No. 04-1966

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WISCONSIN COMMUNITY SERVICES, INC. and
WISCONSIN CORRECTIONAL SERVICE FOUNDATION, INC.,

Plaintiffs-Appellees

v.

CITY OF MILWAUKEE, WISCONSIN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 01-C-575
(Honorable Lynn Adelman, District Judge)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE ON REHEARING EN BANC

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This brief is submitted in response to the Court's invitation to the Department of Justice (Department) to express the views of the United States.

IDENTITY AND INTEREST OF THE AMICUS CURIAE AND THE SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF

The amicus curiae United States has authority to file this brief under Federal Rule of Appellate Procedure 29(a) and this Court's Order of August 31, 2005. The United States has an interest in this case because the Department of Justice promulgated the two regulations that are the focus of this Court's supplemental

briefing order. The United States also has an interest in the Court's question about the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, because the Attorney General enforces that statute, see 42 U.S.C. 3612(o)(1), 3614, and has special responsibilities for handling cases involving zoning matters. 42 U.S.C. 3610(g)(2)(C).

STATEMENT OF THE ISSUES

This Court invited the United States to address four questions:

1. "Whether 28 C.F.R. § 35.130(b)(7) and 28 C.F.R. § 41.53 apply to disputes about zoning in suits under the Rehabilitation Act and Title II of the Americans with Disabilities Act."

2. "Whether, if so, either of these regulations creates an entitlement to accommodation in the absence of intentional discrimination or disparate impact."

3. "If the answer to Questions 1 and 2 is yes, are the regulations valid?"

4. "If neither the Rehabilitation Act nor Title II of the ADA establishes an accommodation requirement for zoning disputes independent of intentional discrimination and disparate impact, does the approach of the Fair Housing Amendments Act apply to disputes about zoning?"

STATEMENT OF THE CASE

1. Wisconsin Community Services and Wisconsin Correctional Service Foundation, Inc. (collectively WCS) operate an outpatient clinic in Milwaukee for persons with mental-health problems. *Wisconsin Cmty. Servs., Inc.* v. *City of*

Milwaukee, 413 F.3d 642, 644 (7th Cir. 2005), vacated on grant of reh'g en banc (7th Cir. Aug. 31, 2005). Because of overcrowding at the existing location, WCS wants to move its clinic to a larger building at a different site in Milwaukee. That larger building is in a business zone, and under Milwaukee's zoning code, a special-use permit is necessary to allow operation of the clinic at that location. The City's Board of Zoning Appeals denied WCS's request for a special-use permit on the grounds that (1) WCS could have purchased or leased space in other areas of the City that are already zoned for clinics, and (2) the presence of a clinic at the site could undermine a redevelopment plan that calls for a commercial enterprise at that location. *Id*. at 644-645; *Wisconsin Cmty. Servs., Inc.* v. *City of Milwaukee*, 309 F. Supp. 2d 1096, 1101-1102 (E.D. Wis. 2004), vacated, *Wisconsin Cmty. Servs., Inc.* v. *City of Milwaukee*, 413 F.3d 642 (7th Cir. 2005).

2. WCS sued the City under Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. 12131-12165 (Title II), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504). WCS argued that Title II and Section 504 required Milwaukee to grant a special-use permit as a reasonable accommodation to persons with disabilities. The district court granted partial summary judgment in WCS's favor, concluding that the City had an obligation under Title II and Section 504 to make a reasonable accommodation in its zoning rules to allow WCS to operate the clinic in the business zone. *Wisconsin Cmty. Servs.*, 309 F. Supp. 2d at 1104-1108.

3. In a 2-1 decision, a panel of this Court vacated the grant of partial summary judgment and remanded for further proceedings. At the outset, the panel majority noted that two Department regulations – 28 C.F.R. 35.130(b)(7) and 41.53 – imposed accommodation requirements. See *Wisconsin Cmty. Servs.*, 413 F.3d at 645.

The panel majority then concluded that the district court erred in treating the failure to make a reasonable accommodation as an independent theory of liability under Title II and Section 504. *Wisconsin Cmty. Servs.*, 413 F.3d at 646. The majority assumed that challenges to zoning decisions under Title II and Section 504 are governed by the same standard as disability claims under the Fair Housing Amendments Act of 1988 (FHAA), Pub. L. No. 100-430, 102 Stat. 1619 (amending the Fair Housing Act, 42 U.S.C. 3601 *et seq.*). *Wisconsin Cmty. Servs.*, 413 F.3d at 645. The panel majority then explained that

> the FHAA's accommodation requirement is not free standing. * * * Accommodation in the FHAA's parlance is the means by which disparate impact is alleviated. If a zoning or building-code rule bears more heavily on disabled than on other persons, the city must change the rules to the extent necessary to redress the adverse effect. In the absence of disparate impact, however, there is no need for accommodation under the FHAA.

Id. at 646. According to the majority, absent proof of intentional discrimination or disparate impact, neither the FHAA, Title II, nor the Rehabilitation Act imposes a duty to provide reasonable accommodations. *Ibid*.

Applying that standard, the majority concluded that the record did not support the district court's conclusion that the City had violated Title II or Section 504. The majority emphasized that "[t]he district court did not find that Milwaukee's zoning rules bear more heavily on the kind of medical services that the disabled need especially frequently than on the kinds of medical services that all members of the populace require." *Wisconsin Cmty. Servs.*, 413 F.3d at 647. Although concluding that "[d]isparate impact is difficult to see" here, *id.* at 648, the majority did not resolve that issue, but, instead, remanded for further proceedings to give WCS an opportunity to present additional evidence it might have of either disparate impact or intentional discrimination. *Ibid.*

In dissent, Judge Wood argued that the majority's reasoning contradicted 28 C.F.R. 35.130(b)(7). *Wisconsin Cmty. Servs.*, 413 F.3d at 649, 651. According to Judge Wood, that regulation "unambiguously" imposes an obligation "to make reasonable accommodations for the disabled," and "says nothing about an antecedent need to prove pre-existing intentional discrimination or disparate impact." *Id.* at 649. Judge Wood also cited 28 C.F.R. 41.53, a Section 504 regulation, as imposing similar requirements. See *ibid*.

ARGUMENT

The United States respectfully provides the following answers to the Court's four questions:

1. Does 28 C.F.R. 35.130(b)(7) or 28 C.F.R. 41.53 apply to disputes about zoning in suits under the Rehabilitation Act and Title II of the Americans With Disabilities Act?

a. Section 35.130(b)(7)

This regulation states:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. 35.130(b)(7). Zoning rules qualify as "policies" and "procedures" of a municipality, and the enforcement of those rules is one of the "practices" of a local government. Consequently, zoning matters fall within the plain language of the regulation.

Consistent with this language, the Department has interpreted the reasonable-accommodation[1] requirement to apply to zoning. For example, the Department has issued a technical assistance manual providing the following example to illustrate the reasonable-modification requirement:

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[1] Although Section 35.130(b)(7) uses the term "reasonable modifications" rather than "reasonable accommodation," the two terms are interchangeable. See *Alexander* v. *Choate*, 469 U.S. 287, 299-301 & nn.19-20 (1985) (using both terms to describe the same legal obligation).

> ILLUSTRATION 1: A municipal zoning ordinance requires a set-back of 12 feet from the curb in the central business district. In order to install a ramp to the front entrance of a pharmacy, the owner must encroach on the set-back by three feet. Granting a variance in the zoning requirement may be a reasonable modification of town policy.

Dep't of Justice, The Americans With Disabilities Act: Title II Technical Assistance Manual § II-3.6100 at 14 (Nov. 1993) (available at http://www.usdoj.gov/crt/ada/taman2.html). In addition, the United States has previously argued as an *amicus curiae* in another circuit that 28 C.F.R. 35.130(b)(7) covers zoning. See US Amicus Br., *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37 (2d Cir. 1997) (No. 96-7797), overruled on other grounds by *Zervos* v. *Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001) (brief available at 1996 WL 33661732).

b. Section 41.53

This regulation, which implements Section 504, states:

> 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.

28 C.F.R. 41.53. This provision is one of four regulations appearing under the heading "EMPLOYMENT." See 28 C.F.R. 41.52-41.55, at 779 (2005). The United States thus interprets Section 41.53 to apply only to employment, not to zoning matters.

2. Do 28 C.F.R. 35.130(b)(7) and 41.53, if applicable to zoning disputes, create an entitlement to accommodation in the absence of intentional discrimination or disparate impact?

In response to Question 2, the United States will address only 28 C.F.R. 35.130(b)(7) because, as noted above, Section 41.53 does not apply to zoning disputes.

Although an individual with a disability need not prove intentional discrimination to prevail under 28 C.F.R. 35.130(b)(7),[2] the question whether a showing of disparate impact is required is a more complicated issue. The answer depends on what the Court means by "disparate impact." The Department of Justice interprets Section 35.130(b)(7) to require a plaintiff to show that, due to his disability, a challenged rule or practice has a greater adverse effect on him than on other individuals who do not have that disability. To the extent the Court is using the term "disparate impact" to describe such an adverse effect, then the United States agrees that a plaintiff must show a disparate impact to establish a violation of Section 35.130(b)(7). If, however, the Court is using "disparate impact" as a

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[2] See *Good Shepherd Manor Found., Inc.* v. *City of Momence*, 323 F.3d 557, 562 (7th Cir. 2003) ("reasonable accommodation is a theory of liability separate from intentional discrimination" under Title II of the ADA); *Washington* v. *Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 846 (7th Cir.) ("We cannot accept the suggestion that liability under Title II of the [ADA] must be premised on an intent to discriminate on the basis of disability."), cert. denied, 528 U.S. 1046 (1999). It appears that the panel majority in the present case agreed that a showing of intentional discrimination is unnecessary to trigger the duty of reasonable accommodation under 28 C.F.R. 35.130(b)(7) or Title II. See *Wisconsin Cmty. Servs.*, 413 F.3d at 646.

term of art to refer to the disparate-impact theory of liability, the United States' answer is different. A plaintiff need not prove liability under a disparate-impact theory to prevail on a reasonable-accommodation claim under Section 35.130(b)(7). The failure to make a reasonable accommodation is a free-standing theory of liability, not merely a way to remedy a violation of the ADA's disparate-impact requirements.

a. Both The Reasonable-Accommodation And Disparate-Impact Theories Require A Showing Of An Adverse Effect Related To The Plaintiff's Disability

In the context of disability-based discrimination, the United States interprets the reasonable-accommodation and disparate-impact theories as sharing a common requirement: In order to prevail under either theory, the plaintiff must show that a public entity's rule or practice has a harsher impact on him, due to his disability, than on individuals who do not have his disability. The United States thus agrees with Seventh Circuit precedent limiting "the duty of reasonable accommodation in 'rules, policies, practices, or services' to rules, policies, etc. that hurt handicapped people *by reason of their handicap*, rather than that hurt them solely by virtue of what they have in common with other people, such as a limited amount of money to spend on housing." *Good Shepherd Manor Found., Inc.* v. *City of Momence*, 323 F.3d 557, 561 (7th Cir. 2003) (interpreting Title II and the FHAA and quoting *Hemisphere Bldg. Co.* v. *Village of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999)). The panel majority in the present case correctly concluded that this

standard applies to reasonable-accommodation claims under Title II and 28 C.F.R. 35.130(b)(7). See *Wisconsin Cmty. Servs.*, 413 F.3d at 651.

This conclusion flows naturally from the language of the regulation, which focuses on modifications that "are *necessary* to avoid *discrimination on the basis of disability*." 28 C.F.R. 35.130(b)(7) (emphasis added). No disability-based need for an accommodation exists if the negative effect of a challenged rule or practice on a person with a disability is no greater than that experienced by persons who do not share his disability.

This interpretation is also consistent with positions the Department has taken in responding to complaints under Title II. In 1994, for example, the Department concluded that the City of Xenia, Ohio, did not violate Title II when it refused to rezone complainant's property:

> The evidence shows that the City's decision to deny the rezoning application for your property has the *same effect* on your employees without disabilities as it does on your employees with disabilities. Further, the evidence shows that the City has an established policy of maintaining the area where your property is located as a predominantly single family area, and that this policy has the *same effect* on people without disabilities as it does on people with disabilities. The evidence shows that the City's decision to deny your rezoning application was made for reasons that are not discriminatory under the ADA.

Letter of Findings No. 31 at 3 (March 14, 1994) (emphasis added) (available at http://www.usdoj.gov/crt/foia/lofc031.txt).

b. The Failure To Make A Reasonable Accommodation Is A Form Of Discrimination Separate From Either Intentional Or "Disparate Impact" Discrimination

The United States has consistently taken the position that disparate treatment, disparate impact, and failure to make reasonable accommodations are separate theories of liability under Title II and its implementing regulations. See U.S. Amicus Br. 12-13, 28-29, *Ferguson* v. *City of Phoenix*, 157 F.3d 668 (9th Cir. 1998) (No. 96-17350), cert. denied, 526 U.S. 1159 (1999) (brief available at 1997 WL 33634235).[3] While acknowledging similarities between the disparate-impact and reasonable-accommodation theories, the United States has advised the Supreme Court and lower courts that the two theories differ in an important respect: "the obligation to accommodate is less intrusive than the traditional disparate impact remedy because the government is not required to abandon the practice *in toto*, but may simply modify it to accommodate those otherwise qualified individuals with disabilities who are excluded by the practice's effect." U.S. Br. 45 n.55, *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001) (No. 99-1240) (claim under Title I of the ADA) (brief available at http://www.usdoj.gov/osg/briefs/2000/3mer/2mer/1999-1240.mer.aa.pdf); accord, *e.g.*, U.S. Intervenor Br. 39 n.27, *Chisolm* v. *McManimon*, 275 F.3d 315 (3d Cir.

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[3] Accord U.S. Amicus Br. 7, 16-18, *Tyler* v. *City of Manhattan*, 118 F.3d 1400 (10th Cir. 1997) (No. 94-3344); U.S. Amicus Br. 22-23, *Burkhart* v. *Washington Metro. Area Trans. Auth.*, 112 F.3d 1207 (D.C. Cir. 1997) (No. 96-7163).

2001) (No. 00-1865) (claim under Title II of the ADA) (brief available at http://www.usdoj.gov/crt/briefs/chisolm.pdf).

Moreover, 28 C.F.R. 35.130 suggests that failure to accommodate is a separate theory of liability. Section 35.130(a) sets forth the general anti-discrimination prohibition of the Title II regulations. Section 35.130(b), which contains numerous subsections, specifies several types of discrimination that are encompassed within the general rule of Section 35.130(a). Some of those subsections prohibit intentional discrimination. See, *e.g.*, 28 C.F.R. 35.130(b)(1)(ii), (b)(2), & (b)(4)(ii).[4] Other subsections proscribe what is commonly known as "disparate impact" discrimination. For example, one subsection provides that "[a] public entity may not * * * utilize criteria or methods of administration * * * [t]hat have the *effect* of subjecting qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. 35.130(b)(3)(i) (emphasis added).[5] Another disparate-impact provision states that

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[4] See 28 C.F.R. 35.130(b)(1)(ii) (A public entity "may not * * * [a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is *not equal to that afforded others*.") (emphasis added); 28 C.F.R. 35.130(b)(2) ("A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different."); 28 C.F.R. 35.130(b)(4)(ii) (prohibiting certain actions that "have the *purpose* or effect of defeating * * * the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities") (emphasis added).

[5] The Supreme Court has described similar language in other provisions as "disparate impact" prohibitions. See *Garrett*, 531 U.S. at 361, 372 (42 U.S.C.

(continued...)

a public entity "shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities * * *, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. 35.130(b)(8).

The regulation's reasonable-accommodation requirement is found in a separate subsection, 28 C.F.R. 35.130(b)(7). That section does not make the reasonable-accommodation requirement contingent on a violation of either the intentional-discrimination or disparate-impact prohibitions. If the reasonable-accommodation requirement were merely a means to remedy a disparate-impact violation, one would expect that the requirement would appear in the same subsection as the disparate-impact provisions – in (b)(3) or (b)(8), rather than in (b)(7) – or at least would cross-reference the prohibitions on disparate-impact discrimination. The language and structure of 28 C.F.R. 35.130 thus support the conclusion that the reasonable-accommodation provision prohibits a form of discrimination separate from either disparate-impact or intentional discrimination.

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[5](...continued)
12112(b)(3)(A)); *Alexander* v. *Sandoval*, 532 U.S. 275, 278 (2001) (28 C.F.R. 42.104(b)(2)).

3. If the answer to Questions 1 and 2 is yes, are the regulations valid?

Section 35.130(b)(7), as construed by the Department, is a valid interpretation of Title II.[6] "Because the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II," see 42 U.S.C. U.S.C. 12134, "its views warrant respect." *Olmstead* v. *L.C.*, 527 U.S. 581, 597-598 (1999). Cf. *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) ("As the agency directed by Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III [of the ADA] in court, § 12188(b), the Department's views are entitled to deference.") (citing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). At the very least, the Department's construction of Title II, as reflected in Section 35.130(b)(7), is reasonable under *Chevron*.

First, the regulation's coverage of zoning is valid because it is consistent with the language of Title II, which states in relevant part that

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

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[6] The Court's question does not require the United States to address the validity of Section 41.53 since that provision does not apply to zoning. See p. 7, *supra*.

42 U.S.C. 12132. Zoning regulations and enforcement qualify either as "programs" or "activities" of public entities, *ibid.*, and thus fit comfortably within Title II's language. Although Title II does not define "programs" or "activities," the ordinary definitions of those terms encompass zoning rules and decisions. "Program" is commonly defined as "a plan or system under which action may be taken toward a goal." Webster's Ninth New Collegiate Dictionary 940 (1991). A municipal zoning scheme is a plan under which officials regulate land use to further certain goals, such as economic development or the tranquility of residential neighborhoods. "Activity" is defined as a "natural or normal function." *Id.* at 54. Imposing and enforcing zoning restrictions is a normal function of a municipality. *Innovative Health Sys.*, 117 F.3d at 44-45.

Second, the regulation's reasonable-accommodation requirement is valid because Title II itself imposes such a requirement. Title II prohibits discrimination against a "qualified individual with a disability," 42 U.S.C. 12132, which the statute defines as "an individual with a disability who, *with or without reasonable modifications* to rules, policies, or practices, * * * meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. 12131(2) (emphasis added). The Supreme Court has relied on this definition to conclude that Title II imposes a reasonable-accommodation requirement. See *Tennessee* v. *Lane*, 541 U.S. 509, 531-532 (2004) (Title II requires "'reasonable modifications' that would not

fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.") (citing 42 U.S.C. 12131(2)); see also *id.* at 549 (Rehnquist, C.J., joined by Kennedy and Thomas, JJ., dissenting) (Title II "requir[es] special accommodation and the elimination of programs that have a disparate impact on the disabled."). Moreover, prior to enactment of the ADA, the Supreme Court had interpreted Section 504 of the Rehabilitation Act to require reasonable accommodations under certain circumstances. See *School Bd.* v. *Arline*, 480 U.S. 273, 287 n.17, 289 n.19 (1987); *Alexander* v. *Choate*, 469 U.S. 287, 299-301 & nn.19-21 (1985) (clarifying the decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979)). Interpreting Title II to encompass a reasonable-accommodation requirement is thus consistent with Congress's mandate that, unless otherwise indicated, "nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 * * * or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. 12201(a).

Third, as explained below, the language and structure of the ADA support the United States' interpretation of the reasonable-accommodation requirement as a free-standing theory of discrimination separate from either intentional or disparate-impact discrimination. In accordance with the United States' interpretation, this Court previously recognized that the duty of reasonable

accommodation is one of three distinct theories of liability under Title II of the ADA. See *Washington* v. *Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 847 (7th Cir.) (noting the existence of three "methods of proof" for "Title II ADA claims": "discrimination under [Title II] may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant's rule disproportionally impacts disabled people"), cert. denied, 528 U.S. 1046 (1999); accord *Regional Econ. Cmty. Action Program, Inc.* v. *City of Middletown*, 294 F.3d 35, 48 (2d Cir.) (plaintiffs who allege violations of Title II of the ADA "may proceed under any or all of three theories: disparate treatment, disparate impact, and failure to make reasonable accommodation"), cert. denied, 537 U.S. 813 (2002).

In directing the Attorney General to promulgate regulations to implement Title II, see 42 U.S.C. 12134(a), Congress specified that

> [e]xcept for "program accessibility, existing facilities," and "communications," regulations under subsection (a) of this section *shall be consistent with this chapter* and with the coordination regulations under part 41 of title 28, Code of Federal Regulations * * *, applicable to recipients of Federal financial assistance under section 794 of Title 29.

42 U.S.C. 12134(b) (emphasis added). "[T]his chapter" refers to the ADA as a whole, including Titles I and III of the statute. See 42 U.S.C. 12134 note ("References in Text"); 28 C.F.R. Pt. 35, App. A, § 35.103 at 535 (2005) ("Title II

* * * incorporates those provisions of titles I and III of the ADA that are not inconsistent with the regulations implementing section 504."). In accordance with this mandate, the Department incorporated Title I and III provisions into the Title II regulations. *Ibid.*; see *id.*, § 35.130 at 546. The statutory language thus supports the Seventh Circuit's conclusion in earlier decisions that "the methods of proving discrimination under Titles I and III of the ADA also apply to Title II." *Washington*, 181 F.3d at 848; accord *Dadian* v. *Village of Wilmette*, 269 F.3d 831, 841 (7th Cir. 2001).[7]

Titles I and III of the ADA confirm that a failure to make reasonable accommodations is itself a form of discrimination, separate from disparate-impact

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[7] Because the text of 42 U.S.C. 12134(b) supports the Attorney General's decision to incorporate Title I and Title III standards into the Title II regulations, the Court need not rely on the legislative history for support. Nonetheless, we note that the House Committee Reports fully support the United States' reading of 42 U.S.C. 12134(b):

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination," as was done in titles I and III, because this title [Title II], essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments. The Committee intends, however, that the forms of discrimination prohibited by section 202 [42 U.S.C. 12132] be identical to those set out in the applicable provisions of titles I and III of this legislation. Thus, for example, the construction of "discrimination" set forth in section 102(b) and (c) [42 U.S.C. 12112(b) and (c)] and section 302(b) [42 U.S.C. 12182(b)] should be incorporated in the regulations implementing this title.

H.R. Rep. No. 485, Pt. 2, 101st Cong. 2d Sess. 84 (1990); accord H.R. Rep. No. 485, Pt. 3, 101st Cong. 2d Sess. 51 (1990).

discrimination. Title III is particularly relevant because the Attorney General patterned Section 35.130(b)(7) on Title III's reasonable-accommodation requirement. See 28 C.F.R. Pt. 35, App. A, § 35.130 at 546 (2005) (referring to Section 302(b)(2)(A)(ii) of the ADA). That provision states that

> discrimination includes * * * a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. 12182(b)(2)(A)(ii). Title III's prohibition against disparate-impact discrimination is found in a different subsection. See 42 U.S.C. 12182(b)(2)(A)(i). Title I has a similar structure. It defines "discriminate" to include

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. 12112(b)(5)(A). Title I also contains disparate-impact prohibitions, but they appear in subsections separate from the reasonable-accommodation requirement. See 42 U.S.C. 12112(b)(3) & (6).

By stating in Titles I and III that "discrimination" or "discriminate" includes a failure to make reasonable accommodations, Congress signaled that the reasonable-accommodation requirement was a free-standing theory of liability, not simply a remedy for a violation of the disparate-impact prohibitions. Congress

further confirmed the distinction between the two theories of liability by placing the reasonable-accommodation requirements in subsections separate from the disparate-impact provisions. The Attorney General thus properly drew the same distinction when he used Titles I and III as models for the Title II regulations.

Another provision of the ADA also supports the distinction that Section 35.130 draws between a failure to make reasonable accommodations, intentional discrimination, and a disparate-impact violation. In the "[f]indings and purpose" section of the statute, Congress found that

> individuals with disabilities continually encounter *various forms of discrimination*, including outright *intentional* exclusion, the *discriminatory effects* of architectural, transportation, and communication barriers, overprotective rules and policies, *failure to make modifications* to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities[.]

42 U.S.C. 12101(a)(5) (emphasis added). This provision, which pertains to the ADA as a whole, illustrates that Congress viewed a failure to make reasonable modifications as a separate "form[] of discrimination," in addition to intentional discrimination and disparate impact (sometimes called "discriminatory effects").

The Civil Rights Act of 1991 (CRA) provides additional support for this distinction. That statute created provisions governing the award of compensatory and punitive damages in employment cases under the Rehabilitation Act and Title I of the ADA. See Pub. L. No. 102-166, § 102, 105 Stat. 1072-1074 (1991), codified at 42 U.S.C. 1981a(a)(2) & (a)(3). Those provisions draw a distinction

between intentional discrimination, disparate-impact discrimination, and a failure to make reasonable accommodations:

> In an action brought by a complaining party * * * against a respondent who engaged in unlawful *intentional discrimination* (*not an employment practice that is unlawful because of its disparate impact*) under [the Rehabilitation Act or its regulations] or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), *or committed a violation of section 102(b)(5) of the Act [42 U.S.C. § 12112(b)(5)*], against an individual, the complaining party may recover compensatory and punitive damages * * * .
>
> * * * * *
>
> In cases where a discriminatory practice involves the provision of a *reasonable accommodation pursuant to section 102(b)(5)* of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or the [Rehabilitation Act regulations], damages may not be awarded under this section where the covered entity demonstrates good faith efforts * * * to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

42 U.S.C. 1981a(a)(2) & (a)(3) (emphasis added). By authorizing damages in reasonable-accommodation cases under certain circumstances, but prohibiting them altogether for disparate-impact claims, Congress recognized that a failure to make reasonable accommodations was a distinct theory of discrimination under Title I.[8]

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[8] We are not suggesting that the CRA is a dispositive indicator of Congress's intent in enacting Title II. The CRA, which does not mention Title II, was passed by a different Congress (the 102d) from the one that enacted the ADA (the 101st). Nonetheless, given that the two statutes were enacted only about 16 months apart, the CRA provides some evidence about Congress's likely understanding of the reasonable-accommodation theory when it enacted the ADA.

Finally, the United States' interpretation is consistent with the traditional understanding that the equitable remedy for a violation of a reasonable-accommodation requirement is far narrower than the remedy for disparate-impact discrimination. See p. 11, *supra*. If a challenged rule or practice is unlawful under a disparate-impact theory, that rule or practice is invalid as to everyone, not just the plaintiffs. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) ("If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, *the practice is prohibited*.") (emphasis added). By contrast, the remedy for a violation of the reasonable-accommodation requirement is to make a narrow exception in the rule or practice that adversely affects the plaintiff, not to abandon that rule or practice altogether. See *Washington*, 181 F.3d at 850-852 (upholding preliminary injunction under Title II of the ADA that required the defendant to waive a rule for a particular student with a disability; concluding that the proper analysis was not whether "the rule itself is generally an essential or necessary eligibility requirement" but, rather, "whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change").

4. If neither the Rehabilitation Act nor Title II of the ADA establishes an accommodation requirement for zoning disputes independent of intentional discrimination and disparate impact, does the approach of the Fair Housing Amendments Act apply to disputes about zoning?

The Court need not address this question if it agrees with the United States' responses to Questions 1 through 3. WCS does not base its claims directly on the FHAA,[9] and, as far as the United States can determine, plaintiffs would have no cause of action under that statute since the zoning dispute in this case does not concern housing. The United States assumes that the Court has asked about the FHAA simply because of Seventh Circuit caselaw holding that, in the zoning context, the reasonable-accommodation requirements of Title II and Section 504 are identical to that of the FHAA. See *Wisconsin Cmty. Servs.*, 413 F.3d at 645; *Good Shepherd Manor*, 323 F.3d at 561.[10]

In *Hemisphere Building Company*, a zoning case, this Court interpreted the FHAA to confine "the duty of reasonable accommodation in 'rules, policies,

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[9] See Supplemental Brief of Plaintiffs-Appellees Wisconsin Community Services and Wisconsin Correctional Service Foundation, Inc. on Rehearing En Banc 23, 26 (filed with this Court on October 11, 2005).

[10] The United States does not interpret the Court's question as asking whether the FHAA applies to zoning disputes. This Court has correctly held that it does, see *Oconomowoc Residential Programs, Inc.* v. *City of Milwaukee*, 300 F.3d 775, 782-783 (7th Cir. 2002), and the panel majority appeared to agree with that holding. See *Wisconsin Cmty. Servs.*, 413 F.3d at 646. Instead, the United States construes Question 4 as asking whether the FHAA standard, which applies to zoning, should be used in analyzing Title II and Rehabilitation Act claims in zoning cases.

practices, or services' to rules, policies, etc. that hurt handicapped people *by reason of their handicap*, rather than that hurt them solely by virtue of what they have in common with other people, such as a limited amount of money to spend on housing." 171 F.3d at 440. The Seventh Circuit later adopted the *Hemisphere* standard for Title II claims, see *Good Shepherd Manor*, 323 F.3d at 561, and the panel majority in the present case applied the *Hemisphere* test. See *Wisconsin Cmty. Servs.*, 413 F.3d at 646. As previously noted, that standard is consistent with 28 C.F.R. 35.130(b)(7)'s requirement that a plaintiff prove an adverse effect related to his disability in order to prevail on a reasonable-accommodation claim. See pp. 8-10, *supra*. Thus, applying the *Hemisphere* standard is appropriate when a plaintiff alleges that a municipality violated Title II and its implementing regulations by failing to make reasonable accommodations in zoning rules or practices.

CONCLUSION

This Court should adopt the positions set forth in this amicus brief.

Respectfully submitted,

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I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 5,917 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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