

**Statement by
Michael Allen, Partner
Relman, Dane & Colfax, PLLC
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Subcommittee on the Constitution and Civil Justice**

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Examining Sober Living Homes

Introduction

Thank you for the invitation to address the continuing importance of sober living homes at a time when the incidence of addiction—whether to controlled substances, including opioids, or to alcohol—remains very high across the nation, and has reached epidemic proportions in too many communities.

My name is Michael Allen, and I'm a partner at the civil rights law firm Relman, Dane & Colfax, based here in the District of Columbia, but with a national litigation practice focused on challenging discrimination in housing, lending, employment, education and public accommodations. A substantial part of my practice since 2006 has focused on enforcement of the disability provisions of the Fair Housing Act and related federal statutes, like the Americans with Disabilities Act ("ADA"). I appear today not on behalf of any client, but in my personal capacity and as a reasonably well-informed citizen concerned about the issues raised at today's hearing.

Prior to coming to the Firm, I spent 11 years as a senior staff attorney at the Bazelon Center for Mental Health Law. In that capacity, between 1996 and 1999 (in the 104th and 105th Congresses), I led the Coalition to Preserve the Fair Housing Act, and worked closely with Members and staff of this Subcommittee and the full Committee on bills seeking to address

group homes for people with disabilities under the Fair Housing Act. If memory serves correctly, I also testified once or twice to the Subcommittee.

In other words, I've been thinking carefully about these issues for a long time. I appear before you today—30 years after Congress prohibited disability discrimination in housing and 28 years after the passage of the ADA—to say that both federal statutes remain critical tools to “end the unnecessary exclusion of persons with [disabilities]¹ from the American mainstream.” H.R. Rep. No. 100-711, *reprinted at* 1988 U.S.C.C.A.N. 2173, 2179. Over the past three decades, these laws have ended the “unnecessary institutionalization” of people with disabilities. *Olmstead v. L.C.*, 527 U.S. 581, 613 (1999) (Kennedy, J., concurring). While the objective of full community integration for all people with disabilities is not fully realized, the Fair Housing Act and ADA have moved the country from an “out of sight, out of mind” approach to people with disabilities to one of acceptance and inclusion.

We are gathered here today, though, because some communities are experiencing negative consequences related to sober living homes. You have heard testimony today from Members of Congress and local government representatives that predatory and unscrupulous operators of sober living homes are disserving residents of those homes and diminishing the quality of life in the neighborhoods where they are located. I know these concerns are legitimate, and must be addressed immediately. My message is simple: They can be addressed, directly and aggressively, in ways that are entirely consistent with the Fair Housing Act and the

¹ The Act uses the term “handicap” instead of “disability.” Both terms have the same legal meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that the definition of “disability” in the Americans with Disabilities Act is drawn almost verbatim “from . . . the definition of ‘handicap’ contained in the Fair Housing Amendments Act of 1988”). For purposes of this testimony, I use the term “disability,” which is more generally accepted.

ADA. Congress, federal agencies and federal courts have all made clear that these laws provide a shield against discrimination, not a “sword” or a “go free” card for predators and fraudsters.

Statutory Background

The original Fair Housing Act was passed in 1968, and prohibited discrimination on the basis of race, color, religion and national origin. Twenty years later, the 100th Congress expanded the law to prohibit discrimination on the basis of disability. In taking that action, Congress made clear that “the prohibition against discrimination against those with [disabilities] appl[ies] to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.” 1988 U.S.C.C.A.N. at 2185.

Congress also intended the Fair Housing Act to “apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with [disabilities].” *Id.* It was particularly concerned about “imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities” that were “not imposed on families and groups of similar size of other unrelated people.” *Id.*

The 101st Congress enacted the ADA in 1990, providing that people with disabilities could not “be excluded from participation in or be denied the benefits of the services, programs, or activities of [any State or local government], or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. In 1999, the U.S. Supreme Court handed down its decision in *Olmstead*, holding that “unjustified isolation . . . is properly regarded as discrimination based on disability.” 527 U.S. at 597. Its conclusion rested heavily on the purposes of the ADA—to

“provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” 42 U.S.C. § 12101(b)(1)—and on a U.S. Department of Justice regulation interpreting the ADA as requiring State and local governments to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). That regulation defined “most integrated setting” to mean “a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible” 28 C.F.R., Part 35, App. A, p. 450.

Perspective of the Disability Community

Without exaggeration, the Fair Housing Act and the ADA have been characterized as the equivalent of the Emancipation Proclamation for people with disabilities. *See, e.g.*, U.S. Equal Employment Opportunity Commission, *available at* <https://www1.eeoc.gov//eeoc/history/ada25th/thelaw.cfm?renderforprint=1>.

When asked about their housing preferences, people with disabilities answer in much the same way as people without disabilities. They want decent, safe and affordable housing. They want it to be both physically accessible and accessible to community services and community activities, including employment, transportation, education, health care and civic life. In short, many people with disabilities say they do not want “special needs” housing but rather housing that looks like where you and I live, and they do not want their use of health care or personal care services to define the location or appearance of their housing.

But because so many people with disabilities are poor, they often don’t have these choices. And people with addiction disorders often want and need more structured living environments to reinforce their choice of sobriety. To address both of these conditions, some

communities provide federal or local financial and other support for sober living homes, thereby helping to ensure that people with addiction disorders have real options to live in the community. *See, e.g.,* Government Accountability Office, Substance Use Disorder: Information on Recovery Housing Prevalence, Selected States’ Oversight, and Funding, GAO-18-315 (March 2018), available at <https://www.gao.gov/assets/700/690831.pdf>. Most others rely on a patchwork of local agencies, voluntary organizations and for-profit providers.

The result in some communities—such as those in California and Florida that you have heard about today—is a concentration of sober living homes in certain neighborhoods and an absence of such homes in other neighborhoods. This imbalance has several ill effects. First and foremost, it tends to segregate and concentrate people with addiction disorders in less desirable neighborhoods and limits their interaction with people who do not have such disorders. This is directly at odds with the “community integration” mandates of the Fair Housing Act and ADA. Second, to the extent that people with addiction disorders are relegated to predatory and unscrupulous sober living home operators, they may be subjected to abuse, neglect and economic exploitation. Third, over-concentration often leads neighborhood residents to believe they are bearing more than their “fair share” of such homes and to complain to elected officials that sober living homes are changing the character of the neighborhood. Fourth, when market or regulatory forces exclude sober living homes from more attractive neighborhoods, people with addiction disorders lose opportunities for access to employment and public and private amenities.

The Need for Enforcement

Even with the Fair Housing Act and ADA in place these past 30 years, people with disabilities and their advocates have faced resistance to true, fully-integrated, community-based

housing and services. Until I left the Bazelon Center in 2006, I was the principal author of the *Digest of Cases and Other Resources on Fair Housing for People with Disabilities*. It summarized hundreds of Fair Housing Act and ADA cases, most of which involved challenges to local zoning, land use and health and safety restrictions that discriminated against housing for people with disabilities. Many of these arose in the late 1980s or early 1990s, as local governments adjusted to the fact that they could no longer entirely restrict group homes, or segregate them to specific neighborhoods or zoning districts. But those cases have also persisted to the present day. In fact, my firm is now litigating a case against a Connecticut town that quite literally drove a group home for people with mental illnesses right out of business.

Of the many *Digest* cases, there were a few that involved close questions, most involved “meat cleaver” ordinances and practices when the proper instrument should have been a scalpel. That is, rather than sensible regulation to protect residents and neighbors, local governments too often chose to ban group homes altogether, or to subject them to “spacing” requirements (*e.g.*, a group home had to be at least one-half linear mile from any other group home), density limitations (*e.g.*, only 0.005% of a municipality’s residents can reside in a group home), discriminatory definitions of “family” to deter unrelated people with disabilities living together, harsher enforcement of fire safety requirements, and higher rates for public utilities.

Efforts to Amend the Fair Housing Act

In the mid-1990s, with some of its members unhappy that the Fair Housing Act and the ADA had reined in discretion to exclude or limit group homes, the National League of Cities (NLC) proposed or supported a series of bills to scale back or repeal some of the disability provisions of the Fair Housing Act. In 1996, Rep. Brian Bilbray (R-CA) introduced H.R. 2927,

which would have amended the Fair Housing Act to permit any “reasonable local or State law or regulation governing residential care facilities, including laws and regulations governing the proximity of such facilities to each other, the maximum allowable number of occupants, whether related or unrelated, of such a facility or other dwelling, or the ownership, use, or occupancy of a residential care facility by a convicted felon, registered sex offender, or recovering drug addict” if the purpose of the restriction is to restrict land use in single family dwellings. The legislation died in Committee.

In early 1998, Mr. Bilbray introduced H.R. 3206, which included all of the substantive limitations of his previous legislation, added a requirement of exhaustion of state remedies before filing a Fair Housing Act claim, and extended restrictions to foster care group homes. The Coalition to Preserve the Fair Housing Act met regularly with the NLC and other local government interest groups through 1997 and 1998, while actively opposing the legislation. Even though the legislation did not get out of the House Judiciary Committee during the 105th Congress, the Coalition and NLC worked together extensively to address methods by which State and local governments could attend to concerns related to group homes while respecting the protections offered by the Fair Housing Act. Together, we co-authored an important consensus document, titled *Fair Housing: The Siting of Group Homes for People with Disabilities and Children*, which was published in 1999, and which I submitted as part of the background materials associated with this testimony.

Together, we petitioned the U.S. Department of Justice (“DOJ”) and the U.S. Department of Housing and Urban Development (“HUD”)—the two agencies charged by Congress with authoritatively interpreting the Fair Housing Act—to issue enforcement guidance in 1999 to clarify how the Act applies to local zoning, land use and health and safety regulation. While

technically superseded in 2016, this original *Joint Statement on Group Homes, Local Land Use and the Fair Housing Act* guided DOJ and HUD enforcement in these areas until very recently. That original Joint Statement spoke directly to concerns about “fair share” and “over-concentration,” and made clear that State and local governments retained wide latitude to address legitimate concerns about the operation of group homes without violating the Fair Housing Act. Among other things, it encouraged State and local governments to review and resolve citizen complaints about group homes, and emphasized that local governments “could offer incentives to providers to locate future homes in other [non-concentrated] neighborhoods.” 1999 Joint Statement, at 4.

Growing Demand for Sober Living Homes

In the ensuing 15 years, the demand for and supply of sober living homes expanded significantly. State and local substance abuse agencies supplied some of this demand, usually through community-based, mission-driven, nonprofit agencies. Oxford House, Inc., a national nonprofit that charters democratically run, self-supporting sober living homes, expanded its efforts, reporting that 2,287 Oxford Houses in 44 states provide housing to a total of 18,025 individuals. *GAO Report*, at 6. But in certain communities in Florida, California and other states, profit-motivated sober living homes filled the vacuum, and operated without significant regulation or oversight. Reportedly, some operators engaged in insurance fraud and abuse and neglect of residents. *Id.* at 7-11.

In May 2014, Rep. Lois Frankel (D-FL), along with Rep. Ted Deutch (D-FL) and other Members of Congress, sought the assistance of DOJ and HUD in addressing how local governments experiencing a glut of sober living homes could take steps to address these serious

concerns. After a series of meetings, DOJ and HUD issued further guidance in November 2016. Titled *Joint Statement on State and Local Land Use Laws and Practices and the Application of the Fair Housing Act*, available at <https://www.justice.gov/opa/file/912366/download>, and submitted as part of my background materials, this document provides detailed guidance on how local governments can, consistent with the non-discrimination provisions of the Fair Housing Act and ADA, address problems of over-concentration; enforcement of generally-applicable health and safety regulations to group homes; prosecution of drug crimes, fraud, abuse and neglect; and affirmative efforts to integrate group homes in particular neighborhoods where they are not currently located. *Id.* at 10-14.

The Fair Housing Act Does Not Impair Legitimate and Reasonable Regulation

As you have heard from today's panelists, local governments continue to express the concern that the Fair Housing Act somehow constrains their ability to regulate bad behavior by predatory and unscrupulous operators. As someone whose life work for the past quarter-century has revolved around the enforcement of these laws, I just don't understand these concerns. While scoundrels often seek refuge in the law, I see no reason why any local government should ever be concerned about liability for legitimate and reasonable regulation of the operation of sober living homes.

First, the Fair Housing Act anticipates and makes room for such regulation. Among other things, it:

- Effectively strips disability protections indefinitely for people convicted of manufacture or distribution of controlled substances. 42 U.S.C. § 3607(b)(4);

- Precludes discrimination claims by current users of controlled substances. 42 U.S.C. § 3602(h)(3);
- Provides that housing need not be made available to an individual whose tenancy would constitute a “direct threat” to the health or safety of others or would result in substantial property damage. 42 U.S.C. § 3604(f)(9);
- Disclaims any interest in superseding local zoning, land use and health and safety regulation that is not discriminatory. *2016 Joint Statement*, at 1;
- Makes clear that localities can impose generally applicable zoning, land use and health and safety regulations to sober living homes. *2016 Joint Statement*, at 13;
- Requires State and local governments to provide “reasonable accommodations” in local laws and regulations, but imposes on a plaintiff the requirement of demonstrating the necessity of such an accommodation and disallows accommodations that impose an undue financial or administrative burden, or that would require a fundamental alteration of the regulatory scheme. *Jeffrey O. v. City of Boca Raton*, 511 F. Supp. 2d 1339 (S.D. Fla. 2007).

Second, a number of federal courts have interpreted the Fair Housing Act to provide prudential limitations on the number of unrelated people who can live together on the basis of constituting the functional equivalent of a family. *See, e.g., Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597 (4th Cir. 1997); *Smith & Lee Associates, Inc. v. City of Taylor*, 102 F.3d 781 (6th Cir. 1996).

Third, both the Fair Housing Act and the ADA clearly balance protection of people with disabilities against the prospect of being housed in “mini-institutions” in the community. *See Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991); *Olmstead*.

Addressing the Scourge of Predatory and Unscrupulous Operators

Because the Fair Housing Act and ADA are not barriers to sensible regulation of sober living homes, there should be no occasion for Congress to seek their amendment for that purpose. Rather, as the 2016 Joint Statement and 2018 GAO Report make clear, there are a number of tools at the immediate disposal of State and local governments to address the exploitation of sober living home residents, and any diminution of neighborhood quality that may result from the operation of sober living homes. Among the most obvious are:

- Law enforcement against criminal activity, including drug distribution or sale, insurance fraud, nuisance regulations and abuse or exploitation of sober living home residents;
- Civil enforcement against deceptive marketing practices;
- Investigation and prosecution of schemes by which drug treatment centers receive kickbacks for placing residents in specific sober living homes;
- Limiting discharge referrals to sober living homes that voluntarily comply with certification and/or best practices requirements;
- Use of monetary and other incentives to induce sober living home operators to promote community integration for residents by locating homes in particular neighborhoods without sober living homes.

Conclusion

Ultimately, people with addiction disorders need and want to live in stable, integrated housing with appropriate supports and reinforcement of their sobriety. Neighbors and local

governments want the same outcomes. As members of the Senate Health, Education, Labor & Pensions Committee concluded after their April 11, 2018, hearing on the Opioid Crisis Response Act of 2018, amending the Nation's bedrock disability rights laws is neither necessary toward that end, nor is it desirable. The disability community and local governments should work together—as we did in the 1990s—to clarify the immediate and sensible steps that can be taken to address the scourge of predatory and unscrupulous sober living home providers.