift in scenarios of extreme informational imbalances.[213] For example, consider the doctrine of res ipsa loquitur, classically articulated by the case of *Byrne v. Boadle*.[214] A plaintiff was walking down the street when a barrel of flour fell on him from the window of a shop above him.[215] Though the plaintiff had no direct evidence of negligence because he was not in the shop at the time of the accident, the court held that the plaintiff had proven a prima facie case of negligence because "[a] barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the

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[213] *See, e.g.*, Susan Block-Lieb & Edward J. Janger, *Impact Ipsa Loquitur: A Reverse Hand Rule for Consumer Finance*, 45 CARDOZO L. REV. 1133, 1169–71 (2024).

[214] (1863) 159 Eng. Rep. 299; 2 H. & C. 722 (Ex.).

[215] *Id.* at 299; 2 H. & C. at 722.

warehouse to prove negligence [is] preposterous."[216] More generally, the doctrine of res ipsa loquitur allows plaintiffs in certain conditions to flip the burden of proving negligence to the defendant. Many torts scholars have tied this doctrine to the inherent informational asymmetries in such cases. For example, Judge Guido Calabresi has stated that a key consideration in a res ipsa loquitur inquiry is "which side has more *knowledge* and therefore which side should bear the *incentive* to come forward with the evidence."[217]

The Supreme Court has endorsed a burden-shifting framework for other causes of action under the FHA. In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,[218] the Court held that disparate impact claims are cognizable under the FHA.[219] As part of its holding, the Court articulated a burden-shifting framework to establish a disparate impact claim. First, a plaintiff must establish a robust causal connection between the challenged policy and the alleged disparate impact.[220] The burden then shifts to the defendant to provide a valid interest served by its policy.[221] The plaintiff must then show that the defendant's interest could be achieved by another practice with less discriminatory effect.[222] While *Inclusive Communities* did not expressly connect this burden-shifting framework to the presence of informational imbalances between the parties, Justices have previously suggested such approaches to address exactly those problems.[223] Intuitively, the framework

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216 *Id.* at 301; 2 H. & C. at 728.

217 Williams v. KFC Nat'l Mgmt. Co., 391 F.3d 411, 424 (2d Cir. 2004) (Calabresi, J., concurring) (emphasis in original). A similar burden-shifting doctrine exists for the causation element of a tort claim in certain scenarios of informational imbalances as well. *See* Summers v. Tice, 199 P.2d 1, 4 (Cal. 1948); Megan Edwards, Katrina Fischer Kuh & Frederick A. McDonald, *Scientific Gerrymandering & Bifurcation*, 29 N.Y.U. ENVTL. L.J. 171, 211 (2021) ("*Summers v. Tice* allows burden-shifting, in part, because of the asymmetry of information regarding causation between the plaintiff and defendant.").

218 576 U.S. 519 (2015).

219 *Id.* at 534.

220 *Id.* at 542.

221 *Id.* at 541.

222 *Id.* at 533.

223 *See, e.g.*, Murray v. UBS Sec., LLC, 144 S. Ct. 445, 454 (2024) ("Because discriminatory intent is difficult to prove, and because employers 'contro[l] most of the cards,' burden shifting plays the necessary role of 'forcing the defendant to come forward with some response' to the employee's circumstantial evidence. The result is that the trier of fact has the full picture before it." (citation omitted) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993))); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 191–92 (2009) (Breyer, J., dissenting):

> [S]ince the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger

acts to solicit relevant information from the parties that have best access to it. Plaintiffs can better pinpoint the way in which a policy harms them, and landlords are best positioned to explain their motivations.

Note that a proposal to calibrate the strictness of the necessity inquiry based on the type of case is a slightly different informational problem than in the res ipsa loquitur or disparate impact examples. While those examples address informational differences between parties, this Comment's proposal addresses informational differences across case types (i.e., whether the case is brought by a housing occupant or developer). But, while the informational problems stem from slightly different sources, the fact remains that courts across diverse areas of law have responded to informational issues by modifying their doctrines in ways that will conserve limited judicial resources and tend to lead to fairer outcomes.

Tort law serves as a clear example of courts considering informational concerns when crafting doctrine. And the Supreme Court's ruling in *Inclusive Communities* suggests that such reasoning is not limited only to common law but rather has already influenced interpretation of the FHA itself. When coupled with the statutory argument that the term "use and enjoy" already suggests a differential necessity standard for current housing occupants versus developers, courts should take seriously these informational imbalances when interpreting the necessity requirement.

C. Implications of Adopting This Approach

If courts take seriously the idea that reasonable accommodation claims brought by current housing occupants should be held to a lower necessity standard than those brought by developers seeking zoning variances, a few critiques may arise.

First, while the term "use and enjoyment" may be useful in understanding the reasonable accommodation provision, it is not always clear how to ascertain the prevailing land usage in an area. Consider, for example, the case of *Cohen v. Clark*.[224] A tenant named David Clark requested an exception to the building's

> position than the employee to provide the answer. . . . I can see nothing unfair or impractical about allocating the burdens of proof in this way.

[224] 945 N.W.2d 792 (Iowa 2020).

no pet policy to allow for his medically necessary emotional support animal.[225] Another resident, plaintiff Karen Cohen, suffered from a severe allergy to dogs.[226] The landlord was in a bind determining which tenant to accommodate, and a lawsuit ensued. Ultimately, the Iowa Supreme Court[227] held that the accommodation for the emotional support animal was not reasonable because Cohen lived in the building first.[228]

Cohen is a thought-provoking example because it shows that prevailing land uses are not always clear and can even be in tension with one another. For example, is the prevailing use of the land to be able to reside without severe mental anxiety (as the tenants other than Clark could) or to be able live without allergic reactions (as the tenants other than Cohen could)? Both parties had a strong argument that the prevailing means to "use and enjoy" the land favored their case. In the end, the court simply had to pick one. *Cohen*, therefore, illustrates a limitation to the argument that prevailing land usage is easier to discern in cases brought by current housing occupants than by developers. Though that is likely to be true in general (for the reasons discussed in Part III.B), it may not be true in every case. Sometimes, regardless of the standard courts use, there will be no clear solution. But even in such corner cases, so long as the plaintiff has a colorable argument that their activity falls within the ambit of typical use and enjoyment (as Clark clearly did), the court is likely best positioned to make a fact-specific reasonableness determination.

Second, developers in reasonable accommodation cases tend to be seeking zoning *variances*, implying that they are explicitly seeking to depart from the prevailing land use. If courts indeed interpret the words "use and enjoy" as an instruction to look into the prevailing land usage, does a request to change zoning laws automatically undermine a necessity claim? While such a line of reasoning may be tempting, it is misguided. Rather, courts should assess the prevailing use of an area of land at a higher level of generality than the land's zoning laws. For example, if an area is zoned for agricultural use and is mostly used as farmland, then a court would correctly determine that it is likely not a necessary

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225 *Id.* at 795.

226 *Id.*

227 While *Cohen* is a state case, it was brought under an Iowa statute nearly identical to the FHA's reasonable accommodation provision. *Id.* at 800 ("The [ ] housing provision is nearly identical to the Federal Fair Housing Act.").

228 *Id.* at 803.

spot for a group home of people with disabilities. Looking past the land's zoning code, a court can determine that the land's primary use is agricultural, not residential.

Consider, on the other hand, a town that is zoned for single-family housing and is mostly residential. If a court looked only to the zoning code, a multiresidence group home would appear to go against the prevailing land use. But by using a higher level of generality, it would become clear that the prevailing use of the land is residential, and a group home—while not a single-family residence—extends these residential opportunities to people with disabilities who may not otherwise have access to them. In short, courts should look to the typical benefits people derive from the land in a particular area rather than the typical type of person deriving those benefits.

In fact, courts typically employ this higher level of generality when assessing the necessity of a zoning variance. In *Lapid-Laurel, L.L.C. v. Zoning Board of Adjustment*,[229] for example, the Third Circuit held that because elderly disabled people are often unable to live on their own, a variance seeking to establish an institutional healthcare facility in land zoned for single-family housing would be a necessary accommodation.[230]

Rather than suggest that an accommodation is less necessary because it seeks to alter the zoning status quo, I merely argue that ascertaining the prevailing land use requires a more in-depth inquiry in the context of developers than current housing occupants. In *Lapid-Laurel,* for example, the Third Circuit ultimately rejected the proposed ninety-five-bed facility.[231] The court held that, even though some institutional healthcare facility would be necessary to provide the disabled plaintiffs access to the residential area, the specific facility proposed was not necessary because it was too large for the neighborhood.[232] In essence, the court held that past a minimum point of viability, the proposed home had to be in line with the prevailing land use in the area. And establishing that prevailing land use is more difficult in the case of a zoning variance than Vorchheimer's petition to store her walker in the lobby or Bhogaita's request to keep his heavier emotional support dog, Kane.

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229 284 F.3d 442 (3d Cir. 2002).
230 *Id.* at 460.
231 *Id.* at 460–61.
232 *Id.*

On one dimension, *Lapid-Laurel* appears similar to *Bhogaita*. Both cases turn on the issue of size. The town in *Lapid-Laurel* insisted that the group home would be too big, and the homeowners' association in *Bhogaita* argued that Kane exceeded the size limit. But despite the superficial similarity between the cases, the use and enjoyment assessment would be quite different. In Bhogaita's case, a court need not look around the surrounding area to see who else has an emotional support dog. Courts can easily ascertain that the typical use and enjoyment of residential property includes the ability to feel safe and to go about life without debilitating mental anguish. But when a developer requests a zoning variance to build a ninety-five-bed group home, the use and enjoyment inquiry is more complicated. Here, the court does need to look to the surrounding area to determine the typical use and enjoyment. Not only does it need to establish that the area is residential, it must look to surrounding land uses to determine whether the prevailing use is closer to a twelve-bed home or a one-hundred-bed home. As *Lapid-Laurel* acknowledged,[233] there may be some minimum size necessary to achieve financial or therapeutic viability, but for proposals above that size, the typical use and enjoyment of the area is determined by the surrounding land uses—not merely what the developer desires. A strict-necessity inquiry is more appropriate in the developer context because the use and enjoyment analysis is much more difficult.

A high level of generality can also address a third concern: that looking to the prevailing land use in the developer context could defeat the FHA's goal of housing integration. If a court looks only to how land is predominantly used, won't that simply ensure that the land keeps being used as it always has, even if that perpetuates discrimination against the disabled? No, because at a high level of generality, the fact that a neighborhood currently houses only people without disabilities does not make the prevailing land use that of only able-bodied people. Such an interpretation would fly in the face of the core goals of the FHAA. Courts have been clear that the FHAA was "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."[234]

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[233] *Id.* at 461.

[234] Helen L. v. DiDario, 46 F.3d 325, 333 n.14 (3d Cir. 1995) (emphasis and quotation marks omitted) (quoting H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179).

Instead, emphasizing a higher level of generality, courts would first determine that the typical use and enjoyment of land is residential, which is in line with the use of a group home. The court would next assess the typical size of other group homes in the area and, if they find none, they would then determine what is required to make the venture financially or medically viable.[235] Such an inquiry strongly resembles a strict-necessity approach. Importantly, a development of minimum viable size would be necessary for residential use and enjoyment even if no other people with disabilities lived in the area.

One could argue that such a showing is still too onerous and holds back the type of residential integration that the FHAA sought. And it is likely true that a stricter standard of necessity limits the amount of housing for people with disabilities in developed residential areas. However, given the difficulty of assessing the typical use and enjoyment of land coupled with the lack of information available for courts to conduct an effective reasonableness inquiry, a strict-necessity approach is adequate in the developer context. In contrast, the relatively stable set of activities that constitute the typical use and enjoyment of residential property suggest that a lenient-necessity standard in cases brought by current housing occupants is more consistent with the statute. Additionally, because courts generally have the information they need to conduct an effective reasonableness inquiry in these contexts, employing a lenient-necessity standard in cases brought by current housing occupants can lead to more societally efficient outcomes.

Finally, a strict-necessity proponent might contend that, even if the phrase "use and enjoy" is informative, it does not warrant a departure from the dictionary definition of the word "necessary." For example, even if the *Vorchheimer* court acknowledged that the ability to freely come and go is a typical privilege of residential property, it may still contend that the condo's alternative proposals satisfied that use, and so Vorchheimer's request to leave her walker in the lobby was still not necessary. This is a fair argument, but remember that the statute here is by no means clear.[236] More than two decades before its highly textual ruling in *Vorchheimer*, the Third Circuit admitted exactly that fact, writing:

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[235] *Vorchheimer*, 903 F.3d at 109.

[236] *See supra* note 156 and accompanying text.

"We acknowledge that precisely what the 'reasonable accommodations' standard requires is not a model of clarity."[237] Further, courts have also rooted the lenient-necessity standard in the text of the statute (though often focusing on the term "equal opportunity").[238]

Importantly, courts have repeatedly analyzed the word "necessary" in other statutes and decided against a strict-necessity interpretation. For example, the Telecommunications Act of 1996[239] directs the Federal Communications Commission to forbear from applying regulation if (among other factors) "enforcement of such regulation or provision is not necessary for the protection of consumers."[240] In construing the statute, the D.C. Circuit explicitly stated that "the word 'necessary' does not always mean absolutely required or indispensable. Indeed, there are many situations in which the use of the word 'necessary,' in context, means something that is done, regardless of whether it is indispensable, to achieve a particular end."[241] Courts have reached similar conclusions in statutes governing debtors' ability to reject a collective bargaining agreement,[242] Amtrak's ability to exercise eminent domain power,[243] and military investigators' ability to administer oaths during investigations.[244] As Justice David Souter once aptly explained:

> The word[ ] "necessary" [is] ambiguous in being susceptible to a fairly wide range of meanings. . . . If I want to replace a light bulb, I would be within an ordinary and fair meaning of the word "necessary" to say that a stepladder is "necessary"

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237 *Hovsons*, 89 F.3d at 1104.

238 *See, e.g.*, *Schwarz*, 544 F.3d at 1226.

239 Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

240 47 U.S.C. § 160(a)(2).

241 Cellular Telecomms. & Internet Ass'n v. FCC, 330 F.3d 502, 509–10 (D.C. Cir. 2003).

242 *In re* Mile Hi Metal Sys., Inc., 899 F.2d 887, 893 (10th Cir. 1990) ("The word 'necessary' in [the statute] does not mean absolutely necessary. We hold instead that [the statute] 'places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes.'" (quoting Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 90 (2d Cir. 1987)).

243 Nat'l R.R. Passenger Corp. v. 4,945 Square Feet of Land More or Less Situated in Cnty. of Bristol, 1 F. Supp. 2d 79, 82 (D. Mass. 1998) ("I conclude that 'necessary' should be construed to mean that Amtrak finds that an acquisition is a useful and appropriate way to accomplish its goals.").

244 United States v. Whitaker, 13 C.M.A. 341, 343, 344 (1962) (holding that to interpret "necessary" to mean "outright essentiality and strict necessity" would be to "indulge in judicial legislation," and instead interpreting necessary as meaning "essential to a desirable end").

> to install the bulb, even though I could stand instead on a chair, a milk can, or eight volumes of Gibbon.[245]

In light of these alternative readings of the word "necessary," one could make a strong textualist argument for the application of a lenient-necessity standard in the FHAA. Under such a reading, "necessary" would define the set of accommodations that achieve the end of ameliorating a disability, just as a chair, milk can, or stack of books are all in the set of necessary tools to replace a lightbulb. For a mobility-impaired tenant, some accommodations are necessary to address that limitation (a closer parking sport or accessible walker) and others are not (a free subscription to HBO Max, perhaps). So long as the occupant's requested accommodation falls into the former set, it is necessary, though it would of course still need to be reviewed for reasonableness.

The point here is not to engage in a debate about which reading of the word "necessary" is definitively correct but rather to illustrate that a textualist interpretation of the word "necessary" alone is not enough. In the face of such ambiguity, courts should look to the rest of the statute to provide context on how to interpret the necessity requirement. Indeed, broadening the interpretative lens to analyze the word "necessary" in conjunction with the term "use and enjoy" is arguably a more faithful textual analysis. Congress chose the term "use and enjoy"—a term with deep roots in common law—and so any textualist analysis should carefully evaluate that term.

In widening the analysis to read "necessary" in conjunction with "use and enjoy," courts can recognize that the statute provides an avenue to calibrate the necessity inquiry based on the type of case that is brought. Accepting this invitation to differentially apply the necessity standard based on the type of case can both help to resolve some of the doctrinal confusions that have plagued lower courts[246] and help to bridge the wide interpretive gap that has grown between the circuits. Further, in the face of an ambiguous statute, the importance of the informational issues that characterize different types of reasonable accommodation cases should merit more consideration.[247] By adopting this

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[245] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 399 (1999) (Souter, J., concurring in part and dissenting in part).

[246] *See Yates*, 404 F. Supp. 3d at 916 (describing such "interpretive difficulties").

[247] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353–54, 359–60 (1990) (acknowledging that

Comment's proposal, courts can doctrinally address these informational problems while still adhering to a faithful textual interpretation of the statute.

CONCLUSION

This Comment brings into focus the circuit split regarding how courts interpret the reasonable accommodation provision of the FHAA. More specifically, it discusses how employing a strict-necessity versus a lenient-necessity standard can lead to starkly different outcomes. This is especially true when there are viable alternative accommodations available.

Beyond simply highlighting the split, this Comment has demonstrated that the two approaches may both be valid but better suited to one type of case than another. On one hand, a lenient-necessity requirement (which leads to analysis focusing on reasonableness) is better suited to cases of current housing occupants requesting a specific accommodation. On the other hand, a strict-necessity requirement may make more sense in cases of developers seeking zoning variances.

Such an approach has roots in the text of the statute. Though the statutory language is ambiguous, Congress's choice of the phrase "use and enjoy" invokes common law property ideas that should inform the reading of the reasonable accommodation provision. Due to this common law background, courts should evaluate necessity in light of other prevailing property uses in the area—a task that is much more straightforward in the case of a current housing occupant than a developer seeking a variance. Finally, I argue that because of the differences in information about costs and benefits in the two types of cases, such an approach would enable courts to optimally select for more societally beneficial accommodations. In addition to creating better outcomes, such information asymmetries have shaped doctrine in other areas of law (and other parts of the FHAA itself) and should shape the doctrine of reasonable accommodation cases as well.

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statutory interpretation will consider "evolutive concerns" such as "statutory policies," though they carry less weight than textual and historical considerations).